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Corporate Governance in Latin America: A Functional Análisis

Francisco Reyes

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Corporate Governance in Latin America: A Functional Análisis

Francisco Reyes*

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I. INTRODUCTION

In Latin America change has taken place at an unprecedented pace during the last decades. Countries in the region have witnessed an active process of trade liberalization and modernization

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of their economic institutions. The benefits arising from multinational free trade agreements with the United States,¹ the European Union² and other nations may be a determinant factor for economic development in the area. Insertion in a globalized framework may also allow local businesses to access the international securities market. In order for this process to be successful, a parallel adjustment of the legal infrastructure will have to be completed.³ The existence of an appropriate juridical framework has been identified as a crucial element, without which the benefits of free trade could be hindered.⁴ Regulatory efforts aimed at facilitating commerce, surpassing bureaucratic obstacles and attenuating a paternalistic culture of legal formalities will be significant challenges in the near future for most Latin American nations.⁵ Furthermore, local codes, statutes and business practices will have to be updated according to recent legal developments achieved in various parts of the world.⁶

1. At the end of 2005, Peru executed a Trade Promotion Agreement with the United States. Colombia also entered into a similar bilateral treaty in 2006. The latter treaty remains to be ratified. See Trade Promotion Agreement, U.S. - Peru, Apr. 12, 2006, http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html; Trade Promotion Agreement, U.S. - Col., Nov. 22, 2006, http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html.

2. Chile and the European Union entered into an agreement that regulates cooperation between them regard to political, commercial, economic, financial, scientific, technological, social and cultural matters. Agreement Establishing an Association, Art. II, E.U. - Chile, Nov. 18, 2002, http://www.sice.oas.org/Trade/chieu_e/chieu1_e.asp.

3. This ongoing process of modernization of the legal infrastructure began at least two decades ago. See generally Antonio Mendes, *Update on Laws Affecting Trade*, 7 FLA. J. INT'L. L. 1, 1-46 (1992) (describing the changes in Brazilian Law in the late 1980's and the subsequent effects on the economy).

4. "Throughout Latin America, law reform is in the air. After decades of neglect, Latin American legal systems are experiencing substantial if not drastic processes of reform and transformation These reform processes respond to global and domestic actors and pressures." Joseph R. Thome, *Heading South But Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691, 691 (2000).

5. For example, in Mexico "there is a strong predilection in favor of adherence to formalities in commercial contracting." STEPHEN ZAMORA ET AL., MEXICAN LAW 534 (2004).

6. Some authors consider that this adaptation process may contribute to improving a country's economic perspectives. "[I]f earnings are limited and financial resources considered insufficient to attain the desired growth rate, the challenge is to find domestic and international sources of capital. This often implies that governance practices have to be adapted to meet the demands of outside sources of finance, without sacrificing the benefits of the alignment of ownership and defined control." Heloisa B. Bedicks & M. Cecilia Arruda, *Business Ethics and Corporate Governance in Latin America*, 44 BUS. & SOC'Y. 218, 219 (2005), available at <http://bas.sagepub.com/cgi/content/abstract/44/2/218>.

Even if globalization offers significant opportunities for developing countries including the gains arising from broader market access, it creates an interdependence that is usually linked with regulatory homogeneity.⁷ A problem associated with globalization relates to the indiscriminate imposition of international models and schemes for convergence. In some cases, this process takes place without regard to diversity and local traditions.⁸ The increasing presence of international agencies specialized in providing consulting services relating to the convergence of legal institutions may prove challenging. The frequent lack of an appropriate process of adaptation to the economic and cultural realities of the recipient country may very well determine the failure of any legal transplant. Such importation of rules of a foreign origin has already taken place in the field of corporations and more specifically in the subject of corporate governance.

The problems associated with legal transplants are well known in Comparative Law. Alan Watson analyses the basic factors that determine the failure or success of a legal transplant, which include, *inter alia*, language proximities, proper adaptation of relevant statutes, as well as historic and political relationships between the borrower and the lender.⁹ An indispensable process of adaptation encompasses the quest for a common language aimed at determining mutual grounds for understanding between heter-

7. This has been the path followed in the European Union, where the issuance of directives has allowed for the harmonization of several fields of the law, including company law. "A series of Directives has the general aim of harmonization of the company laws of the Member States." M.C. OLIVER & ENID A. MARSHALL, *COMPANY LAW* 5 (1994). The need for certain harmonization is evident in light of the worldwide dimension of securities markets. "The distinction between local and international financial markets becomes blurred when we consider that firms in a country can issue securities abroad and when international investors can buy shares issued by local firms, either directly or via American depository receipts (ADR)." Fernando Lefort & Eduardo Walker, *The Past and the Future of Domestic Financial Markets in Latin America*, http://www.frbatlanta.org/econ_rd/larg/events/conf2001/walker-lefort_paper.pdf.

8. A new trend in cooperation for development embodies the idea that its effectiveness will depend on there being a sense of national policy ownership. Ocampo notes that such a principle has won formal acceptance as a guideline by several cooperation institutions including the OECD. Nevertheless, "quite frequently, it is ignored in practice. Indeed, an effort is often made to 'compel' ownership of the policies that international agencies feel are appropriate." GLOBALIZATION AND DEVELOPMENT, A LATIN AMERICAN AND CARIBBEAN PERSPECTIVE 133 (José Antonio Ocampo & Juan Martín eds., Economic Commission for Latin America and the Caribbean 2003).

9. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 23 (2d ed. 1993) (analyzing the historic and political relationships between the borrowers and lenders of legal transplants).

ogeneous legal institutions. The difficult apprehension of such a language implies the use of a functional equivalent, namely, an intelligible translation of notions, which transcends the literal meaning of words and expressions.¹⁰ Mary Ann Glendon is explicit in regards to the dangers that stem out of simplistic comparisons. According to this author, legal provisions cannot be fully understood without some knowledge of their political, social and economic purposes. A mere comparison of legal rules may be misleading when it relates to different legal systems subject to conflicting procedural rules and dissimilar legal classifications.¹¹

Prominent authors go as far as considering that it is unfeasible to import rules from a system pertaining to the Common Law tradition into a Civil Law system, due to an assumed lack of compatibility between them. In this regard, Eduardo Favier-Dubois holds that certain Latin American social, religious and cultural values are antagonistic to those prevailing in Common Law jurisdictions. The author further states that a legal institution that works properly within the individualistic and protestant philosophy will not be equally useful in countries characterized by a gregarious and cooperative behavior. The obvious conclusion of this somehow extreme doctrinal position is that a defensive attitude vis-à-vis cultural globalization should require an affirmation of local traditions as a means to preserve the national identity.¹²

The Argentine professor Guillermo Cabanellas adopts a similar approach. According to his perception, there are multiple dangers and difficulties ensuing from foreign intellectual influences in Latin American legal systems. Such a caveat is more relevant

10. FRANCISCO REYES, DERECHO SOCIETARIO EN ESTADOS UNIDOS, INTRODUCCIÓN COMPARADA, (3d ed. 2006). According to Mary A. Glendon a *functional approach* "means that legal rules and institutions at some point have to be liberated from the conceptual categories of their home systems so that they can be seen in terms of the social objectives they serve." MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 12 (2d ed., 1994).

11. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL 101 (1982).

12. Eduardo Favier-Dubois, *Doctrina societaria y concursal*, No. 181, Buenos Aires, 2002, at 825. This opinion coincides with Linda O. Smiddy's comparative analysis on the influence of culture in corporate legal reform in France, in what appears to be cultural differences between Latin and Anglo-Saxon communities. According to this author, a study based on a survey of 15,000 business managers working for companies in Western and Asian industrialized countries showed two very different views of a business corporation. "Americans valued individual opportunity, achievement, and individual qualifications as being more important than group cohesiveness. The French, in contrast, tended to emphasize communitarian concerns." Linda O. Smiddy, *Corporate Reform in France: The Influence of Culture*, 27 VT. L. REV. 879, 881 (2003).

when the influence comes from a wrongful interpretation of U.S. legal materials rather than from the construction of continental European statutes and texts. The author emphasizes on problems arising out of translations of complex terminology, lack of conceptual equivalences and structural differences among the concerned systems.¹³

It is thus clear that an appropriate process of adaptation to the economic and social realities of the recipient country is a determining factor for the success of legal transplants. The importation of rules and regulations is obviously facilitated if both countries -lender and borrower- belong to the same legal tradition. In the case of Latin America, there has been dependency on the codification system in vogue in nineteenth-century continental Europe. This fact has resulted in a continued reliance on the evolution of the French and Spanish legislations.¹⁴ Such dependency is still significant today in various fields of Private Law.¹⁵ Nonetheless, the economic importance of the U.S. as well as the practical nature of its legal institutions has determined an undeniable global influence in most fields of the law. Even European

13. FRANCISCO REYES, *DERECHO SOCIETARIO EN ESTADOS UNIDOS, INTRODUCCIÓN COMPARADA* 3 (3d ed. 2006) (preface by Guillermo Cabanellas de las Cuevas). A similar approach is exemplified by the adoption of Americanized Corporate Law statutes in Russia. That country's new legislation provides an example of the problems associated with trans-cultural reform. "Russia's current corporate code was heavily influenced by U.S. law. It was apparently not significantly based on Russian's legal tradition and culture. In addition, at the time it was drafted, Russia's legal and financial institutions did not provide the necessary support for the law. Consequently, in Russia, an innovative and very modern corporate code reportedly languishes in the statute books. The lesson to be learned from the Russian experience is that as we look to other countries for possible avenues of reform, we must consider what would be effective in the context of U.S. history, culture and legal tradition." Smiddy, *supra* note 12, at 886.

14. For an explanation regarding the codification movement in nineteenth-century Latin America see BORIS KOZOLCHYK, *LA CONTRATACIÓN COMERCIAL EN EL DERECHO COMPARADO* 130-33 (2006). This author describes the so-called Latin American codification family, which encompasses three master codes drafted by great jurists: Dalmacio Vélez-Sársfield (1800-1875) for Argentina, Andrés Bello (1781-1865) for Chile, and Augusto Teixeira de Freitas (1816-1883) for Brazil. *Id.*

15. Regarding codification in Latin America see generally JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 208-220 (1978). Schlesinger points out to the so-called exogenous influence, which is particularly noticeable in instances in which legislators have resorted to the *wholesale importation* of foreign law. "Most of the codes presently in force in Latin America are the result of extensive comparative study and eclectic choice among European models." RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 11 (6th ed. 1998). Schlesinger also adds that this process involves the danger -evident in Latin America- that foreign institutions may be copied without sufficient adaptation to local conditions. *Id.* at n. 32.

scholars have acknowledged this situation. Pierre Mousseron, for instance, has held that the so-called globalization ("mondialisation") of Corporate Law is the expression chosen to designate an *americanization* of this field of the law.¹⁶

This pressure has been increasingly acknowledged in Latin America during the last century.¹⁷ In fact, according to Matthew Mirow, the most important change for Latin American Private Law has been a turning away from the European doctrinal approaches to indigenous materials or even to legal literature proceeding from Common Law countries.¹⁸ Mirow's assertion in regards to the movement from European to American sources is evidenced through a study carried out in various Latin American countries.¹⁹

The adoption of U.S. models in Latin American law can be justified by multiple explanations, which range from the simple cost-efficient motivation to the more complex perception of legitimacy that is granted to a new legislation if it has been copied from a prestigious legal system.²⁰ It follows that nations in political

16. PIERRE MOUSSERON, *DROIT DES SOCIÉTÉS* 22 (Montchrestien 2d ed. 2005). The author lists the causes of such *americanization*. In his opinion, they resemble the ones that propelled the expansion of Roman Law. The language is the first among them. English has become the common vehicle for business law. This circumstance fosters the Anglo-Saxon legal model to the extent that terminology does not need to be translated and therefore altered upon exportation. The universities are the second cause. Very much like the journeys that French jurists made to Ancient Rome, legal studies in the Anglo-Saxon world are of a paramount importance today. They constitute the basic credential required to access a legal practice in the field of international business transactions. A last cause relates to the affiliation of local law offices with Anglo-Saxon firms. *Id.* at 22-23. "Some [Latin American] countries have begun to see a U.S. LL.M as a requisite to the elite firms that deal with international and large national businesses." MATHEW C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 191 (2005). In regard to the expansion of the Roman legal system, see generally H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 125-69 (2d ed. 2004) (describing the impact and process of the spread of Roman law throughout Europe). "The Romans dominated, then the national civilians dominated (so out went the chthonic ways), then the world became a zone of influence of civil laws, as the colonization process occurred." *Id.* at 165.

17. For instance, according to Stephen Zamora Mexican Corporate Law not only has borrowed from European laws, but owes much to U.S. influences. See ZAMORA ET AL. *supra* note 5, at 567.

18. "In addition to, and concurrent with, the prominence of the United States models and influences, international investment in Latin America and the globalization of legal practice have led to sidestepping domestic law and national legal systems." Matthew C. Mirow, *The Code Napoleon: Buried But Ruling in Latin America*, 33 DENV. J. INT'L L. & POL'Y 179, 187 (2005).

19. See MIROW, *supra* note 16, at 169.

20. Jonathan Miller depicts the differences existing among various types of legal transplants. The following classes can be distinguished: (1) The cost-saving

transformation seek prestigious models to give credibility to their newly enacted statutes. According to Jonathan Miller, "most countries simply cannot engage in international commerce or expect international investment without moving their legal regimes toward common standards. . . ."²¹

In spite of several difficulties arising from the adoption of foreign models, a certain degree of borrowing is necessary at least in the fields related to business associations. More than fifty years ago, Phanor Eder pointed out to the need for convergence in this specific subject. Business Corporation Law is generally the same throughout the world, due to the existence of the equal economic phenomena and the presence of similar general concepts leading to comparable results. However, Eder asserted that the higher industrial and financial development of some countries would determine that the backward-looking ones would "tend to be guided in their legislation by the more progressive nations and by the views of their leading authorities."²²

Difficulties also arise from legal translations. The triumphal arrival of the Common Law in Latin America is not less overwhelming than that of the very language in which it has expressed itself since medieval times. The undisputable supremacy of the English language in the academic scenario is an aspect that must not be overlooked in the field of Comparative Law. The establishment of this language as the new *Lingua Franca* is probably the single most significant contribution for the propagation of the Common Law institutions in Continental Europe and elsewhere. In the field of Private Law, this dissemination of Anglo-Saxon legal institutions is also linked to the preemi-

transplant: the motivation arises out of the need to reduce expenses and save time by using a foreign model dealing with the same issues at hand; (2) The externally dictated transplant: the incentive stems from a desire to please foreign states, individuals or entities; (3) The transplant as a vehicle for individual investment: it is motivated by the presence in the receiving country of individuals interested in the transplanted legal structure so that they can obtain political or economic benefits; (4) The legitimacy-generating transplant: the reason underlying the legal transplant is the prestige of the foreign model. See Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process* 51 AM. J. COMP. L. 839, 845-54 (2003). The prestige can be predicated either of the specific legal institution or of the entire legal system. Miller suggests that governments, foundations and international bodies encouraging legal transplants need to consider their work in light of this typology in order to understand how local dynamics interact with their own goals. See *id.* at 872.

21. *Id.* at 840.

22. Phanor Eder, *Company Law in Latin America*, 27 NOTRE DAME LAW 5, 5 (1951).

nent scholar works of the so-called Law and Economics movement.²³

A well-known factor leading to the failure of legal transplants arises from the lack of equivalent language and the frequent and misleading existence of *false synonyms*.²⁴ As Keith Rosenn has noted, many English juridical terms, developed for Common Law legal systems, have no Spanish equivalents because the same concepts do not exist within the Civil Law tradition.²⁵ "The similarity of words disguises important differences in meaning, and these differences have much to do with intangible aspects of the legal culture."²⁶

In the specific case of *corporate governance* the manner in which this problem has been dealt with is both wrongful and striking. Experts in the field have been satisfied with the simplest literal translation that arises from the identical and common Latin roots of the aforementioned two words. Therefore, the Spanish expression *gobierno corporativo* and the Portuguese *governança corporativa* are widely used irrespective of their misleading meaning in both romance languages. The first aspect to consider is the idea that the term *corporation* has a different legal connotation in countries of a Roman-Germanic tradition as compared to its counterpart in the Common Law world.²⁷ The word *corporación* -at

23. Textbooks like *Economic Analysis of Law*, by Richard Posner are widely diffused in the Latin American academic community. An association for the diffusion of Law and Economic methods was founded nearly a decade ago. ALACDE holds an annual conference in which experts analyze legal institutions in light of functional approaches. See ALACDE, http://www.kentlaw.edu/alacde/index_files/Page1956.htm (last visited Feb. 17, 2008).

24. Cf. Edgardo Rotman, *The Inherent Problems of Legal Translation: Theoretical Aspects*, IND. INT'L & COMP. L. REV. 187, 189 (1996). Apart from precision and certainty, a legal translation "is bound to use abstractions, whose meanings derive from particular changing cultural and social contexts. These contexts generate a certain degree of ambiguity, which increases when the legal cultures and systems are vastly different from each other." *Id.* Legal translation becomes a greater challenge when the concerned terms come from ancient legal sources, subject to specific historical developments. See Matthew. C. Mirow, *Latin American Legal History: Some Essential Spanish Terms*, 12 LA RAZA L. J. 43, 44 (2001).

25. Keith Rosenn, *Dahl's Law Dictionary*, 24 INTER-AM. L. REV. 607, 607 (1993) (reviewing HENRY S. DAHL, *DICCIONARIO JURIDICO* (1992)). The author further states that "[e]ven when similar concepts exist in both languages, English and Spanish juridical terms are often simply functional analogues whose meanings differ in important ways." *Id.* at 608.

26. See ZAMORA ET AL., *supra* note 5, at 77-78.

27. Corporation would be usually translated as *sociedad* or *compañía*. See LOUIS A. ROBB, *DICTIONARY OF LEGAL TERMS: SPANISH-ENGLISH AND ENGLISH-SPANISH* 151 (1991); see also JULIO ROMANACH, *TEACH YOURSELF. . . LEGAL SPANISH* 308 (1999) (defining the same words). But see PHANOR EDER, *A COMPARATIVE SURVEY OF ANGLO-*

least in those Latin American legislations that follow the Andrés Bello Civil Code of 1855- relates, generally, to a non-profit entity deprived of a lucrative purpose.²⁸ The words that more closely resemble that of the corporation would be *sociedad* or *compañía*.²⁹ On the other hand the word *governance* (*gobierno* or *governança*), has a specific technical meaning provided for under local doctrine. Such meaning may not necessarily correspond to the one assigned for the purposes of corporate governance. In the case of Argentine Corporate Law, for instance, the term relates exclusively to the legal issues concerning the shareholders' assembly.³⁰ An appropriate translation, following the most elemental rule of Comparative Law should have to take into account *functional equivalents* for both words. Although it is too late to change a widespread and somehow practical terminology, a proposed technically neutral translation into Spanish for Corporate Governance could be *organización societaria*.

AMERICAN AND LATIN-AMERICAN LAW 136 (1950) (claiming that there is "no possible translation for the word *sociedad*"). This term and the ones given to the different types of business organizations are challenging to translate. Keith Rosenn stresses the complexities of such a task. The author criticizes the wrongful translation in Dahl's Law Dictionary of the *sociedad de responsabilidad limitada* as a limited partnership. More adequately, Rosenn holds that such business entity "is actually a limited liability company whose capital is divided into quotas among a limited number of quota-holders whose liability is limited to unpaid subscriptions for quotas. It can be structured as either a corporation or partnership for U.S. tax purposes, depending upon how the bylaws are drafted." Rosenn, *supra* note 25, at 613. Conversely, José Ramón Cano Rico in his trilingual Law Dictionary provides the English meaning for the Spanish word "corporación". Obviously, he proposes the appropriate legal translation of *association* instead of the misleading word *corporation*. JOSE RAMON CANO RICO, DICCIONARIO DE DERECHO, ESPAÑOL-INGLÉS-FRANCÉS 46 (1994).

28. See COD. CIV. art. 641 (Col. 1873); COD. CIV. art. 545 (Chile 1996); COD. CIV. art. 19 (Venez. 1942); see also ARTURO VALENCIA ZEA & ALVARO ORTIZ MONSALVE, DERECHO CIVIL, Vol I (1994) (discussing Colombian civil law); Alfredo Morles Hernández, CURSO DE DERECHO MERCANTIL Vol. II, (4th ed. 1999) (discussing Venezuelan civil law); ARTURO ALESSANDRI RODRIGUEZ ET AL., TRATADO DE DERECHO CIVIL (7th ed., 2005). In regards to the importance of the great nineteenth century codifier Andrés Bello, it has been said that "he was the father of fifteen children." Matthew. C. Mirow, *Individual Experience in Legal Change: Exploring a Neglected Factor in Nineteenth-century Latin American Codification*, 11 SW. J. L. & TRADE AM. 301, 301 (2005).

29. Hannon warns about the inaccuracy incurred when the term corporate is identified with Latin American *sociedades*. It cannot be suggested that Latin American "'corporate' or 'corporation' law deals with the specific equivalence of the corporation in Latin America." Paul. B. Hannon, *Latin American Corporation Law*, 34 TUL. L. REV. 733, 753 n. 35 (1960).

30. See generally 4 GUILLERMO CABANELLAS DE LAS CUEVAS, *Los Organos Societarios*, in DERECHO SOCIETARIO, PARTE GENERAL, 141-204 (Buenos Aires Heliasta ed., 1993); RICARDO A. NISSEN, CURSO DE DERECHO SOCIETARIO 437 (1998).

Notwithstanding terminology discrepancies as the ones illustrated before, a significant degree of borrowing and harmonization in the field of Corporate Law in Latin America is as practical as it is necessary.³¹ The lack of an appropriate comparison with more advanced jurisdictions has left behind most of the legal systems of Latin America. The legal framework in these countries is clearly underdeveloped as compared to the more progressive and updated regimes of the world.³² Legal transplants in the field of Corporate Law have already taken place in Latin America during the last decades. It is foreseeable that the influence of foreign regulations in the region's Corporate Laws will be further increased. Yet, as it has been suggested, a special caution must be placed in this prospective importation of institutions.

The pace at which borrowing in Corporate Governance has taken place is both impressive and problematic. The hasty world-wide diffusion of the recent American legislation -propelled by broadly publicized scandals of local corporations-, has left neither room nor time to carefully assess the practical implications of such a complex body of rules in foreign territories. Even in the U.S. it is still too early for scholars to properly evaluate the Sarbanes-Oxley Act promulgated by Congress in 2001.³³ Its practical implications as a deterrent of inappropriate Corporate Governance practices

31. "The last century saw, in federal states, like the United States and in supra-national organizations, like the European Union, serious consideration given to the replacement of the current system of corporate regulation with national or supra-national corporate laws." LARRY CATÁ BACKER, *COMPARATIVE CORPORATE LAW, UNITED STATES, EUROPEAN UNION, CHINA AND JAPAN* 543 (2002).

32. Some important authors apparently tend to classify Latin American Corporate Laws within the same category that has been assigned to the African regulations in the field. "Other systems of corporate governance are also worthy of study. The governance systems of Latin America, the Indian subcontinent and Africa merit discussion in their own right." *Id.* at xxxviii n.2. Another example of this categorization can be inferred from the landmark publication *The Anatomy of Corporate Law* written by Reiner R. Kraakman and six other reputed authors. Notwithstanding the comparative and international approach adopted in this important book, its explanations are concerned only with European, American and Japanese Corporate Law. There is generally no reference to Latin American legal systems in this fundamental work. See REINER R. KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW* (2004) (discussing European, American and Japanese Corporate Law, but not Latin American Corporate Law).

33. "It is early days for academic appraisals, but the ones that have been ventured so far tend to the view that costs will exceed benefits. Meanwhile, many of America's businessmen are deeply unhappy, and with reason: the initial costs of the new law have been bigger than expected. And it can be argued that, when it comes to repairing American corporate governance, the law anyway addresses symptoms more than causes." *A Price worth Paying? – Auditing Sarbanes-Oxley*, *THE ECONOMIST*, May 19th, 2005, at 82.

have not been fully verified. In fact, there is a frequent complaint in regards to the costs associated to its implementation in corporations listed in U.S. stock exchanges.³⁴ If this is the status of empirical research in the U.S., the situation in Latin America is even less promising. The impact of these measures has not been the subject of substantive analysis. Generally speaking, countries in the region have embraced the creed of corporate governance, without much regard to economic and cultural local conditions. Not to mention the lack of a careful assessment concerning these new rules' possible implications in terms of costly compliance with formalistic burdens.

The consequences of imitating foreign legislations in this field cannot be determined at this premature juncture. Nonetheless, it can be foreseen that certain corporations will be deterred from listing their securities in stock exchanges due to the expenses associated to such burdensome regulations. However, the overwhelming reality of Corporate Governance as a worldwide phenomenon cannot be ignored. The influence of proposals such as those prepared by international organizations has changed the Corporate Law landscape at least as it relates to the field of listed corporations. It is also true that the implementation of these general proposals can still be subject to a process of adaptation to local realities. Such process should be carried out at the same pace at which legal transplants are being made in this subject.

II. PRINCIPLES OF CORPORATE GOVERNANCE

The Organization for Economic Cooperation and Development (OECD)³⁵ defines corporate governance as "the relationships between a company's management, its board, its shareholders and

34. John Berlau has held that although Sarbanes-Oxley "was sold as a cure for Enron-like corporate misbehavior, the law mostly fails to target the real wrongdoers and instead punishes all public companies as a class. . . . [I]t is innocent small public companies that are really paying an unfair price for Enron's sins." John Berlau & Anastasia Uglova, *Puts & Calls: Sarbanes-Oxley 'Reform' Harming Economy*, *PITT. POST-GAZETTE*, Nov. 13, 2005, available at <http://www.post-gazette.com/pg/05317/605320-28.stm>.

35. "The Organization for Economic Co-operation and Development ('OECD') was established on December 14, 1960 and is now comprised of thirty countries, including the United States and much of Europe. The OECD considers itself 'a forum in which governments work together to address the economic, social and environmental challenges of interdependence and globalization.' Article 1 of the OECD Convention states that its mission is 'to promote policies designed: . . . to contribute to growth in world trade on a multilateral, non-discriminatory basis.'" Kathryn Fugina, *Merger Control Review in the United States and the European Union: Working Toward Conflict Resolution*, 26 *NW. J. INT'L L. & BUS.* 471, 484 (2006).

other stakeholders. Corporate governance provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”³⁶

Even if the afore-quoted definition appears to be precise, it must be recognized that there is no specific boundary for this vague concept.³⁷ McCahery defines Corporate Governance as “the monitoring and control over how the firm resources are allocated and how relations within the firm are structured and managed.”³⁸ In this sense, it does more than regulating ownership and control arrangements inside the firm. “It also contains rules that protect other stakeholders like employees and creditors from moral hazard and adverse selection.”³⁹ Several corporate relationships are included within the broad scope of this discipline. They include, *inter alia*, the ones that stem from control relations amongst management, the board of directors, shareholders and other stakeholders such as the employees, suppliers, credit institutions, etc.⁴⁰ Corporate governance arises not only of Corporate Law regulations, but can also be found in agreements entered into by contracting parties and by optional guidelines that can be adopted by listed or non-listed corporations.

Corporate governance understood as a system to protect external investor is as ancient as the medieval *commenda*. In order to develop long-term relationships in medieval times, “disclosure and enforcement mechanisms were devised through a system of notaries, guilds and mercantile courts.”⁴¹ The development

36. ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), WHITE PAPER ON CORPORATE GOVERNANCE IN LATIN AMERICA 58 (2003), <http://www.oecd.org/dataoecd/25/2/18976210.pdf>.

37. “Changes in corporate governance cover a broad spectrum of issues: trying to ensure better discipline by the domestic financial system, requiring enhanced disclosure of financial transactions, adopting better rules for internal management of corporations, and implementing better capital market regulation and supervision.” Stijn Claessens, *Policy Approaches to Corporate Restructuring Around the World: What Worked, What Failed?* in CORPORATE RESTRUCTURING: LESSONS FROM EXPERIENCE 11, 55 (Michael Pomerleano & William Shaw eds., 2005).

38. Joseph A. McCahery & Eric P.M. Vermeulen, *Corporate Governance and Innovation: Venture Capital, Joint Venture, and Family Businesses*, 1 (European Corporate Governance Institute, Working Paper No. 65, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=894785 (last visited Feb. 17, 2008).

39. *Id.* at 2.

40. *Id.*

41. *Id.* at 12. McCahery describes this ancient institution and explains how “the managerial agency problem and the corresponding governance concerns have existed as long as investors have allowed others to use their money and act on their behalf in risky business arrangements.” *Id.* at 8.

of the stock corporation characterized by centralized management, limited liability, free transferability of shares and continuity of existence gave rise to additional governance problems that today are analyzed under the concept of agency costs. As early as 1776, Adam Smith pointed out to the opportunistic behavior of directors in stock corporations. "The directors of such [joint-stock] companies, however, being the managers rather of other people's money than of their own, it cannot be well expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company."⁴²

The modern Principles of Corporate Governance as well as several other contemporary Corporate Law institutions can be considered to be an American invention.⁴³ In fact, the topic has been analyzed in the US for nearly three decades. Already in 1978 the American Law Institute had undertaken the project entitled "Principles of Corporate Governance and Structure: Restatement and Recommendations". The very first draft of the principles started out from the recognition of the goals of Corporate Law in regards to the objectives of the business corporation, namely, to conduct business activities with a view to corporate profit and shareholder gain. In furtherance of those goals, the principles proposed that the corporation, in the conduct of its business (a) should be obliged to act within the boundaries set by law; (b) may properly take into account ethical principles that are generally recognized as relevant to the conduct of business,⁴⁴ and (c) may devote resources, within reasonable limits, to public welfare,

42. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 326 (James E. Thorold Rogers ed., The Clarendon Press 1869).

43. Even the terminology to identify this topic has been borrowed -in some cases wrongfully- by several civil law jurisdictions. This phenomenon is widespread not only in Latin America but also in European countries. PIERRE MOUSSERON, DROIT DES SOCIÉTÉS 22 (Montchrestien 2d ed. 2005).

44. In asserting the importance of business ethics in the field of corporate governance, Bedicks has addressed the usual lack of concern for discussing ethical standards in some Latin American institutions. "In most meetings with Latin American representatives of the corporate governance institutions, ethical principles have rarely come up as a significant topic. Discussions usually revolve around capital and ownership structure, the role and responsibilities of the board of directors, and market situations." Bedicks & Arruda, *supra* note 6, at 226.

humanitarian, educational, and philanthropic causes.⁴⁵ The initial draft addressed the duties of due care and loyalty as well as the business judgment rule. Attention was also placed on the issues of derivative actions and delegation of management functions in publicly held corporations.⁴⁶

The prominent evolution of this field is reflected in the influence that such body of principles has had in reshaping the corporate regulation throughout the world.⁴⁷ The basic concern in regards to corporate governance relates to the ability to shape a regulatory structure that can foster risk taking, especially by institutional investors and to promote start up companies with innovative ideas.⁴⁸ Nobody disagrees as to the usefulness of corporate governance as a means to foster investment. According to Embid Irujo, "a good corporate governance regime is crucial for an efficient management of capital markets and the system of investment. At the same time, corporate governance insures that all participants in the market take into account the broad range of interests of a legal and economic nature in which those interests evolve. . . ." ⁴⁹

Today, most countries acknowledge the need to incorporate provisions regarding transparency and timely disclosure on the part of directors and officers at least in publicly held firms. The need to provide for auditing committees has also become a standard rule for those corporations willing to enter the competitive international capital markets.⁵⁰ Some financial institutions have

45. PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATMENT AND RECOMMENDATIONS § 2.01 (Tentative Draft No. 1, 1982).

46. See generally ROBERT HAMILTON, LAWS OF CORPORATIONS 35 (West Publishing Co. 1983) (discussing public corporations). More recent versions of the "Principles" include a comprehensive treatment of the duties and responsibilities of directors and officers of business corporations to both the corporations and their shareholders, the objective and conduct of the business corporation, the structure of the corporation, the duty of care and the business judgment rule, the duty of fair dealing, the role of directors and shareholders in transactions in control and tender offers, and corporate remedies. See also ALI, *Principles of Corporate Governance: Analysis and Recommendations*, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=88.

47. "Spurred by a global emphasis on corporate governance, many countries in recent years have been improving the rules on how corporations are monitored and governed." Claessens, *supra* note 37, at 55.

48. See McCahery, *supra* note 38, at 1.

49. JOSÉ MIGUEL EMBID IRUJO & DANIEL ROQUE VITOLO, *SOCIEDADES COMERCIALES: LOS ADMINISTRADOS Y LOS SOCIOS, RESPONSABILIDAD EN SOCIEDADES ANÓNIMAS* 18 (Rubinzal-Culzoni Editores 2003).

50. It is accurate to state that companies pursuing international investments "must differentiate themselves by adopting stellar treatment of minority shareholders

even developed methods to evaluate if a company complies with minimum corporate governance standards.⁵¹ Complex formulae to determine the probability of insider trading -an important variable of corporate governance- have also been proposed.⁵² Thus, it has been determined that there is a clear correlation between the development of capital markets and the nature of legal rules, provided that they can be effectively enforced.⁵³ It has been held that investors are willing to pay a premium for a well-governed company. In this sense, "corporate governance could be seen as a technology -similar to a manufacturing technique, an inventory management system or an engineering economy of scale- and firms face powerful incentives to adopt the best corporate technologies possible."⁵⁴ The following figure shows that, at least in theory, Latin American investors are willing to pay an additional amount of money per share if the issuing entity is diligently managed.⁵⁵

Average premium for "well governed" companies

Venezuela	28
Colombia	27
Brazil	23

that go beyond any country-specific minimum requirements. In order to attract international investors, companies and their managements are not only required to be strong from a financial standpoint, but also to act with transparency and in the best interest of all of their shareholders; in other words, to exercise sound corporate governance practices." Alex Brown, *Latin America Strategy: Who has the Best Corporate Governance in Latin America?*, DEUTSCHE BANK, May 1, 2001, at 3.

51. For instance, the Deutsche Bank applies a method whereby companies are ranked according to the following categories: 1. Shareholders' treatment (score range: -14 to +50 points); 2. Management's independence (score range: -1 to +25 points); 3. Information disclosure (score range: -2 to +20 points); 4. Dividend Policy (score range: -4 to +10 points). *Id.*

52. Variables such as the informed trading probability (ITP) index are important because "the expected probability that outside investors' wealth will be confiscated through poor governance and informed trading is a crucial determinant of their portfolio allocation and the ensuing cost of capital for the corporations trying to raise it." Juan J. Cruces & Enrique Kawamura, *Insider Trading and Corporate Governance in Latin America*, 5 (Inter-American Dev. Bank, Working Paper No. R-513, 2005), <http://www.iadb.org/res/publications/pubfiles/pubR-513.pdf>.

53. See generally, Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131, 1146 (1997).

54. Lucian Arye Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127, 135 (1999).

55. Because these results are based on a survey, a question remains as to the practical behavior of investors in a given situation and the difficulty of defining the concept of a "well-governed" company. The latter subject is one in which reasonable minds could differ to a large extent.

Mexico	22
Argentina	21
Chile	21

The specific aims of corporate governance relate to the enhancement of transparency and disclosure, especially in listed corporations, to improve the monitoring role and performance of the boards of directors, to ensure independence of auditors and to guarantee the autonomy of non-executive directors.⁵⁶

III. THE CONTEXT OF CORPORATE GOVERNANCE: BLOCK-HOLDING VERSUS MARKET SYSTEMS

A basic example of intricate borrowing is given in the specific context of business associations. Several aspects of corporate governance, which have been designed for publicly held corporations operating in systems such as those in the US and the UK, tend to be extrapolated to concentrated ownership structures like those prevailing in Continental Europe and Latin America.⁵⁷ The corresponding rules that are transplanted or recommended usually deal with problems that arise in the context of significant ownership dispersion. Therefore, the underlying concern in such regulations relates to the need to ameliorate the discrepancy of interests between those pursued by shareholders as opposed to managers. The main focus of corporate governance rules that arise in this context is aimed at an alignment of such interests. It is natural, therefore, that most devices sought to deal with this particular agency problem are oriented towards the granting of certain appointment rights, the ability to vote in regards to major corporate decisions and the imposition on managers and directors of liabilities arising from the breach of the duties of care and loyalty.⁵⁸ These rights and remedies are useful even in those systems in which there is no capital dispersion like the one existing in the US and England. However, they do not suffice for the purpose of

56. See McCahery, *supra* note 38, at 2.

57. See for example Argentine Decree 677 of 2001, regarding transparency of public offering of securities, Brazilian Law 10.303 of 2001, regarding publicly held corporations and Colombian Law 964 of 2005.

58. According to Roberta Romano, the more prominent examples of devices designed to mitigate agency problems ensuing from the dichotomy between ownership and control are the following: "(1) shareholder elected boards of directors who monitor managers, (2) shareholder voting rights for fundamental corporate changes, and (3) fiduciary duties that impose liability on managers and directors who act negligently or with divided loyalty favoring their own financial interest over that of shareholders." ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW 2* (The American Enterprise Institute for Public Policy Research 1993).

dealing with corporate governance issues that arise in block-holding systems. The nature of most agency problems in the context of ownership concentration differs to a large extent from those present in highly developed and liquid capital markets.

Lefort has pointed out that the very high level of ownership concentration in the region implies that in Latin American firms, corporate control is tightly exercised by majority shareholders.⁵⁹ The author further states that as a result of such pattern of equity ownership “the focus of corporate governance concern in the region is possible divergence of interests between majority and minority shareholders.”⁶⁰

Instead of addressing the agency problem derived from a conflict between majority and minority shareholders, the imported principles tend to deal with the tension arising from shareholders and directors.⁶¹

Vidal also describes this situation pursuant to the following description: “Latin American companies, in contrast [to US publicly held firms] are characterized by a high concentration of ownership in the hands of a few controlling shareholders. In Latin America, on average, the five largest shareholders of a company own 80% of the company’s shares.”⁶² This description corresponds to the so-called family control, namely, that in which members of a single family hold a large block of stock.⁶³ Therefore, these family

59. Coffee states that ownership concentration is such a widespread condition that only a few systems allow for a clear separation between ownership and control. “[C]ontemporary empirical evidence finds that, even at the level of the largest firms, dispersed share ownership is a localized phenomenon, largely limited to the United States and Great Britain.” 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, 641 (1999).

60. See WHITE PAPER, *supra* note 36, at 48.

61. Pursuant to Kraakman, these conflicts form part of some of the agency problems that exist in any business firm. They involve, on the one hand, the conflict that exists between shareholders and directors and, on the other hand, the antagonism that is present amongst shareholders possessing a controlling interest and the minority owners. In the latest scenario “the non-controlling owners are the principals and the controlling owners are the agents, and the difficulty lies in assuring that the former are not expropriated by the latter.” REINER KRAAKMAN ET AL., *supra* note 32, at 22.

62. CORPORATE GOVERNANCE IN LATIN AMERICA: BEYOND SARBANES-OXLEY, in CLAVES DE GOBIERNO CORPORATIVO 129 (Confecámaras, Bogotá 2005). This situation has some correlation with the empirically demonstrated fact that “Latin America has the most unequal income distribution in the world.” Ocampo & Martin, *supra* note 8, at 109.

63. Bedicks has in fact asserted that “[f]amily control remains the norm for most of the region’s non-listed small- and medium- size enterprises.” Bedicks, *supra* note 6, at 218. Family control is considered to be one of the major obstacles for proper

members will have the power to influence management policies and even replace officers and directors, if necessary, with people to their liking.⁶⁴

Ocampo concurs with Vidal and provides an accurate description of the Latin American situation regarding corporate governance: "In this case, majority shareholders control the firm's board of directors and management. The dispersion and varying interests of minority stakeholders, on the other hand, make it difficult for them to organize themselves effectively. Good corporate governance seeks to prevent the shareholders that have a controlling interest from obtaining a disproportionate share of profits or other benefits relative to the size of their holdings."⁶⁵

From a technical standpoint, the structure for corporate governance in the region could be accurately characterized as the so-called traditional model. It is based upon property rights, in which shareholders who supply the capital become the major factor in the governance process.⁶⁶ This model coincides with the corporate structure provided for under most Latin American statutes regarding stock corporations (*sociedades anónimas*). Pursuant to these regulations, the shareholders meet at least once a year to approve accounts of management and financial statements. In that meeting a board of directors is elected and the shareholders take care of any other general matters relating to the corporation's business ventures. The board intermediates between the shareholders and the corporation's officers. The latter, once

corporate governance reform in Latin America. "Important objections to reform also come from the families that control large corporations. From the point of view of these families, an improvement in the rights of outside investors is first and foremost a reduction in the value of control due to the deterioration of expropriation opportunities. . . . What the reformers see as protection of investors, the founding families call 'expropriation of entrepreneurs.' No wonder, then that in all countries - from Latin America to Asia to Europe- the families have opposed legal reform." Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. OF FIN. ECON. 3, 18-19 (2000).

64. ROGENE A. BUCHHOLZ, BUSINESS ENVIRONMENT AND PUBLIC POLICY, IMPLICATIONS FOR MANAGEMENT AND STRATEGY 249 (Prentice Hall 1992). Mark J. Roe provides an interesting characterization of this corporate governance structure: "Well-to-do families in some nations are said to prefer family ownership of enterprise. Firms are passed from generation to generation; corporate governance sometimes becomes the governance of family relationships." Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2073 (2001). The author further states that the preference of such structure has a functional side, for shareholders in such family structures can keep more of the rents inside that family than can another structure. *Id.*

65. Ocampo & Martin, *supra* note 8, at 137.

66. See Buchholz, *supra* note 64, at 243.

appointed by the board, undertake the day-to-day management of the corporation. The board also monitors the activity of officers and other executives in order to protect the interest of shareholders.⁶⁷

Table 1: Ownership Concentration in Latin America⁶⁸

Country	Sample (2002)	% of the largest shareholder (2002)	% of 3 largest shareholders (2002)	% of 5 largest shareholders (2002)
Argentina	15	61%	82%	90%
Brazil	459	51%	65%	67%
Chile	260	55%	74%	80%
Colombia	74	44%	65%	73%
Mexico	27	52%	73%	81%
Peru	175	57%	78%	82%
Average	168.3	53%	73%	79%

The OECD recognizes the high degree of ownership concentration for listed companies in Latin America⁶⁹. It also acknowledges family control as the prevailing structure for non-listed small and medium size concerns in this region.⁷⁰ Albeit trouble-

67. This description matches the definition given by Buchholz. *Id.*

68. See WHITE PAPER, *supra* note 36, at 53.

69. WHITE PAPER, *supra* note 36, at 9. Ownership concentration and non-listed companies appear to be the general rule throughout Latin America. In Brazil, for instance, only 120 of about 6,000 companies "are listed *and* regularly traded on the São Paulo Stock Exchange (Bovespa). Even some of the listed companies, however, could be considered non-listed companies (NLCs). . . This is the case of some large government controlled companies in the energy and financial industries, large family-controlled groups and privatized companies under foreign control because of the small amount of shares that are freely traded. From a corporate governance point of view, these companies 'look and feel' like NLCs because boards of directors are appointed essentially by controlling shareholders." Leonardo Viegas, *Brazil: Corporate Governance-Challenges and Opportunities*, in CORPORATE GOVERNANCE OF NON-LISTED COMPANIES IN EMERGING MARKETS 133 (Organisation for Economic Co-Operation and Development 2006).

70. WHITE PAPER, *supra* note 36, at 9. Bedicks and Arruda depict other regional structural characteristics that were identified by the OECD:

- Privatization
- Concentration of ownership, defined control, and the need for capital
- Importance of industrial groups
- Restructuring of banking systems
- Regionalization and the importance of multinational enterprises
- Limited domestic capital markets and growing importance of foreign listings

some in many aspects, equity blocks may also prove helpful in terms of efficient monitoring of management.⁷¹ “Clearly identified and actively-engaged majority shareholders can be a great strength for a company by ensuring active oversight of management and by providing a ready source of financial support to the company at critical junctures.”⁷² The International Finance Corporation (IFC) shares this approach and acknowledges the important aspects of majority or family ownership.⁷³ “Much of the global corporate governance dialogue rightly focuses on managing conflicts between controlling shareholders and other stakeholders.”⁷⁴ The IFC also concedes that, “it is also important to recognize the benefits, in terms of stability and focus, that derive from having a committed set of controlling shareholders at the heart of a company.”⁷⁵

Even if the experiences in the US regarding the regulation of publicly held corporations might be useful as a reference for legal reform in Latin America, the significant structural differences between these two disparate corporate realities shall be a required point of departure.⁷⁶ Whereas US Corporate Law and Securities Regulations’ main concern is to address the problem of

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- Mandatory privately managed pension scheme
 - Legal traditions and enforcement.

Bedicks & Arruda, *supra* note 6, at 222.

71. See generally WHITE PAPER, *supra* note 36.

72. *Id.* at 9.

73. Family control is a straightforward fact in Latin America. Mexico, for instance, “with a smaller economy and a political economy that stifled competition for many decades, still shows a high concentration of economic power in several large extended family empires (the Garza Sada family in Monterrey, the Slim and Servitje families in Mexico City and others) that have had inordinate influence over particular sectors because of their majority ownership of financial and industrial enterprises.” ZAMORA ET AL, *supra* note 5, at 536.

74. See generally International Finance Corporation, <http://www.ifc.org> (last visited Feb. 17, 2008).

75. *Id.*

76. According to Troy A. Paredes, “the right corporate governance regime for a country depends on its unique institutional makeup. In adopting a program of reform, therefore, policymakers ultimately must be pragmatic, looking past ideals and ideologies to what is possible and realistic. Even if the market-based corporate governance model of the United States, with its enabling corporate law, is the most effective system of governance for realizing the broadest and deepest securities markets, the U.S. approach is not achievable everywhere.” Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn’t the Answer*, 45 WM. & MARY L. REV. 1055, 1155 (2004). The author has also stressed the following: “[O]ne danger of transplanting U.S. corporate law to developing economies is that it might not fit with the ‘importing’ country’s economic structure, political system, social order, or cultural values.” *Id.* at 1058. “The bottom line for most developing countries is that importing a corporate law regime along the

opportunistic behavior on the part of directors and officers vis-à-vis shareholders,⁷⁷ the objective of Latin American regulations should be the protection of minority shareholders against the risk of expropriation by block-holders.⁷⁸ The absence of a separation between ownership and control in Latin American corporations imposes a necessary departure from applicable principles of corporate governance designed for market systems.⁷⁹ Accordingly, convergence in the field of best governance practices may prove troublesome due to fully identified systemic differences.⁸⁰ Indeed,

lines of the U.S. model, or otherwise depending on a market-based model of governance, is not a viable option." *Id.* at 1059.

77. See generally ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (The Macmillan Company rev. ed. 1967). Such potential for abuse represents the basic *agency problem* in the U.S. publicly held corporation. It is held that there is an information asymmetry, due to the superior knowledge that managers have in regards to investment policies and the firm's prospects. Therefore, "managers tend to be better informed, which allows them to pursue their own goals without significant risk. Consequently, shareholders find it difficult, due to their own limitations and priorities, to prompt managers to pursue the objectives of the firm's owners." McCahery & Vermeulen, *supra* note 38, at 6-7. Such agency problem gives rise to opportunistic behavior on the part of management regarding the following aspects: (1) Exorbitant compensations; (2) usurpation of corporate opportunities; (3) Replacement resistance; (4) Resistance to profitable liquidation or merger; (5) Excessive risk taking; (6) Self dealing transfer pricing and (7) Power struggles between managers. See *id.*

78. The need to protect minority shareholders from expropriation by block-holders is evident in Latin American markets. In fact, foreign investors in the region have shifted from acquiring minority ownership in local companies, to investing in controlling blocks. "Many of the first generation funds [that invested in Latin America] were content with minority positions; more recently funds are clamoring for at least a majority position. In cases where a majority position is not feasible, investors are focusing on voting mechanisms and other methods of de facto control." Alyssa A. Grikscheit, *Private Equity in Latin America: Strategies for Success*, <http://www.goodwinprocter.com/~media/68D1941615F74EB8B4D02C2EEAC69EF4.ashx>. There is no doubt that an effective control on majorities' conduct may also be beneficial for the corporation itself and even for such controlling shareholders. "[L]egal constraints on the ability of controlling shareholders to expropriate minority shareholders should reduce the cost of outside equity capital for the corporation." KRAAKMAN ET AL., *supra* note 32, at 22.

79. Vermeulen has asserted that until recent times "few academics or policymakers even acknowledged the importance of creating effective measures for closely held companies, let alone the need for improved institutions to stimulate social welfare and economic growth. The problems of publicly held firms are not fully present in closely held companies. The 'closely held *versus* public' dichotomy is a useful classification system to explain the different kinds of incentive and governance structures in play and, more importantly, it helps policymakers to rethink corporate governance mechanisms and reforms." ERIK P.M. VERMEULEN, *The Role of the Law in Developing Efficient Corporate Frameworks*, in *CORPORATE GOVERNANCE OF NON-LISTED COMPANIES IN EMERGING MARKETS* 93 (OECD Publishing 2006).

80. This opinion coincides with Vidal's view according to which, "the goal of corporate governance regulations in Latin American countries is the protection of

local regulators in the area and international cooperation institutions should focus on the agency problem derived from the conflict between majority and minority shareholders in order to adequately ameliorate self-dealing and potential reaping of private benefits by block-holders.⁸¹ Nevertheless, it appears that the basic approach of convergence proposals generally deals with the tension between shareholders and directors.⁸²

From another perspective, it must be borne in mind that in Latin America most of the business associations are incorporated as closely held companies.⁸³ The securities markets in the region tend to be small in comparison to those of developed market economies. Therefore, it must be recognized that the agency problem underlying corporate governance in Latin America relates to a large extent to conflicts between controlling shareholders and their counterparts in limited liability companies and closely held corporations.⁸⁴

minority public shareholders against any improper diversion of assets by controlling shareholders." CORPORATE GOVERNANCE IN LATIN AMERICA, *supra* note 62, at 130.

81. An adequate focus on such matters may contribute to the appropriate development of liquid securities markets in emerging economies. In fact, "[i]nvestors will be reluctant to invest if they are not confident that insiders will not expropriate their investments by paying excessive compensation to executives, filling key positions with friends and family, engaging in self-dealing transactions, trading on inside information, shirking, or stealing. In other words, investors will withhold funds if they are not adequately protected from agency problems." Paredes, *supra* note 76, at 1062.

82. McCahery and Vermeulen conclude that corporate governance frameworks for closely held corporations [such as the ones prevailing in Latin America] have failed to address the main issues that may arise in these companies. According to the authors, in closely held firms "[t]he focus shifts from the relationship between management and shareholders to the relationship among several groups of shareholders. In this view, an effective legal governance framework must offer mechanisms that serve to protect shareholders from the misconduct by fellow shareholders." JOSEPH A. McCAHERY & ERIK P.M. VERMEULEN, Amsterdam Center for Corporate Finance, TOPICS IN CORPORATE FINANCE: UNDERSTANDING (UN)INCORPORATED BUSINESS FORMS 5 (2005), http://www.rieti.go.jp/jp/events/06022701/pdf/2-1_3-1_mccahery_vermeulen_paper_1.pdf.

83. There are also a large number of limited liability companies, which resemble the American statutory closely held corporations and LLC's. "Some of the forms of the limited liability firm are interesting examples of hybridism. It ranges from a true partnership to a form so closely resembling the corporation that it is practically indistinguishable from it." Phanor J. Eder, *Limited Liability Firms Abroad*, 13 U. PITT. L. REV. 193, 196 (1952).

84. "The agency problem underlying Code provisions for public corporations is also less severe in the close corporation because ownership and control are typically not severed. Concerns of close corporation shareholders involve instead conflicts between majority and minority shareholders and between shareholder-managers and non-managing shareholders, as well as valuation problems for shareholders that arise from the absence of a public market for shares." ROMANO, *supra* note 58, at 24.

Another feature of the Latin American corporate legal structure that must not be underestimated for the purposes of a comparative law analysis is the codified nature of private law institutions as opposed to the judicial decision making process of their common law counterparts. Even in the presence of multiple corporation law codes in the US, it has been appropriately held that the basic protections for investors and minority shareholders, in general, arise from the judge made law. According to Rudolf Schlesinger, after the evolution of state legislation on corporations, "it became apparent, therefore, that the state statutes, under which corporations are organized, could not afford sufficient protection for shareholders and creditors. Such protection had to be achieved outside of the corporation statutes, by courts of equity imposing fiduciary duties upon management, and by the *federal securities legislation* of the 1930's and 1940's. The result is that, in contrast to the method traditionally followed in the civil-law world, the most important legal devices used in this country for the protection of investors are not built into the corporation statutes themselves, but exist as a separate body of law."⁸⁵ Furthermore, certain authors point out to the rather evident finding whereby, "only US law aggressively protects minority shareholders by emphasizing independent directors, direct voting rights, and fiduciary duties."⁸⁶

IV. CORPORATE LAW STRUCTURE IN LATIN AMERICA

Following the Continental European tradition and particularly the French heritage of the *Code Napoleon*,⁸⁷ the long-stand-

85. SCHLESINGER ET AL., *supra* note 15, at 803. Regarding the usually limited judicial function in Roman-Germanic systems, it has been said that, "[i]n civil law systems, the role and influence of judicial precedent, at least until more recent times, has been negligible." JAMES G. APPLE ET AL., A PRIMER ON THE CIVIL-LAW SYSTEM 36 (Federal Judicial Center 1995). On the other hand, it has been held that certain civil law jurisdictions are shifting towards a more creative judicial function. "Although traditional civil law dogma denied that judges 'make' law and that judicial decisions can be a source of law, contemporary civil law systems are more and more openly acknowledging the inescapable dependence of legislation on the judges and administrators who interpret and apply it." GLENDON ET AL., *supra* note 10, at 63.

86. KRAAKMAN ET AL., *supra* note 32, at 60.

87. Professor Matthew Mirow vigorously contests as simplistic a characterization of the Latin American legal systems as essentially systems that are based on the Napoleonic Code. See Mirow, *supra* note 18, at 179. "Successful codifications of private law were often exercises in comparative legislation. At the core of those exercises were the *Code Napoleon* and the European commentary sources that quickly grew around the main text. This however does not mean that Latin American countries merely translated and borrowed the *Code* article by article." *Id.* at 183.

ing dichotomy of private law still prevails in most Latin American countries.⁸⁸ This legal duality is troublesome in the specific field of contracts and corporations, due to the existence of a two-tier regulation for many private agreements.⁸⁹ The assessment of the applicable substantive regime is usually difficult and often characterized by subjective definitions.⁹⁰ The problem associated with the dichotomy of private law has been extensively addressed by legal doctrine and jurisprudence.⁹¹ The lack of solid objective criteria to determine the civil or commercial nature of a business corporation creates difficulties for the assessment of applicable substantive law. This dichotomy is not necessarily reflected in procedural rules. Thus, in many countries of the area there are no differences between civil and commercial courts as there are in their French counterpart. This difference makes the dichotomy generally pointless here, for both civil and commercial processes tend to be equally inefficient due to an absence of expeditious rules of procedure in either side of Private Law.⁹²

Jorge Esquirol holds rather ironically that "Latin American societies are not European, only their jurists pretend to be." Jorge L. Esquirol, *The Fictions of Latin American Law*, 1997 UTAH L. REV. 425, 470 (1997).

88. "The distinction between Civil and Commercial law is deeply rooted in continental countries . . ." ADRIAAN DORRESTEIJN ET AL., *EUROPEAN CORPORATE LAW* 8 (Kluwer Law and Taxation 1994). Such dichotomy usually creates interpretation problems. "As a result, therefore, while contracts of a commercial nature (i.e. contracts between merchants or between a merchant and a consumer) are governed by the applicable provisions of the Commercial Code, the basic principles of contractual obligation are determined according to the rules stated in the civil code applicable to the transaction." ZAMORA ET AL., *supra* note 5, at 551.

89. After the enactment of the 1942 Civil Code of Italy, there is a tendency towards the unification of Private Law. "There is a branch of Private Law which, by simple inertia, is still labeled with an ancient name. Such name was meaningful in the past but lacks a specific purpose today. This branch is referred to as Commercial Law." FRANCESCO GALGANO, *DERECHO COMERCIAL* 1 (Jorge Guerrero trans., Temis 1999).

90. According to Stephen Zamora, "[u]nlike the Uniform Commercial Code adopted in the United States, which in general applies to merchants and non-merchants, the Commercial Code (of Mexico) only applies to 'acts of commerce' which are defined as certain types of acts carried out between merchants or between a merchant and a non-merchant." ZAMORA ET AL., *supra* note 5, at 541.

91. See, e.g., BORIS KOZOLCHYK, *EL DERECHO COMERCIAL ANTE EL LIBRE COMERCIO Y EL DESARROLLO ECONÓMICO* 193 (McGraw-Hill 1996) ("[E]ven in those cases in which the authors of civil and commercial codes adopted what they believed were clear boundaries between these codes, the reality of business transactions showed them their failure.").

92. More than fifty years ago, Phanor Eder observed appropriately that "in countries where there are no special courts for merchants I can find no justification today for the basic distinction made in Latin America between civil and commercial law." EDER, *supra* note 27, at 32.

Although an effort to reunite the above-mentioned disciplines has resulted in the preparation of several draft legislations in various Latin American countries,⁹³ local legislators have not been inclined to adopt unified statutes for Private Law in which obligations and contracts could be homogenously regulated.⁹⁴ As a result of this dichotomy, company law is usually divided into two different sets of legislation included in separate codes or statutes.

Similar to their European counterparts, Latin American codes and statutes on corporations tend to be characterized by a framework of mandatory rules on accounting principles, capital maintenance, disclosure standards, domestic mergers and securities regulation.⁹⁵ Company law in Latin America can be accurately described as a shareholder friendly regulation in which controlling equity owners are granted full powers to determine corporate policy both in closely held companies and public corporations.⁹⁶

Nevertheless, an overwhelming concern with the regulatory problems associated with the protection of investors, creditors and minority shareholders has been a constant preoccupation in Latin America. As early as 1952, Phanor Eder pointed to the preoccupation of Latin American Corporate Law legislators regarding "the integrity of the capital, in order to protect creditors and investors, and to adopt measures which will protect minority sharehold-

93. See generally ARTURO VALENCIA ZEA, PROYECTO DE CÓDIGO DE DERECHO PRIVADO (Superintendencia de Notariado y Registro 1980).

94. Incredibly enough, several Latin American authors still promote the dichotomy of private law under theoretical and historical arguments. According to Roberto Mantilla Molina, "merging civil and commercial law is not viable. Nevertheless, it would be convenient to eliminate several differences that exist between them." ROBERT MANTILLA MOLINA, DERECHO MERCANTIL 36 (Editorial Porrúa, 29th ed. 1996). In a similar fashion, the Mexican author Joaquín Rodríguez emphasizes the independence of commercial law vis-à-vis civil law. "The underlying unity of civil and commercial law is undeniable; but its separation is not capricious or arbitrary for it obeys to profound reasons, basically related to the need to attend to the demands of commerce, for which civil law had proven to be insufficient and useless due to its formalistic and ritual nature" JOAQUÍN RODRÍGUEZ, CURSO DE DERECHO MERCANTIL 17 (Editorial Porrúa, 26th ed. 2003). A very relevant exception to this anachronism can be found in the enactment of the Brazilian Civil Code (effective as of 12 January 2002). Such important codification unifies civil and commercial law regulations on obligations and contracts. See Werter R. Faria, *O Aval, O Código Civil E Os Bancos*, in 134 REVISTA DE DIREITO MERCANTIL: INDUSTRIAL, ECONÓMICO E FINANCEIRO 49 (2004).

95. See JOSEPH MCCAHERY ET AL., THE GOVERNANCE OF CLOSE CORPORATIONS AND PARTNERSHIPS US AND EUROPEAN PERSPECTIVES 195 (Oxford University Press 2004).

96. See generally Jose W. Fernández et al., *Corporate Caveat Emptor: Minority Shareholder Rights in Mexico, Chile, Brazil, Venezuela and Argentina*, 32 U. MIAMI INTER-AM. L. REV. 157 (2001) (explaining that majority shareholders in Latin America often have a statutory right to dominate minority shareholders).

ers."⁹⁷ Indeed, several different provisions incorporated in most Commercial Codes and corporate statutes of Latin America consecrate countless protections for minority shareholders. Criticism based upon the lack of enforceability of many of these restrictive regulations can be found in texts written by the same authoras early as the nineteen fifties.⁹⁸

In a recent survey of the laws of corporations of several Latin American countries, another authors' conclusion is similar to Eder's in the sense that in the region shareholders' generally are subject to a less significant degree of legal protection as compared to the US.⁹⁹ Another frequent criticism relates to the inadequate drafting of many of these provisions and the ease with which investors can find loopholes and other manners to circumvent imperative provisions and expropriate minority shareholders.¹⁰⁰

V. STRATEGIES TO MITIGATE THE AGENCY PROBLEMS ARISING FROM CONFLICTS BETWEEN MAJORITY AND MINORITY SHAREHOLDERS

In light of the prominent ownership concentration that prevails within the region, the basic governance structure should address the main strategies to protect minority shareholders. A reduction in controlling shareholder powers for the benefit of

97. Eder, *supra* note 83.

98. "All the laws [of Latin America], like our own, contain prohibitions against the declaration of dividends, or other devices of distribution, except out of surplus net profits; but our prohibitions are more effective in practice." Eder, *supra* note 83.

99. See Fernández et al., *supra* note 96, at 171.

100. Fernando Londoño commented on the corporate provisions contained in the Colombian Commercial Code of 1971: "Code provisions banning directors to vote in shareholders' assemblies', others requiring minimum distributions of dividends and mandatory information preceding shareholders' meetings or the requirement of a plural number of persons in order for a quorum to be present, turned out to be a joking matter for experts in playing games with the law." Fernando Londoño, *El Código de Comercio 15 años después: ¿ En qué ha cambiado la vida colombiana?* in I REVISTA DE DERECHO PRIVADO 159 (1987). La Porta thinks that this phenomenon is germane only to countries that pertain to the civil law tradition. "The expansion of legal precedents to additional violations of fiduciary duty, and the fear of such expansion, limit the expropriation by the insiders in common law countries. In contrast, laws in civil law systems are made by legislatures, and judges are not supposed to go beyond the statutes and apply 'smell tests' and fairness opinions. As a consequence, a corporate insider who finds a way not explicitly forbidden by the statutes to expropriate outside investors can proceed without fear of an adverse judicial ruling. . . . The vague fiduciary duty principles of the common law are more protective of investors than the bright line rules of the civil law, which can often be circumvented by sufficiently imaginative insiders." La Porta et al., *supra* note 63, at 9-10.

minorities and other constituencies is usually considered to be a useful device. Several strategies have been sought to achieve the goals of protection of weak investors from the risk of oppression by majorities. Following Kraakman and Hansmann's classification, it is useful to consider the following four strategies: (1) The appointment rights strategy; (2) The decision rights strategy; (3) The trusteeship strategy, and (4) The reward, constraints, and affiliation rights strategies.¹⁰¹ All of these tactics have been dealt with to a high extent by Latin American corporate law statutes long before the emergence of corporate governance as a separate discipline. In fact, most of the legal devices required for the implementation of such four strategies are contained usually in regulatory provisions set forth in commercial codes and corporate law decrees and laws across the area. In order to verify this premise it suffices to classify and review the relevant provisions in accordance with the chart set forth in Annex A.

A. *The Appointment Rights Strategy*

The basic manner in which this tactic is legally pursued consists on the consecration of proportional voting for the election of directors. Systems such as cumulative voting, or the reservation of seats for minority shareholders are some of the proceedings used for this purpose. Almost all Latin American jurisdictions include these sorts of legal devices. While most US jurisdictions have abandoned the concept of proportional representation in favor of a default rule of straight voting,¹⁰² commercial codes and corporate statutes still abide by the more conservative representational rule.

An unusual and stringent possibility to curb the rights of majorities in the context of board elections relates to the existence of legally imposed vote caps. As a result of this sort of restrictions majority shareholders are not allowed to exercise more than a certain percentage of the votes attached to their shares, irrespective

101. See KRAAKMAN ET AL., *supra* note 32, at 54-61.

102. Stephen Bainbridge explains the underlying rationale for such departure from cumulative voting in the US: "During the last few decades, however, cumulative voting in public corporations has increasingly fallen out of favor. Opponents of cumulative voting argue it produces an adversarial board and results in critical decisions being made in private meetings held by the majority faction before the formal board meeting." STEPHEN M. BAINBRIDGE, *CORPORATION LAW & ECONOMICS* 445-46 (Foundation Press 2002). Only 8 states in the US have mandatory cumulative voting. *Id.*

of the size of their holdings.¹⁰³ This system is still viable in Brazil and Chile and was legally feasible until recently in Colombia.¹⁰⁴ Another possibility to assure minority representation stems out from the so-called weak vote caps,¹⁰⁵ namely, legal restrictions that prevent shareholders to exercise voting rights in excess of their economic stake in the corporation. Weak voting caps are related to the principle one share, one vote, which reflects a pro-rata allocation of decision-making rights. They are usually present in most Latin American corporate codes and statutes.¹⁰⁶

B. The Decision Rights Strategy

The second strategy to protect minority shareholders rights is related to the manner in which fundamental corporate transactions are adopted. The underlying concern here relates to the idea of allowing minority shareholders to block certain important decisions by the exercise of veto rights that arise from supermajority provisions. This is an extremely useful device in Latin America, for it allows holders of minority interests to actively participate in crafting policies regarding fundamental corporate transactions. As Hansmann and Kraakman properly suggest, "in most circumstances, supermajority voting, like voting caps or proportional voting, is likely to matter chiefly in closely held companies and public companies with concentrated ownership."¹⁰⁷ Most jurisdictions in the area not only allow for supermajorities as a rule of choice, but also set forth regulatory provisions devising supermajority approval for various relevant shareholders' decisions.

103. These restrictions are referred to as strong vote caps. "Strong vote capping reduces the voting rights of large shareholders *below* their proportionate economic ownership, and thus implicitly inflates the voting power of smaller shareholders: for example, a stipulation that no shareholder, regardless of the size of her holdings, may exercise more than 5% of the votes at the annual shareholders' meeting." KRAAKMAN ET AL., *supra* note 32, at 55. Nevertheless, the effectiveness of this sort of restriction is at least debatable. As early as 1952, Phanor Eder had pointed out to the possible uselessness of such protective devices. "In the attempt to protect the minority shareholders against the majority, artificial restrictions, annoying and generally ineffective, have been imposed on voting rights." Eder, *supra* note 22.

104. Article 242 of Law 222 of 1995, repealed the restriction provided under Article 428 of the Colombian Commercial Code whereby shareholders were not entitled to vote in excess of 25% irrespective of their shareholding percentage.

105. See KRAAKMAN ET AL., *supra* note 32, at 56.

106. A notorious exception is associated with multiple voting rights that exist in Argentina and Venezuela.

107. KRAAKMAN ET AL., *supra* note 32, at 57.

C. *The Trusteeship Strategy*

This tactic refers to the usefulness of a board of directors that is not subject to pressures or dependency constraints arising from the relationship of its members with controlling shareholders. Therefore, the purpose of a trusteeship strategy is to allow for a considerable degree of independence of directors not only from the corporation's managers but also from the holders of a majority interest. For this purpose Hansmann and Kraakman suggest three basic methods: (1) To weaken the rights of shareholders as a whole to appoint directors; (2) to disrupt financial ties of board members to controlling shareholders, and (3) to require board approval for relevant corporate decisions.¹⁰⁸

This used to be one of the weakest fields of corporate governance substantive law in Latin America. However, most major countries have now adopted regulations aimed at providing independence of board members and insulating them from undue influences coming from majority shareholders.¹⁰⁹

D. *The Reward, Constraints, and Affiliation Rights Strategies*

A final strategy aimed at protecting minority shareholders encompasses legal devices not only aimed at providing all shareholders with an equal treatment, but also at the enactment of provisions consecrating fiduciary duties, remedies for oppression, controls for the abuse of rights and other standards to scrutinize directors and majority shareholders' conduct. Within this same group of strategies, the authors also include provisions regarding conflicted transactions, mandatory disclosure rules and dissenter rights such as the appraisal remedy.¹¹⁰

Most of these legal protections can be found in the substantive corporate laws of Latin America. In fact, the already men-

108. *Id.* at 58-59.

109. Many countries in Latin America have regulations dealing with corporate governance that were issued or enacted by local legislatures, governments, securities agencies and stock exchanges throughout Latin America. *See, e.g.*, Venezuela: Resolution # 19-1-2005, issued by the Comisión Nacional de Valores; for Colombia: Resolution 275 of 2003, issued by the Superintendencia de Valores and Law 964 of 2005; for Brazil, Law 10.303 of 2001; for Argentina, Decree 677 of 2001.

110. Obviously, dissenter rights are more effective as an exit strategy than simple transference rights. "Standing alone, a transfer right provides less protection than a withdrawal right, since an informed transferee steps into the shoes of the transferor, and will therefore offer a price that impounds the expected future loss of value from insider mismanagement or opportunism." KRAAKMAN ET AL., *supra* note 32, at 24-25.

tioned concern as to the situation of minority shareholders has determined an ongoing process of amendment in regards to the statutes and codes governing business corporations. As a result of these legal reforms, the catalogue of minority shareholders rights in many of these countries may even exceed the number of prerogatives granted to minority investors within statutes enacted in other more developed areas of the world.¹¹¹

VI. OECD WHITE PAPER ON CORPORATE GOVERNANCE IN LATIN AMERICA

The influence of the OECD as well as of other international institutions¹¹² has resulted in the adoption by various Latin American countries of recommendations rendered by the different working groups of such organizations.¹¹³

In the specific field of corporate governance, the OECD has advanced a number of recommendations for reform in Latin America.¹¹⁴ For this purpose, the organization has taken into account the region's main legal and social features. The White Paper on Corporate Governance contains a list of priorities for

111. P.B. Hannon characterizes the regulation of the stock corporation in Latin America as irritating, even though it is justified by its apologists "as necessary for the protection of unsophisticated shareholders and creditors." Hannon, *supra* note 29, at 756.

112. See generally The Latin American Corporate Governance and Companies Roundtable of the OECD, http://www.oecd.org/document/63/0,3343,en_2649_37439_2048255_1_1_1_37439,00.html (containing links to material on reform proposals related to Latin America). The predominance of international credit agencies has also been a significant factor for the adoption of corporate governance recommendations. In accordance with their policies, "moving into an international equity market requires many Latin American companies to elevate their corporate governance to a new level." *IFC and Corporate Governance, Latin America*, <http://www.ifc.org>. According to Roe "international agencies such as the International Monetary Fund and the World Bank have admirably promoted corporate law reform, especially that which would protect minority stockholders. The Organization for Economic Cooperation and Development and the World Bank have had major initiatives to improve corporate governance, both in the developing and the developed worlds." Mark J. Roe, *Corporate Law's Limits*, 31 J. LEGAL STUD. 223, 237 (2002).

113. See generally WHITE PAPER, *supra* note 36. Other international institutions are constantly promoting legal reform in Latin America. "The World Bank's active support for law reform projects in Latin America is premised on the idea that secure and predictable legal environments are necessary for investment and market oriented development." Thome, *supra* note 4, at 706.

114. Pursuant to Lefort and Walker, "a standard framework to analyze corporate governance practices is provided by the OECD principles. These principles acknowledge not only the importance of legal protection, but also of other mechanisms of corporate governance". Fernando Lefort & Eduardo Walker, *The Effect of Corporate Governance Practices on Company Market Valuation and Payout Policy in Chile*, 2 (March 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=676710.

reform and detailed suggestions in regards to minute legal problems that arise in the context of the corporate organization.¹¹⁵

The White Paper on Corporate Governance for Latin America focuses on legal reform priorities and specific recommendations on that subject. The former are aimed at identifying the fundamental weaknesses of the legal infrastructure that require urgent attention of policymakers across the region. The latter are specific topics that should be addressed in order to improve the corporate governance framework in the concerned countries.¹¹⁶

The OECD lists the following six reform priorities: (i) Taking voting rights seriously; (ii) treating shareholders fairly during changes in corporate control and de-listing; (iii) ensuring the integrity of financial reporting and improving the disclosure of related party transactions; (iv) developing effective boards of directors; (v) improving the quality, effectiveness and predictability of the legal and regulatory framework and (vi) continuing regional co-operation.

The first preoccupation relates to the exercise of voting rights during shareholders' assemblies. The OECD considers that measures should be taken to allow for a more active participation of

115. Heloisa Bedicks considers that these recommendations relate to the following issues:

- Respect for the rights of shareholders (specifically minority shareholders) and taking voting rights seriously
 - Emergence of active and informed owners (transparency practices)
 - Equitable treatment of shareholders particularly in changes of control and in de-listings
 - Emphasis on the role of stakeholders in corporate governance
 - Quality and integrity of financial reporting
 - Disclosure of ownership and control (transparency)
 - Conflicts of interest and related-party transactions
 - Reporting on internal corporate governance structures and practices
 - Board integrity and director independence (i.e., acting in the best interest of the company)
 - Improved compliance and effective enforcement
 - Encouragement in reporting illegal or unethical behavior
- Bedicks et al., *supra* note 6, at 223.

116. Such changes do not necessarily imply amendments to the corporate legislation. Interestingly enough, "recent Western scholarship has suggested that the key issues of corporate governance are largely outside corporate law, as conventionally defined. Corporate codes are largely devoted to regulating the interaction of shareholders, managers, and creditors. But the most important practical distinctions now seem to depend on how shares are allocated among different types of investors, which in turn depends on a variety of rules outside the corporate code". William H. Simon, *The Legal Structure of the Chinese "Socialist Market" Enterprise*, 21 J. CORP. L. 267, 289 (1996).

minority shareholders' and institutional investors in such meetings.¹¹⁷ These steps include the reduction of procedural formalities for the disclosure of information, the incorporation of effective director nomination mechanisms that enable minority shareholders to actually elect board members and the use of new technologies to "provide shareholders and markets with as timely access to required disclosures as possible."¹¹⁸

The second OECD reform priority relates to the equitable treatment of shareholders in several different hypotheses. For instance, pursuant to the White Paper, Latin American legislators should set forth specific rules regarding minority rights during changes in corporate control.¹¹⁹ The Organization also focuses on the need to provide for fairness guidelines in order to protect minority shareholders in the event of de-listing of public corporations. Undeniably, minority shareholders must have exit rights to compensate the loss of liquidity that may ensue in the event of a shareholder decision to de-list. Failure to provide such appropriate mechanisms usually results in distrust and reluctance to invest in publicly held corporations. In fact, the risk of being held hostage in a closely held firm deters investors from participating in the securities market. Nevertheless, there is a delicate balance between dissenters' rights in de-listings and appropriate incentives for a corporation to go public. In fact, the requirements for de-listing should not be so burdensome as to discourage companies from listing their securities in the stock exchanges of the area.¹²⁰

A third proposal to amend the regional legislation is concerned with the need to insure transparency and appropriate disclosure not only in regards to the financial reporting by the corporation, but also concerning interested party transactions. Lack of disclosure of accurate information is a significant deter-

117. WHITE PAPER, *supra* note 36, at 13.

118. *Id.* at 15-16.

119. "Improved predictability with respect to shareholder treatment during changes in corporate control will allow investors to make better informed investment decisions, increases the ability of markets to properly price traded shares, and should result in less overall volatility stemming from uncertainty and disappointment." *Id.* at 18.

120. For instance, article. 1.2.5.7 of Resolution 400 of 1995 requires for the de-listing of a Colombian corporation that shareholders holding at least 99% of the shares of stock approve the decision. If such supermajority is not reached, the controlling stockholders to all dissenting persons must launch a tender offer. The latter are entitled to be bought out pursuant to a complicated appraisal remedy provided for under the statute. Even if the supermajority is reached, the remaining stockholders (no more than 1%) are allowed to exercise an exit right. *See id.*

rent for the growth of capital markets in the area. Establishing homogenous disclosure rules necessarily enables the comparison of financial data and allows for informed decision-making. To be sure, unreliability of financial information gives rise to confusion as to the actual prices of securities. Using international accounting principles may also attract foreign investors who speak a uniform financial language. Irrespective of this necessary reform, such accounting and financial amendments must be accompanied by a serious policy of enforceability preferably monitored by administrative agencies. On the other hand, the regulation of interested party transactions has already been a matter of concern in some countries in the area. However, several corporate statutes lack a comprehensive treatment of these topics. The OECD suggests that the assessment of this issue is aimed at eliminating such conflicts of interest. It is true that prejudicial self-dealing transactions are facilitated by the absence of prohibitions of this nature. It is also acknowledged that this problem can be dealt with in a more appropriate manner by full disclosure of conflicting transactions accompanied by an authorization rendered by shareholders or disinterested directors rather than by altogether barring these transactions.

A fourth priority is associated with the independence of boards of directors.¹²¹ In fact, the OECD recommends that board members should act independently in the interest of the company and its shareholders within the duties of care and loyalty.¹²² The need to foster objective decision-making processes, which are in accordance with the interests of the company -and not only with the interests of a certain group of stockholders-, may very well justify this recommendation. It is therefore appropriate to promote board structures and practices that reinforce the ability of directors to act independently of management and controlling share-

121. According to Lefort, "as a consequence of the high ownership concentration observed in most firms in the region, boards in Latin American countries tend to be much weaker than in the US or UK, and constitute a poor governance mechanism." Lefort & Walker, *supra* note 114, at 18.

122. A relevant consequence of a truly independent board of directors is the possibility of an appropriate cross-scrutiny of fellow members and other parties. "A separately-constituted board can also provide a check on opportunistic behavior by controlling shareholders -either toward their fellow shareholders or toward other parties who deal with the firm, such as creditors or employees- by providing a convenient target of personal liability for decisions made by the firm." KRAAKMAN ET AL., *supra* note 32, at 12. Obviously, in order for a board to be independent, such quality must be applicable to the majority of its members. A majority of outside directors is an important means of mitigating the agency problem between controlling and minority shareholders. *Id.* at 30.

holders. Various Latin American jurisdictions have enacted regulatory statutes to determine the need to include independent directors, especially, in publicly held corporations.¹²³ In spite of the obvious importance of this recommendation, it must not be ignored that the absence of a separation between ownership and control allows direct monitoring on managers and directors by block holders, which in turn subjects the former to a high degree of control. Accordingly, due care must be exercised to avoid the impairment of advantages arising from strict control by blockholders. A balance must be struck through legal reform between a significant autonomy in the board's decision-making processes and the benefits for minority stockholders that stem out of the so-called "free ride" regarding the monitoring activities of block holders.

Even if it is listed as the fifth priority, the improvement of the regulatory framework should be considered to be the most significant problem in the area. The OECD points out to the need to strengthen the capacity of rule-making and enforcement bodies and to ensure that the legal framework supports effective use of private actions. Probably one of the aspects in which the OECD demonstrates an appropriate analysis in regards to the situation of Corporate Law in Latin America, is that concerning causes of action granted to shareholders.¹²⁴ The White Paper considers that a reform priority should be the incorporation of *private actions* to allow shareholders to resort to class action suits and mechanisms for alternative dispute resolution.¹²⁵ The implementation of these mechanisms in different areas of Company Law and Corporate Governance will improve the quality of the regulatory frame-

123. For example, Colombian Law 964 of 2005 and Argentine decree 677 of 2001. Moreover, while Mexican law "is not known for emphasizing conflicts of interest principles, Mexican corporations law takes conflicts seriously. Thus, board members who have a conflict of interests (*conflicto de intereses*) in any transaction of business of the corporation must apprise the other board members of the situation, and must refrain from participating in all deliberations concerning the matter in question (LGSM, Article 156). Where such conflict exists, a director is usually required to leave the board of directors meeting while a decision is made by the remaining directors." ZAMORA ET AL., *supra* note 5, at 588.

124. In this sense, some authors have held the need for corporate governance codes: "Markets that have national corporate governance codes in place have a marginal advantage over those that do not in the competition for international equity capital. Codes contribute to reduce risk in a market by clarifying a benchmark of minimum standards of accountability, governance and control." *Revista Buen Gobierno*, Cámara de Comercio de Bogotá, 2003, at 112.

125. Until recently class action suits were only allowed in certain common law countries.

work.¹²⁶ It is of the essence to contemplate and remove obstacles that hinder the effective use of potentially efficient mechanisms for the settlement of shareholders' disputes. As it will be explained in further detail below, some of the countries in the area have taken serious steps to improve the enforceability of Corporate Law by allocating quasi-judicial powers to administrative agencies. Such governmental institutions as the General Inspection of Justice of Argentina and the Colombian Superintendence of Corporations also provide predictability to the market participants by creating a significant body of administrative precedents.¹²⁷

The last priority concerns continuing legal co-operation. Probably the relevance of this recommendation relates more to the need for some degree of harmonization among the different corporate law systems of the area, rather than to monitor the implementation of conclusions. The existence of a number of regional treaties such as Mercosur and the Andean Pact has not contributed to the actual approximation of the countries' legislation in the field of business associations.¹²⁸ As a consequence of such lack of harmonization, a significant disparity is still the rule. A regional approach similar to the European real seat doctrine determines that the law applicable to business corporations is that of the country in which they have their actual operation.¹²⁹

126. According to Erik Berglof "in most societies, it is largely private initiatives that help enforce existing laws and regulations. The government creates the rules governing private conduct but leaves the initiation of enforcement to private parties. When a party feels cheated, he or she could initiate a private suit and take it to the court or other agency". Erik Berglof, *Enforcement and Corporate Governance* 22, (The World Bank, Working Paper No. 3409, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=625286.

127. "For the field of corporate law, the existence of the Superintendencia in particular probably also assures that there will be interstitial development of some kind: the value placed on consistency in the western legal tradition almost inevitably must give Superintendencia decisions at least a *de facto* precedential authority". ROBERT CHARLES MEANS, *UNDERDEVELOPMENT AND THE DEVELOPMENT OF LAW: CORPORATIONS AND CORPORATION LAW IN NINETEENTH-CENTURY COLOMBIA* 287 (The University of North Carolina Press 1980).

128. "The most remarkable feature of South American integration is that it is a disorderly and multiple process that permits parallel and overlapping initiatives." Raúl Aníbal Etcheverry, *The Mercosur: Business Enterprise Organization and Joint Ventures*, 39 ST. LOUIS U. L. J. 979, 983 (1995). Latin America has seen "the emergence of a number of economic unions patterned, to some extent, on the European Community. The largest of the South American Regional trade associations, MERCOSUR, for example, unites Brazil, Argentina, Uruguay and Paraguay. It is still too early to gauge the success of these new economic combinations." BACKER, *supra* note 31, at xxxv.

129. The Treaty of Montevideo of 1889 sets forth a rule whereby all business

This circumstance hinders the development of a market for corporate chartering similar to the one existing in the U.S. Such situation is a factor for the underdevelopment of the corporate system due to the lack of competition between jurisdictions.¹³⁰ This last circumstance is aggravated by a complete lack of concern for the harmonization of corporate regimes. As a consequence, there is neither the market-driven pressure for the enactment of modern *avant-garde* corporate regulations nor the legal obligation to adopt uniform standards imposed by supranational organisms such as the ones provided for under the Andean Pact.¹³¹ Mandatory harmonization would be a sensible step to be undertaken in the process of integration, even more so in light of the execution of Free Trade Agreements with the U.S. by some countries.

Besides the above-mentioned reform priorities, the OECD has also developed recommendations related, *inter alia*, to shareholders' rights. In this sense, a suggestion that could be suitable for the matter of equity participation within a company is the one related to the one share/one vote rule. This rule should be enforced, "unless it can be demonstrated that sufficient checks and balances, effective legal protections and enforcement mechanisms are in place to ensure that the contractual and statutory rights of limited voting and non-voting shares will be adequately protected."¹³² In this regard, Mierta Capaul holds that Brazil is well known for the widespread use of non-voting shares in order to separate control from cash flow rights.¹³³ In addition, in Mexico,

associations will be governed under the laws existing in the country of their domicile. "In constructing TM89, it was decided that the law of the country where the basic elements of a company were originated and perfected was the most appropriate to regulate the existence and capacity of a corporation. Article 4 provides that the relationships between the shareholders and the company and third persons, as well as the form of the contract which gives birth to the company, are subject to the law of the corporation's domicile." Beatriz Pallarés, *International Regime of Commercial Companies in Argentina and Mercosur*, 32 STETSON L. REV. 785, 801 (2003). Nevertheless, the comparative lack of corporate mobility within the region, represents an obstacle for the creation of markets for corporate chartering. This lack of mobility is caused by the usual legal requirement to set up a local corporate structure in order to carry out business in each Latin American jurisdiction.

130. See ROMANO, *supra* note 58, at (explaining the race for the bottom versus the race to the top debate).

131. A different dynamic arises from the activity of the European Council that has fostered several directives aimed at the harmonization of corporate law in the European Union. See DORESTEIJN ET AL., *supra* note 88, at 27-28.

132. WHITE PAPER, *supra* note 36, at 15.

133. In this sense, Capaul holds that non-voting shares represented "the majority of traded shares and 46 percent of the total equity of listed companies." The author further notes that "[u]ntil 2001, it was possible to structure the capital of a

dual-vote shareholding structures were designed to promote foreign investment without local entrepreneurs losing control of their companies.¹³⁴ As in other Latin American countries, Chile presents a very high ownership concentration and a corporate structure dominated by the presence of conglomerates, which in turn tend to separate their voting rights from cash flow rights through the use of the so-called pyramidal structures.¹³⁵ Thus, it is clear that non-voting shares are a useful mechanism of obtaining resources at a lower cost for the corporation and its controllers. Indeed, if minority shareholders are not entitled to voting rights, their participation at shareholders' meetings may become a mere formality.

Even though the above-mentioned rule of one share/one vote is an important principle, it is already set forth under most Latin American corporate codes and statutes. Nonetheless, it should be taken into account that voting shares are an important mechanism that allows corporations to obtain financing.¹³⁶ At the same time, non-voting shareholders benefit from a preferred dividend

corporation with two-thirds of nonvoting shares, the rest being in the form of ordinary voting shares. Thus a corporation could be controlled by shareholders owning only 16.7 percent of its total share capital." Miarta Capaul, *Corporate Governance in Latin America* 5, [http://wbln0018.worldbank.org/LAC/lacinfoclient.nsf/1daa46103229123885256831005ce0eb/7865c8ecf52ed8d585256ea9005b1b6a/\\$FILE/Corporate%20Governance%20in%20LAC.pdf](http://wbln0018.worldbank.org/LAC/lacinfoclient.nsf/1daa46103229123885256831005ce0eb/7865c8ecf52ed8d585256ea9005b1b6a/$FILE/Corporate%20Governance%20in%20LAC.pdf). However, according to the different sources already quoted, the prevailing structure of control in Latin America shows a significant equity concentration and a tendency on the part of controlling stockholders to retain a large percentage of shares of stock.

134. "As a general rule, all shares must have equal value and confer equal rights on all shareholders, in keeping with the general requirement that shareholder agreements may not produce legal effects that exclude any shareholder from sharing in the profits ([General Corporation Law of Mexico or] L.G.S.M., article 17). There are important exceptions to this general rule, however, and L.G.S.M. Article 112 allows shareholders to agree that the capital stock may be divided into several different classes of shares, and that special rights may be granted to the respective holders of each type. Thus, the articles of incorporation may limit the rights of the holders of certain classes of shares to only one right: the right to vote at extraordinary shareholders' meetings where fundamental matters are decided." ZAMORA ET AL., *supra* note 5, at 582.

135. According to Lefort, Chilean conglomerates have a relatively simple structure. "The most common way of separating voting from cash flow rights is through simple pyramid structures with only 1/3 of affiliated listed companies being second or higher tier in the pyramidal structure." WHITE PAPER, *supra* note 36, at 49.

136. There seems to be a contradiction between the idea of providing access to inexpensive financing for local corporations and the strict enforceability of the one share/one vote principle. Non-voting shares are a well-known useful mechanism of obtaining capital resources at a lower cost. Furthermore, since minority shareholders are not entitled to veto rights, their participation at shareholders' meetings may become a mere formality.

as well as a liquidation priority. Granting these groups of shareholders non-voting rights would not necessarily result in an active participation in the corresponding decision-making bodies. Moreover, empirical data shows that at least in large corporations the principle of one share/one vote does not have a significant impact on the structures of ownership and control. "The results suggest that multiple classes of shares are not a central mechanism of separating ownership and control."¹³⁷

According to the OECD's recommendation, non-voting shareholders' views should be taken into account in the company's decision-making process and "should be accorded the same rights and treatment regarding notice of and opportunity to be heard in the General Meetings."¹³⁸ Bearing in mind that non-voting stockholders are not granted with decision-making power, implementing this recommendation would be burdensome for the corporation. The emphasis should instead be placed in reinforcing their access to information, as well as to strengthen their possibility to challenge oppressive and unjust decisions on behalf of voting shareholders.¹³⁹

If the recommendation is taken to an extreme, local regulation would not allow the issuance of non-voting securities by any corporation. This idea appears to be fully inconsistent with the need to develop local securities exchanges. Indeed, suppression of non-voting stock would be detrimental to local markets and may not provide a significant improvement in minority shareholders' treatment.

The organization also insists that shareholders be provided with adequate notice, specific voting procedures for general meetings, as well as the need to include an agenda containing information about the matters to be treated in these meetings.¹⁴⁰ In spite

137. La Porta et al., *Investor Protection and Corporate Governance*, 54 J. OF FIN. ECON. 2, 499-500 (1999).

138. WHITE PAPER, *supra* note 36, at 16.

139. Some authors have pointed out that all shareholders should be treated in an equitable way, including the minority and foreign stockholders, which should be given causes of action to challenge the violation of their rights. Cf. IRUJO & VITOLO, *supra* note 49 at 24.

140. See, e.g., IRUJO & VITOLO, *supra* note 49 at 25. The relevance of holding shareholders meetings is fully recognized in most Latin American jurisdictions. As early as 1960, Hannon pointed out to the overwhelming nature of the requirements associated with these sessions. "For the S.A. directed by the domestic parent in the United States, the requirements in various Commercial Codes (of Latin America) for meetings of the ostensible or actual owners may be a time-consuming and costly nuisance." P.B. Hannon, *supra* note 29, at 759.

of the relevance of such recommendation, most Latin American corporate statutes have already adopted notice of meeting requirements.¹⁴¹ For example, Mexican and Colombian statutes generally demand a notice issued fifteen days in advance of a general meeting of shareholder.¹⁴² Such provisions are usually specific and in some cases so restrictive that they prevent shareholders from modifying the agenda in the absence of majority vote. Some of these countries also require due notice in the press in order to fulfill the aforementioned duty to inform. These requirements may even be stricter than the U.S. standard for publicly-held companies.

The OECD also holds that non-controlling shareholders should be allowed “to collectively achieve a voice by influencing the composition of the board of directors.”¹⁴³ According to the organization, non-controlling shareholders should have a realistic opportunity not only to appoint board members but also to access information relevant to the company.

The OECD strongly recommends the so-called “shareholder activism.” It holds that an appropriate legal environment could have the effect of encouraging institutional investors to make informed decisions that allow them to maximize returns.¹⁴⁴ For such purpose, the White Paper emphasizes on adopting corporate

141. Most Latin American countries have also adopted mechanisms whereby minority shareholders are entitled to summon a meeting of the general assembly. According to Capaul, minority shareholders in Mexico holding ten percent of a public company's voting or limited voting shares may call a shareholders' meeting, while in Bolivia and Colombia the percentage remains at twenty percent. In Brazil and Peru the required number of shares for this same matter is of five percent. Capaul, *supra* note 133, at 10.

142. Article 186 of the General Corporation Law of Mexico; Article 424 of the Colombian Commercial Code; *see also* Article 278 of the Ecuadorian Company Act and 124-1 of the Brazilian Corporation Law No. 6.404 (requiring 8 days for notice of meeting).

143. WHITE PAPER, *supra* note 36, at 16.

144. In Latin America, pension funds could be considered as a powerful group of domestic investors with a high degree of influence on corporate governance. According to Iglesias-Palau, “since the early eighties and as the result of radical reforms to their social security systems, pension funds have come to play a leading role in capital markets of many Latin American countries. So far, Chile shows the most interesting experience, with a twenty-year-old system, a very active presence in capital markets and mature regulations.” Augusto Iglesias-Palau, *Pension reform and Corporate Governance: Impact in Chile*, REVISTA ABANTE, Vol. 3, No. 1, Oct/Abr 2000, at 110. Moreover, early pension fund reforms in Chile, Argentina, Peru and Mexico gave institutional investors an important role as capital suppliers. Lefort holds in this regard that “pension reform has triggered capital market and corporate law reforms that have helped to improve overall minority shareholders protection.” *See* WHITE PAPER, *supra* note 36, at 50.

statutes that encourage pension funds and other institutional investors to exercise their ownership rights in an informed way. Specifically, the OECD suggests the implementation of provisions that enhance the flow of information between the company and such investors. This is one of the aspects in which the influence of the U.S. law and practice has arrived too late in Latin America. Indeed, this recommendation conflicts with empirical demonstration of this policy's limited effectiveness. "Today, there is relatively little evidence that shareholder activism has mattered. Even the most active institutional investors spend only trifling amounts on corporate governance activism. Institutions devote little effort to monitoring management; to the contrary, they typically disclaim the ability or desire to decide company-specific policy questions (. . .). Most importantly, empirical studies of U.S. institutional investor activism have found 'no strong evidence of a correlation between firm performance and percentage of shares owned by institutions.'"¹⁴⁵

The OECD proposes a scheme whereby ADR holders should be granted similar rights to those provided to holders of the underlying shares.¹⁴⁶ In that manner, the White Paper asserts that ADR holders should also have pre-emptive rights in new share offerings.¹⁴⁷ It also recommends that national legislation in the country of the issuing corporation should ensure "that the proxy voting system functions equally well for ADR holders as it does for those who hold the underlying shares."¹⁴⁸ This recommendation appears to be rather unusual. The legislative process to amend the corporation laws is cumbersome and time-consuming in most of the countries in the region. Changing the voting rights to allow outsiders -like ADR holders- to participate in shareholders' meetings may imply a radical departure from the ownership and capital structure of local corporate law. It may also entail a difficulty to differentiate the voting rights of the ADR depository and those

145. BAINBRIDGE, *supra* note 102, at 515.

146. WHITE PAPER, *supra* note 36, at 16. An American Depositary Receipt (ADR) is a certificate issued by U.S. depository that represents a number of shares of stock issued by a non-U.S. company. In a number of cases Latin American corporations have taken advantage of ADR programs in order to access the broader U.S. capital market.

147. "Pre-emptive rights give an existing shareholder the opportunity to purchase or subscribe for a proportionate part of a new issue of shares before it is offered to other persons. Its purpose is to protect shareholders from dilution of value and control when new shares are issued. In modern statutes, preemptive rights may be limited or denied." HAMILTON, *supra* note 46, at 466-67.

148. WHITE PAPER, *supra* note 36, at 16.

that pertain to their individual holders. Moreover, it seems dubious that the investors acquiring ADRs could have an intention to participate in the decision-making processes of the issuer of the underlying shares. In fact, if the investor were willing to have a saying in corporate affairs, it would appear to be more reasonable for her to directly acquire shares of stock in the corporation. In conclusion, a recommendation that does not seem to be realistic, particularly in light of the small number of ADR programs in place as compared to local issuance of shares.

Regarding the recommendations addressing the equitable treatment of shareholders the OECD insists that the legal framework should strengthen minority shareholders' rights in the event of change in corporate control.¹⁴⁹ These reforms should not only be aimed at allowing investors to make better-informed investment decisions but also to increase the ability of markets to properly price traded shares. Consequently, measures like these will contribute to a climate of confidence which in turn could be appropriate to foster market development. A clear-cut definition of the precise meaning of a change in corporate control as well as other events that may be detrimental to minority shareholders is also advisable. The White Paper recognizes the existence of withdrawal rights within corporate statutes in the region. However, the OECD recommends the inclusion of a more precise definition of the events triggering dissenters' rights and remedies.¹⁵⁰ In fact, corporate statutes should be as clear as possible about the events under which such remedies could be exercised. The OECD also points out to the necessity of introducing mechanisms that allow for proper appraisal of the shares held by stockholders exercising dissenters' rights.

Another recommendation rendered by the OECD is aimed at determining the role of stakeholders in corporate governance issues. Such actions as ensuring conformity of corporate officers with legislation related to the rights of stakeholders should be taken. The paper also emphasizes in the need to encourage the reporting of illegal or unethical behaviors by corporate officers to the extent that they are in violation of stakeholders' rights.

149. The OECD takes into account that "exchange rules and company charter documents have in practice failed to ensure equitable treatment of shareholders in cases of 'squeeze outs', de-listings, and exercise by shareholders of statutory withdrawal rights." *Id.*

150. For example, events such as a transformation of the corporation's business purpose of the company, or a restructuring of its capital stock should allow for the exercise of dissenter's remedies. See WHITE PAPER, *supra* note 36, at 18.

As explained above, the organization has shown concern about the necessity to enhance the quality and integrity of financial reporting as a means to improve disclosure and transparency.¹⁵¹ The White Paper suggests that the regulatory framework concerning the financial reporting process should be evaluated considering the potentiality for the emergence of conflicts of interests. In order to deal with this situation, the information relevant for the annual reports should be prepared and verified on a timely basis, by means of implementing a division of responsibilities among the company and taking into consideration the auditing process. The organization insists on the importance of a qualified and independent auditor as well as in the relevance of abiding by international standards for the preparation of financial information.

The OECD is also concerned with the need of a legal framework that creates effective means to obtain accurate information about beneficial ownership and control. This recommendation is grounded upon the difficulty to identify controlling parties in corporations based in countries in which a concentrated ownership structure prevails. These systems are propitious for potential conflicts of interest, related party and insider trading transactions.¹⁵² Ownership concentration may thus allow controlling shareholders to undertake business transactions that may be detrimental to the interests of minority shareholders.¹⁵³ Hence, the OECD has recommended the use of a *three-fold template* that sets forth the following mechanisms aimed at identifying beneficial equity owners: (i) up-front disclosure; (ii) imposition of an obligation to keep beneficial ownership and control information, and (iii) creation of a reliable information system. The organization further insists in the

151. According to Mierta Capaul, "[d]isclosure and transparency refer to the availability, reliability, and timeliness of financial and non financial information to all shareholders. This includes information on the governance structure of the company, how corporate decisions are taken, and what checks and balances are in place to ensure equitable treatment." Capaul, *supra* note 133, at 10.

152. Some countries have already adopted these protective measures. Capaul informs that in Chile, for instance, shareholders holding at least five percent of the outstanding shares may subject a related party transaction to an approval at an extraordinary general meeting. *Id.* at 10.

153. In regards to the specific situation of Bolivia, Mierta Capaul holds that there is "a widespread perception among Bolivians that the controllers of some 'capitalized companies' understate profits or transfer them out of the company through related party transactions or other means." *Id.* at 9. The same author further states that this perception "has generated an intense debate on how the capitalized companies should be governed to ensure that their activities are conducted in the best interest of the company and all shareholders" *Id.*

importance of allowing interested shareholders to identify all the parties with whom controlling stockholders have a material business relationship.

The White Paper also contains extensive recommendations regarding the duties of the board of directors. As it has already been stressed out, equity ownership concentration in Latin America allows controlling shareholders to exercise a dominant influence over directors. Thus, the OECD deems necessary to foster a legal framework that compels members of the board to strictly abide by their duties of care and loyalty, as a means to protect the interests of *all* of a company's shareholders.¹⁵⁴ For this purpose, the organization contends once again that minority shareholders should be entitled to appoint board members. This may be accomplished by the use of cumulative voting systems.¹⁵⁵

As it has already been explained, minority-appointed directors will generally lack a veto power on board decisions.¹⁵⁶ Therefore, imposition of mandatory voting mechanisms such as the one depicted before may fail to effectively protect the interest of minority stockholders.¹⁵⁷

As we have analyzed thus far, the OECD's focus appears to be the substantive areas of corporate law that need to be amended in

154. In most jurisdiction in the Latin American region there is comprehensive regulation not only on the duties of directors but also on the liabilities that are imposed upon them. See ZAMORA ET AL., *supra* note 5, at 590. The effectiveness of such provisions is generally limited due to enforceability concerns.

155. By this method, each shareholder receives a proportionate number of votes to their shareholdings, which at the same time are assigned to one or more candidates. According to Bainbridge, "cumulative voting provides an alternative mechanism for electing the board of directors that can assure board representation for the minority." BAINBRIDGE, *supra* note 102, at 444. Nevertheless, most Latin American legal systems have already adopted mandatory systems for the designation of directors. Such is the case of Mexico. See WALTER F. PHILIPP, *LA SOCIEDAD ANÓNIMA MEXICANA* 375 (3rd ed. 1994).

156. In fact, establishing compulsory board representation for minority shareholders may have little or no positive effect on a given company's decision-making processes. It could also be held that excessive restrictions may hinder the board's ability to perform. That would be the case, for instance, whenever excessive supermajority requirements are provided under the corporate by-laws. Stephen Zamora has held that "in setting a higher voting majority for certain decisions, corporations should be careful not to hamstring the board from making the normal decisions that are vital to the daily operations of the company." ZAMORA ET AL., *supra* note 5, at 589.

157. Vermeulen worries that cumulative voting systems "may easily be eliminated or minimised by the controlling shareholder. For instance, he or she may alter the articles of association or remove the minority shareholders' director without cause and replace him or her with a more congenial person." VERMEULEN, *supra* note 79, at 105.

order for corporate governance to be successful in the region. This approach seemingly disregards a simple fact that has been constantly reiterated in this article, that is, the comparative sufficiency of corporate law provisions dealing with minority stockholders' rights. The OECD seems to overlook the significance of enforceability, which appears to be the single most important aspect to be improved in most -if not all- Latin American countries. As it will be analyzed below in further detail, the lack of appropriate and effective judicial remedies, the general inefficiency of the judicial systems, and the time-consuming nature of legal processes result in the uselessness of any positive consecration of substantive rules. The issue of enforceability of corporate statutes is dealt with in further detail below.¹⁵⁸

VII. ENFORCEMENT OF CORPORATE GOVERNANCE RULES

A determining factor for poor corporate governance in this region relates to the prevailing weakness of the legal infrastructure and, specifically, the comparative lack of enforceability.¹⁵⁹ The extent to which the legal system functions in Latin American countries is still a matter of debate.¹⁶⁰ Generally, it can be

158. Within the OECD *White Paper for Corporate Governance* there is, nevertheless, a brief reference to enforceability. The organization lists a number of measures that should be implemented to this end, including: (i) removal of contradictions between rules and laws relating to corporate governance; (ii) achieving an optimal distribution of powers among local courts, supervisory authorities and enforcement mechanisms; (iii) enhancing the political and financial independence of regulatory and supervisory agencies; (iv) providing such agencies with ample powers so as to investigate and solve cases in a manner that fosters public confidence in enforcement and deters rule-breaking and (v) allowing supervisory agencies to appear before courts to submit advisory opinions in shareholder-related cases. See WHITE PAPER, *supra* note 36, at 30-32.

159. Some authors have held that in the specific context of corporate governance "[e]nforcement of laws is as crucial as their contents. In most countries, laws and regulations are enforced in part by market regulators, in part by courts, and in part by market participants themselves. All outside investors, be they large or small, shareholders or creditors, need to have their rights protected." La Porta et. al., *supra* note 63, at 5.

160. According to Thome, "[d]espite recent reform efforts, the administration of justice in Latin America to a large extent continues to be based on a bureaucratic model; as such, it is hierarchically organized and retains a written process that facilitates the internal control of the proceedings (and the judicial functionaries), but strictly limits participation in the process by affected parties." Thome, *supra* note 4, at 705. Rosenn also shares this concern: "[I]t is quite common to discover that the authorities charged with administering a particular body of law are unaware of significant changes in the statutory or case law. Inertia, ignorance, and inability to keep abreast of rapid-fire legal change frequently combine to produce substantial differences between the formal norm and the law actually being applied." Keith

acknowledged that there is a considerable disparity between the degrees to which the official legal systems penetrate in rural areas as compared to the same phenomenon in major urban centers.¹⁶¹ In the latter scenario an increasing development of legal institutions has allowed for the modernization of several economic sectors.¹⁶²

The literature has identified relevant substantive law factors that affect corporate governance in Latin America. There is a consensus as to the main structural legal changes that could be made in order for local corporations to be more competitive in a global environment and to have a broader access to the international capital markets. However, enough emphasis has not been placed in the need to develop effective mechanisms for the enforceability of corporate governance principles in the region.¹⁶³ A failure to identify appropriate measures in order to effectuate a significant turnaround in the traditional legal systems of Latin America has caused corporate governance to lack usefulness that it has in other parts of the world.

According to Bratton, empirical evidence demonstrates the obvious premise whereby there is a strong correlation between the

Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 AM. J. COMP. L. 514, 541 (1971). This rather extreme vision of Latin America has been critiqued as unrealistic by Jorge L. Esquirol: "Exoticizing these societies indeed characterizing them as somehow beholden to different conceptions of the meaning of law, plays a large role." Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41, 87 (2003).

161. Merryman points to the fact that to the urban oligarchy population, Western Law is the significant legal standard as opposed to customary law, which is the law for millions of marginal inhabitants in Latin America. JOHN H. MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPE AND LATIN AMERICAN LEGAL SYSTEMS* 365 (1978).

162. "A more developed commercial and financial law, with related changes in property and procedural law, serve to build the framework for the expanding economic activity [in Brazil]. Legal forms for aggregation of capital and skills, or for the exertion of greater economic power, assume high significance." Henry J. Steiner, *Legal Education and Socio-Economic Change: Brazilian Perspectives*, 19 AM. J. COMP. L. 39, 47 (1971).

163. According to Berglof and Claessens, "[e]nforcement more than regulations, laws-on-the books or voluntary codes is key to effective corporate governance, at least in transition and developing countries." Berglof, *supra* note 126, at 1. It must also be noted that "a corporate law regime will not be effective if it is not enforced. Shareholders rights are only meaningful to the extent they are protected. Simple bright-line rules and greater transparency facilitate enforcement, but more is needed. Rooting out corruption is essential to promoting the rule of law and is a precondition to any effective legal system. The law must be crafted and enforced by honest-dealing and competent judges, lawmakers, and regulators, and scores cannot be settled by bribes, violence, and politics." Paredes, *supra* note 76, at 1154-1155.

rule of law and the ability to enhance and deepen local capital markets.¹⁶⁴ In other words, the few thick and liquid capital markets that exist in the world are characterized by legal investor protection as opposed to thin markets lacking significant liquidity in which shareholders are subject to less effective legal safeguards.¹⁶⁵ This author also stresses out the obvious rationale that underlies the assumption: "given a weak legal protection, only voting control will protect against expropriation by other equity investors."¹⁶⁶

Interestingly enough, Roe states that there are limits associated to the ability of corporate law to change ownership patterns. Such boundaries are so clear that even in nations in which there is a significant protection awarded to investors (i.e., Germany and Scandinavian countries), there is no separation between ownership and control. This situation arises, according to Roe, from "deeper features of society, such as industrial organization and competition, politics, conditions of social regularity, or norms that support shareholder value. . . ."¹⁶⁷

During decades, efforts have been constantly made in order to improve the judicial system in the region. Although some signifi-

164. Keith Rosenn also holds that despite opinions to the contrary, it is undoubtedly true that strengthening the rule of law will bear on the developmental process and often in a positive way. See Keith Rosenn, *Lectures on Latin American Law*, Chapter 2, University of Miami, 1992, at 110 (on file with author).

165. Authors such as Troy A. Paredes highlight the fact that "the law has a central role to play in the development of equity markets. In short, the law is essential to securing the property rights of shareholders. Strong legal protections shield shareholders, especially minority shareholders, from having their investments expropriated by insiders, including directors, officers, entrepreneurs, and controlling shareholders. . . . By protecting shareholders from insider abuses, the law can instill in shareholders the confidence needed to invest, thereby leading to thicker and more highly valued equity markets." Paredes, *supra* note 76, at 1057.

166. William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross-Reference*, 38 COLUM. J. TRANSNAT'L L. 213, 229 n.48 (1999). Mark Roe also addresses this concern pursuant to today's dominant academic explanation regarding the lack of deep securities markets in Continental Europe, which is supposed to be linked to "the weak role of corporate and securities law in protecting minority stockholders, a weakness that is said to contrast with America's strong protection of minority stockholders." Roe, *supra* note 112, at 236-37.

167. *Id.* at 239. Other authors like Jeffrey N. Gordon argue that corporate governance convergence does not depend exclusively on an economic logic (which assumes that legal systems will converge to best corporate practices), but on a country's or group of countries' commitment of transnational economic and political cooperation. JEFFREY N. GORDON, AN INTERNATIONAL RELATIONS PERSPECTIVE ON THE CONVERGENCE OF CORPORATE GOVERNANCE: GERMAN SHAREHOLDER CAPITALISM AND THE EUROPEAN CORPORATE GOVERNANCE INSTITUTE (ECGI) EUROPEAN UNION, 1990-2000, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=374620.

cant achievements have been accomplished, imbedded vicious practices die hard in Latin American judiciaries. It can be anticipated that surpassing these obstacles will be a lengthy process to which significant corporate governance improvements cannot be subject to. Therefore, alternative avenues must be pursued. For instance, the application of arbitration for corporate matters has been regarded as a means to cope with the requirement for hasty resolution for these conflicts. Among these solutions, the most auspicious one appears to be the strengthening of administrative agencies in charge of supervising Latin American corporations. As it will be seen below, the specific characteristics of these entities may enable them to solve corporate issues on a more technical and swift manner.

Probably the lack of knowledge of the actual operation of these entities and in some cases the misuse or their powers have resulted in distrust towards their existence. In fact, governmental control on corporations in Latin America has not been exempt from constant criticism ever since these administrative agencies were created.¹⁶⁸ "The requirement for prior government authorization has met with constant opposition in all countries on diverse grounds."¹⁶⁹ It has also been asserted that these agencies lack sufficient transparency to deal with corporate affairs.¹⁷⁰ Moreover, it

168. According to Guillermo Cabanellas de las Cuevas governmental control on business corporations corresponds to historical reasons more than actual economic concerns. This control does not exist in the majority of industrialized countries. 8 GUILLERMO CABANELLAS DE LAS CUEVAS, DERECHO SOCIETARIO, PARTE GENERAL, INTERVENCIÓN Y FISCALIZACIÓN ESTATAL DE SOCIEDADES 33 (Editorial Heliasta ed., 2003). "Using a widespread ill conceived technique in Argentine law, corporate statutes grant supervisory agencies overwhelming powers and a great deal of discretionary authority to interfere in the creation and existence of corporate organizations. In doing so, such agencies have been converted into a kind of overpowering supervisory institutions, which may disregard subjective rights granted upon shareholders." *Id.* at 12.

169. Eder, *supra* note 22, at 38. The author lists the following challenges to government control of corporations: (i) it is an unconstitutional restriction on the right of freedom of association; (ii) the supposed protection to the public is illusory; (iii) the task is beyond the capacity of States with poorly organized civil services; (iv) it is a hindrance to progress; (v) it infringes on the constitutional separation of powers; (vii) it is an obstacle to commerce without corresponding benefits; (viii) tutelage by the law is better than tutelage by the government; (ix) judicial functions should not be entrusted to the administration and (x) it is violative of principles of economic liberalism. *Id.* at 38-39.

170. A rather cynical approach in regards to this same issue can be found in the following excerpt: "There is general agreement that in several Latin American nations, the government body charged with the supervision of companies has extended its powers to ensuring that the statutory mandates be fulfilled to a degree which tends to rigidify the S.A. (stock corporation) into an inflexible stereotype

has been argued that conferring judicial functions upon administrative agencies is against the basic principles of democratic systems.¹⁷¹ The argument is grounded on the presumed lack of independence of these agencies vis-à-vis the executive branch of government.¹⁷² It is said that the lack of autonomy of the agencies' directors is evidenced in the fact that they are usually appointed by Presidential Decree and, therefore, subject to undesirable political pressures.¹⁷³

However, it is acknowledged that these agencies have a higher technical qualification and consequently a better understanding of complex corporate issues as compared to the average Latin American judge.¹⁷⁴ In fact, in some countries of the region there is a longstanding tradition of a kind of "administrative jurisprudence" rendered by these agencies.¹⁷⁵ Furthermore, the degree

constantly subject to inspection from minor government officials not uncommonly hungry for a *mordida*." Hannon, *supra* note 29, at 756.

171. Pursuant to Adolfo Rouillon, the Colombian Constitution determines that the judges must remain independent from the executive branch of government. "Nevertheless, the officers of the Superintendence of Corporations -that acts as a judicial authority in bankruptcy proceedings- cannot guarantee an independence equal to the one granted to the judiciary." ADOLFO ROUILLON, COLOMBIA: DERECHOS DE CRÉDITO Y PROCESOS CONCURSALES 46, http://www.minhacienda.gov.co/pls/portal30/docs/PAGE/INTERNET/REGULACION/TAB698536/3_12.%2BCOLOMBIA%2BDERECHOS%2BDE%2BCREDITO%2BY%2BPROCESOS%2BCONCURSALES.PDF.

172. It has also been held that the effectiveness of this kind of entities is usually linked to the person who is appointed to lead them. According to Guillermo Cabanellas the Corporate Law of Argentina depends upon the premise whereby undesirable incompetent individuals will not ever be in charge of institutions such as the Inspection of Justice. "This is a dangerous premise, the worst consequences of which we have been fortunate enough to avoid thus far." CABANELLAS DE LAS CUEVAS, *supra* note 168, at 12.

173. In accordance with Adolfo Rouillon, the Colombian Superintendent of Corporations is appointed and removed by the President in a discretionary manner. As a consequence, "the person empowered to decide on final adjudication of debtors and creditors' rights within insolvency proceedings is politically appointed by the Colombian President." ROUILLON, *supra* note 171, at 44-45. The author further presents the following valid criticism: "There is no statute or regulation establishing either objective criteria for the appointment and removal of the Superintendent of Corporations or tenure for the officer to remain in charge of the agency during a determined period of time." *Id.*

174. "Even countries with a career judiciary seldom attract the most able law students, who find the gap between judicial salaries and the remuneration of private practice too great. In many Latin American nations, these economic and legal-cultural explanations for a low level of judicial independence are overshadowed by political considerations." Rosenn, *supra* note 164, at 135.

175. "The rules enforced by the Superintendencia are for the most part cast in reasonably, precise terms An administrative agency such as the Superintendencia may contribute to legal development in several ways. It may act as both an interested party and as a source of technical knowledge in the preparation of new statutes and codes. It may also promulgate regulations within the scope of its

of predictability, legal certainty and expeditiousness of this supervisory system is higher than the one that would exist in its absence.¹⁷⁶ As it has been stressed out, the basic argument against the exercise of judicial powers by administrative agencies is their lack of independence vis-à-vis the executive branches of government.¹⁷⁷ This assertion arises from a conception whereby there must be a complete separation of powers. Nevertheless, modern constitutional law embraces the notion of cooperation between the executive and judicial branches.¹⁷⁸ Furthermore, the criticism also arises from an idealized autonomy of the judiciary -intimately linked with pure Montesquieu's theories- that in the Latin American area is still unrealistic. In the specific context of Latin America there are extensive studies as to the evils of which the local judicial system is plagued. Mirow holds that for the region the twentieth century "has been a period of relative judicial weakness. Too often courts are seen as riddled with delays, black logs, and bribes. The extreme extent to which the judiciary is dependent on the executive power has hindered the development of law, and throughout the twentieth century even the supreme courts of some Latin American countries have been summarily removed and replaced by the executive or the military."¹⁷⁹ The same author has held that the Latin American judiciary in the twentieth century continued to be politically subordinate to the executive to the extent that, in practice, "judges often function at the mercy of the executive."¹⁸⁰ Rosenn further notes that no Latin American judici-

statutory authority. Finally, its own decisions in individual cases may constitute an administrative jurisprudence." Eder, *supra* note 22, at 284-285.

176. See, e.g., FRANCISCO REYES VILLAMIZAR, REFORMA AL RÉGIMEN DE SOCIEDADES Y CONCURSOS 339 (2d ed., 1999) (showing the rapid adjudication in bankruptcy proceedings filed before the Superintendence of Corporations between the years 1969 and 1997).

177. As a result of the Superintendent of Corporations' appointment by the Colombian President, this officer in his capacity of adjudicator of rights, lacks institutional independence vis-à-vis the executive branch of government. Nevertheless, such independence -which constitutes a fundamental tenet of modern democracy is granted by the Colombian Political Constitution to every judge as a member of the judiciary. See Rouillon, *supra* note 171, at 45.

178. See, e.g., article 116 of the Colombian Constitution (allowing for the exercise of judicial powers by administrative agencies, provided that an express authorization is given by the legislator).

179. See MIROW, *supra* note 16, at 174.

180. *Id.* at 193. Matthew Mirow explains in further detail the basic causes of such subordination, which are mainly of a financial and political nature. *Id.* Pursuant to the opinion of Stephen Zamora "[t]he reasons for the endemic deficiency of Mexico's judicial system lie in the country's unique and complex historical, ideological, cultural and political traditions. Such traditions include the Spanish colonial practice of

ary "enjoys the prestige, deference and independence of the judiciary in Anglo-American countries."¹⁸¹

To be sure, most comparative law authors who have written on Latin American legal systems point out to the notorious difference that exists between the law in the books and enforceability by a judiciary that is generally considered to be neither proficient nor independent.¹⁸² Precluding administrative agencies from adjudicating complex corporate matters is tantamount to proposing a denial of justice. In fact, apart from independency, corporate litigation requires expeditious and technical processes that can only be achieved where highly qualified adjudicators are in place. Diminishing the degree of independence could be justified to allow for a more precise and timely enforceability of corporate law. Thus, if administrative agencies such as the Argentine General Inspection of Justice or the Colombian Superintendence of Companies were empowered with the enforcement of corporate governance provisions, due compliance with these statutes could probably be ensured. As it will be explained below, the usefulness of these institutions arises from their multi-functional nature as well as from their ability to enforce rules and regulations. These entities are not restrained to the cumbersome and lengthy proceedings to which judges are commonly subject. At the same time,

unifying executive, legislative, and judicial powers in a single organ, the *Audiencia*; a history of dominance of public life by the political executive; and the powerful forces of centralism that have shaped Mexico's legal landscapes. . . . Mexico's judicial inadequacies were seen as products of several key shortcomings including a lack of judicial independence." ZAMORA ET AL., *supra* note 5, at 187-88. According to David S. Clark, the "*audiencia* was essentially a court of appeals with jurisdiction over roughly the same territory governed by the viceroy or captain general. It served, in addition, as a consultative counsel to the executive officials and had a limited degree of legislative power." David S. Clark, *Judicial Protection of Constitution in Latin America*, 2 HASTINGS CONST. L. Q. 405, 408 (1975).

181. According to Nagle even Latin Americans tend to be distrustful of their own businesses, banks and financial institutions, and of the government. "Their wariness comes from long traditions of institutional corruption and unethical business practices." Luz E. Nagle, *E-Commerce in Latin America: Legal and Business Challenges for Developing Enterprise*, 50 AM. U. L. REV. 859, 907 (2001).

182. "Judges, police chiefs, and other local officials in Latin America are notoriously underpaid and provided with inadequate working facilities; judges in smaller cities are usually isolated from each other for months or years at a time – there are no annual conferences of conventions; and finally, their tenure well may depend on maintaining their local political contacts and friendships. Not surprisingly, then, while adequate social and economic legislation (such as labor and water laws) is not difficult to find in Latin America, in many cases it is ignored, inefficiently enforced, or implemented in a manner that unduly favors a given element of society." SCHLESINGER ET AL., *supra* note 15, at 988 (citing J.R. Thome, *The Process of Land Reform in Latin America*, 1968 WIS. L. REV. 9, 20-21.

their ability to issue regulations and to impose fines and other administrative penalties allows them to exercise broad disciplinary actions on shareholders, directors, officers, and other stakeholders of a given corporation. These agencies, therefore, could play a significant role in the enforceability of corporate governance rules in the near future.¹⁸³

As anachronistic as it may appear, far-reaching powers granted upon these administrative agencies are not necessarily prejudicial to the economic activity. Under Comparative Law it is recommended to analyze the specific economic, social and political realities that underlie any given institution.¹⁸⁴ Failing to do so usually results in misleading analysis of a specific legal reality. In the case of Latin American corporate law, such a reality is one of discrepancy between the law in the texts and its actual application.¹⁸⁵ This evident downside needs to be dealt with by confronting two competing views. First, the unrestricted defense of the principle of judicial independence. Second, the undisputed need for an expeditious adjudication in corporate litigation. It is true that a harmonization between those two views would be an ideal solution as it has been proven by more developed nations in which corporate matters can be rapidly resolved by an independent judiciary.¹⁸⁶ Such an ideal solution is far beyond the realistic possibilities of Latin America at least in the short run. An intermediate solution that corresponds to an accepted idea of cooperation between branches of government can and has proven useful towards this end.

The experience accumulated over years of administrative activity has determined the development of summary proceedings for the enforcement of rules. The rulings contained in resolutions and other decisions are usually reported in websites and pub-

183. In fact, the Colombian Financial Superintendence has created a division entrusted with the enforceability of corporate governance as well as in corporations issuing securities in the stock exchange (Decree 4327 of 2005).

184. Legal rules, institutions, or systems cannot be compared without knowing how they function, and in order to do that, it is necessary to situate them "in their legal, economic and cultural context." MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 9 (St. Paul, West Publishing Co. 2d ed. 1999).

185. See SCHLESINGER ET AL., *supra* note 15, at 987.

186. A major example of these characteristics is present in the jurisdiction of Delaware in which the prestigious Court of Chancery is considered to be an effective and independent system for the adjudication of corporate disputes. See STEPHEN M. BAINBRIDGE, *MERGERS AND ACQUISITIONS* 135, (The Foundation Press 2003). See also ALAN PALMITER & FRANCISCO REYES VILLAMIZAR, *ARBITRAJE COMERCIAL Y OTROS MECANISMOS DE RESOLUCIÓN DE CONFLICTOS SOCIETARIOS EN ESTADOS UNIDOS*, BOGOTÁ, CÁMARA DE COMERCIO 79-80 (2000).

lished in books that are broadly accessible to the general public.¹⁸⁷ The diffusion of these materials not only provides certainty as to the authoritative interpretation of corporate statutes, but also allows for predictability of the law. In a manner comparable to the so-called no-action letters rendered by the Securities and Exchange Commission, the *precedents* rendered by these administrative agencies are “an alternative dispute resolution system.”¹⁸⁸ Criticism based on the assumed old-fashioned nature of these agencies and the argument whereby they are inconsistent with modern corporate law, disregards the basic problem associated to the region’s legal systems. These entities have developed an expertise on specialized fields of business law that has in many cases contributed significantly to foster the rule of law.

A. *The General Inspection of Justice*

One of the most significant institutions that has allowed for the enforcement of corporate statutes in Argentina is the General Inspection of Justice. This administrative agency -presently regulated under Law 22.315 of 1980- has been vested with a series of powers that enable it to function as the leading enforcement institution in the province of Buenos Aires.¹⁸⁹ Such prerogatives include not only a permanent supervisory activity on closely held corporations,¹⁹⁰ but also a number of functions associated with the

187. The Superintendence of Companies has made available a large amount of information at www.supersociedades.gov.co (last visited Feb. 17, 2008). There are also a series of publications entitled *Doctrinas y conceptos jurídicos* of the Superintendence of Corporations that have been continuously published for more than four decades. The General Inspection of Justice’s resolutions are available at www.infoleg.gov.ar (last visited Feb. 17, 2008). A number of publications carried out by private publishers also report on several resolutions and other decisions rendered by the Inspection. See, e.g., SILVANA MARTÍNEZ & RICARDO A. NISSEN, *Nuevas resoluciones de la Inspección General de Justicia* (2005).

188. See PALMITER ET AL., *supra* note 186, at 99-125.

189. Article 6 of Law 22.315, determines the various powers granted to the General Inspection of Justice. The following important functions are included in such list: (i) To request any information that it deems necessary to fulfill its purposes, (ii) to undertake investigations and inspections, in which case it is entitled to request information from any related party (iii) to file complaints against any given company before any judicial or governmental authority, and (iv) to enforce its decisions by any available means, including the request for police assistance.

190. Such powers allow the Inspection to undertake, among others, the following measures: (i) Request information and documents from a corporation, (ii) initiate investigations, (iii) receive and verify complaints against corporations, and (iv) void any actions by means of administrative resolutions. See generally 4 GUILLERMO CABANELLAS DE LAS CUEVAS, *Los Organos Societarios*, in *DERECHO SOCIETARIO, PARTE GENERAL*, 136 (Heliasta, 1993).

Argentine mercantile registry.¹⁹¹ In addition, the Inspection of Justice is an important source of corporate doctrine in the area of its jurisdiction, due to its thorough catalogue of resolutions and other documents in which corporate law is analyzed. The latter feature has led some authors to consider this agency's rulings as one of Argentina's primary sources of regulation for corporate governance.¹⁹²

The Inspection's wide-ranging powers to enforce corporate regulations has also allowed the agency to issue regulations forcing offshore companies to subject themselves to Argentine corporate statutes (Law 19.550 of 1972 and other relevant provisions).¹⁹³ This drastic remedy arose as a reaction to the increasing number of companies that were incorporated outside the country hiding behind the corporate cloak to circumvent Argentine corporation laws.¹⁹⁴ Indeed, by means of Resolution No. IGJ-7 of 2003, the General Inspection of Justice determined that any corporation that meets certain criteria is compelled to undergo amendments of its by-laws in order to adjust them to Law 19.550.¹⁹⁵ Reluctance to abide by these provisions may result in

191. See art. 4 of Law No. 22315, Oct. 31, 1980 (containing the powers that the Inspection may exercise as keeper of the country's mercantile registry).

192. See generally Rodrigo Olivares Caminal, *Corporate Governance Rules under Argentine Law*, 9 L. & BUS. REV. AM. 226 (2003).

193. The severe measures that the Inspection may undertake in regards to offshore corporations have led some authors to challenge the agency's exercise of powers in excess of those legally granted to it. See ALICIA JOSEFINA STRATTA, *LA REGULACIÓN DE LAS SOCIEDADES EXTRANJERAS POR LA INSPECCIÓN GENERAL DE JUSTICIA* 8 (Buenos Aires, Universidad Católica Argentina, 2004) (stressing that "personal opinions [of the Inspection's staff] may not replace the legislator's will without severely affecting legal certainty, the importance of which is undeniable for commercial affairs"). Nonetheless, other authors have underlined the advantages of having the means to exercise control over the activity of companies incorporated outside of the Republic of Argentina. See generally DANIEL ROQUE VITOLO, *SOCIEDADES CONSTITUIDAS EN EL EXTRANJERO O CON SEDE O PRINCIPAL OBJETO EN LA REPÚBLICA* 95 (Buenos Aires, Universidad Católica Argentina, 2005) (concluding that article 8 of Law 22.315 provides sufficient powers to the Inspection of Justice to undertake a regulation on foreign corporations); see also Carlos Molina Sandoval, *Sociedades extranjeras: Se acabó la fiesta!*, in *SOCIEDADES EXTRANJERAS* 104 (Buenos Aires, Universidad Católica Argentina, 2004) ("The basis for Resolution 7/03 is both commendable and adjusted to the current demands of mercantile activity because corporate practice showed that several foreign companies with little or no activity in their state of incorporation were registered to undertake business activities [in Argentina].").

194. Sandoval, *supra* note 193, at 103 (suggesting that one of the main reasons that led to the adoption of such a drastic measure was the need to distinguish between companies that actually carry out business transactions in foreign countries from those incorporated abroad for the sole purpose of avoiding Argentine law).

195. These criteria are contained in Article 5 of Resolution No. IGJ-7 of 2003. Some Argentine authors assert that whenever the General Inspection of Justice exercises

the corporation's delisting from the Argentine mercantile registry as well as the initiation of compulsory liquidation proceedings.¹⁹⁶

The Inspection has also issued rules regarding the execution of single or unrepeatd acquisitions of real estate in Argentina by offshore corporations.¹⁹⁷ Since foreign companies undertaking these "isolated" transactions are generally not subject to Resolution No. IGJ-7 of 2003, such corporations were being used as straw men to hold property located in Argentina. By means of such a proceeding the actual individual owners were able to disguise their identities, escaping legal actions that could be initiated against them. This fraudulent use of corporate entities compelled the Inspection of Justice to issue Resolution No. IGJ-8 of 2003 by which the "Registry for the Isolated Activities of Foreign Corporations" was created.¹⁹⁸ The Registry lists all offshore companies that have undertaken transactions concerning immovable property located in Argentina.¹⁹⁹ This measure is aimed at providing the General Inspection with sufficient information to determine whether a given corporation is being used as a mere holder of property so as to avoid Argentine legal provisions. Should this be the case, the Inspection would be entitled to force such corporation to abide by the strict regulations set forth under Resolution No. IGJ 7 of 2003, which as it has been already explained, relates to corporations with permanent activities in Argentina.²⁰⁰

It is also important to note that the General Inspection of Justice has issued significant regulation on matters that concern cor-

the powers contained in Resolution No. IGJ-7 of 2003, the following consequences ensue: (i) The foreign company will have to meet local minimum shareholder plurality rules, (ii) fulfillment of Argentine prerequisites for incorporation must be complied with, (iii) the foreign entity will have to adopt one of the types of business associations regulated under Law 19.550, and (iv) the requirements for such type of business association will have to be met in their entirety. *See VITOLO, supra* note 193, at 80. It is important to stress out that in 2005 the General Inspection of Justice compiled a single regulation containing the contents of Resolution IGJ-7 of 2003 with a number of dispersed rules regarding offshore corporations.

196. *See* art. 6 of Resolution No. IGJ-7 of 2003.

197. The General Inspection of Justice has also enforced regulations aimed at preventing the misuse of the corporate form by foreign companies. For example, the Inspection has compelled offshore corporations to undertake the acts provided for under their purpose clause within the Argentine territory. Conversely, this has resulted in a ban to set up branches that, due to their potential insolvency, may not be able to satisfy their debts as they become due. *See generally* Resolution No. IGJ-1632 of 2003. *See also* MARTÍNEZ, *supra* note 187, at 11.

198. MARTÍNEZ, *supra* note 187, at 10.

199. The information contained therein is provided to the Inspection by the Argentine Registry for Real Estate Assets. *See* art. 1 of Resolution No. IGJ-8 of 2003.

200. *See* art. 4 of Resolution No. IGJ-8 of 2003.

porate governance. For instance, it has addressed directors and officers' liability for wrongful or negligent acts. In this regard, Resolution No. IGJ-20 of 2004 -modified by Resolution No. IGJ-1 of 2005- mandated directors and officers to provide sufficient collateral to make up for any damages that may be inflicted upon the corporation or its shareholders.²⁰¹ In addition, the Inspection has dealt with issues regarding the relationship between shareholders including, *inter alia*, calling of meetings of the general assembly,²⁰² rules regarding enforceability of shareholders' rights²⁰³ including the inspection of books and records by shareholders,²⁰⁴ reduction of legal capital,²⁰⁵ as well as the winding up of corporations.²⁰⁶ In regards to stakeholders' protection, the General Inspection has set forth Resolutions concerning the prohibition to establish fictitious domiciles for a given corporation,²⁰⁷ time limits for the payment of subscribed shares²⁰⁸ and minimum capital requirements.²⁰⁹

The Inspection's far-reaching activities have also allowed it to uphold minority shareholders' rights in the context of specific transactions. In a series of recent cases, the Inspection deterred several corporations from excluding non-voting shareholders by means of a proceeding known as the accordion maneuver (*coup d'accordéon*).²¹⁰ Should this practice had been allowed, it would have resulted in the expropriation of non-voting shareholders by majorities.²¹¹ For this reason, the Inspection precluded several Argentine corporations from executing the accordion maneuver, in

201. This obligation had already been introduced in a general manner by article 256 of Law 19.550.

202. See Resolutions No. IGJ-258, IGJ-259 and IGJ-1556 of 2004.

203. See Resolution No. IGJ-1505 of 2003.

204. See Resolution No. IGJ-1257 of 2004.

205. See Resolutions No. IGJ-1328 and IGJ-1619 of 2003.

206. See Resolution No. IGJ-1619 of 2003.

207. See Resolution No. IGJ-12 of 2004.

208. See Resolution No. IGJ-24 of 2004.

209. See Resolution No. IGJ-9 of 2004.

210. The *coup d'accordéon* is a complex operation most commonly used by corporations in financial distress. See MAURICE COZIAN ET AL, *DROIT DES SOCIÉTÉS* 346 (Paris: Lexis-Nexis, 18th ed. 2005). The proceeding commences with the shareholders' decision to reduce the corporation's subscribed paid-in capital to zero. Subsequently the board causes the corporation to issue new shares of stock. As a consequence, the company receives new resources from either stockholders or third parties. In the last case, incumbent shareholders may be diluted due to a significant reduction of their equity participation. They may also be altogether excluded from the corporation. *Id.*

211. See generally MARTÍNEZ, *supra* note 187, at 17 (asserting that the accordion maneuver would have allowed the concerned corporations to exclude non-voting shareholders without proper consideration).

spite of their adverse financial situation.²¹²

The Resolutions and decisions rendered by the General Inspection of Justice demonstrate the importance of administrative agencies in furthering the effectiveness of Latin American corporate governance, particularly in cases in which corporations of a large dimension are supervised.²¹³ The same may be said of the Colombian Superintendence of Companies.

B. The Superintendence of Corporations

The Colombian Superintendence of Corporations is a second example of the advantages of having an administrative agency dealing with corporate law matters. For more than 65 years the Superintendence has assumed uninterruptedly important supervisory activities regarding the governance of business corporations.²¹⁴ The enactment of Law 58 of 1931 by which the Superintendence was initially created was permeated by the idea of protection concerning the interests of shareholders and other stakeholders from potential abuses carried out in business corporations. The official comment written by the Congressmen who prepared the draft legislation reads as follows: "The disrespect of the corporate entity in our system is paradigmatic. We all have numerous examples taken from real life to prove that it is a threat against a person's equity to contribute our assets to a corporation. This word is tantamount to loss, failure and fraud."²¹⁵

212. See Resolutions No. IGJ-1471 and IGJ-851 of 2004; see also Resolution No. IGJ-1452 of 2003.

213. See EFRAÍN H. RICHARD & ORLANDO M. MUINO, *DERECHO SOCIETARIO: SOCIEDADES COMERCIALES, CIVIL Y COOPERATIVA* 576 (Astrea 2d ed., 1997) (explaining that when the corporation reaches a certain size due to the importance of its capital resources, the social-economic influence that it can exercise supersedes the individual interest of equity owners and results in its permanent supervision by government in order to ensure its compliance with applicable corporate statutes); see also ROBERTO A. MUGUILLO, *LEY DE SOCIEDADES COMERCIALES: LEY 19.550 COMENTADA Y CONCORDADA: NORMATIVA COMPLEMENTARIA* 390 (LexisNexis, 2005) ("This supervisory agency is not only empowered to verify the formal legality, but also to investigate the substantial lawfulness of the incorporation and all additional transactions provided for under the statute.").

214. "The Superintendencia possesses a broad mandate to supervise the creation and operation of Colombian non-financial corporations. Its creation was attended by sharp political controversy. The statute establishing it was enacted in 1931 over government opposition, but the implementing decree was delayed until 1939. . . ." ROBERT CHARLES MEANS, *UNDERDEVELOPMENT AND THE DEVELOPMENT OF LAW: CORPORATIONS AND CORPORATION LAW IN NINETEENTH-CENTURY COLOMBIA* 283 (The University of North Carolina Press, 1980).

215. The Congressional Commission in charge of reviewing the draft legislation emphatically asserted that some "may find that there is an exaggerated intrusion of

In a process to update the legal infrastructure of the Superintendence – undertaken in 1995 (Law 222) and 1998 (Law 446) – the agency was vested with quasi-judicial powers to decide on litigation arising out of shareholders' conflicts. Such allocation of judicial functions to administrative agencies corresponded to the authorization granted under article 116 of the Colombian Constitution. By means of this provision the executive branch of government can assume certain judicial powers concerning non-criminal matters. The statutes have applied this constitutional provision in those cases in which non-judicial institutions have shown a particular expertise to offer rapid solutions in the adjudication of subjective rights. Pursuant to the official comment to the draft legislation that resulted in the enactment of Law 446 of 1998, "upon demanding justice, conflicting parties in an economic dispute may well find an appropriate response from the government. The concept of 'judicial relevance' requires that the powers granted to the judiciary be kept for adjudicating cases of a higher social and legal importance. At the same time, access to a better justice is also ensured."²¹⁶ The official comment also made it clear that at least at the time in which the draft legislation was prepared (1995), some of the remedies granted by the ordinary jurisdiction were illusory. This was due to the adverse equation arising from a comparison between the matter in demand on one side, and the cost and time required for the process in the other.

Among the specific processes that have been de-judicialized, the following are particularly relevant:

- a. Actions aimed at setting aside resolutions rendered by shareholders' assemblies and boards of directors (See, generally, article 133 of Law 446 of 1998);
- b. Discrepancies arising from causes of dissolution (Id., Article 138);
- c. Complaints regarding the appraisal of shares of stock when there is a controversy between shareholders (Id., Articles 134-136);
- d. Actions regarding the validity of transactions involving the conveyance of shares of stock (Article 87 of Law 222 of 1995);

governmental powers in the supervision of corporations. We believe otherwise. Not only do we find it justified, but we hold that it is indispensable. . . ." 1 FRANCISCO REYES, *DERECHO SOCIETARIO* 625 (Temis, 2d ed. 2006).

216. *Eficiencia y Acceso en la Justicia*, BOGOTÁ, MINISTERIO DE JUSTICIA Y DEL DERECHO, Apr. 2005, at 112.

- e. Actions to challenge the effectiveness of an issuance of shares by a stock corporation (*Id.*);
- f. All bankruptcy proceedings involving corporations and other business entities (Article 90 of Law 222 of 1995 and Law 116 of 2006).

As it has been held, one of the Superintendence's major contributions to the interstitial development of Colombian corporate law relates to the "administrative jurisprudence" that it has provided. In fact, reported "precedents", doctrinal opinions and no-action letters form an impressive body of law that is permanently used as a point of reference to elucidate the meaning of corporate law provisions. Such reporting of decisions and other relevant materials supplies a large degree of predictability as to the outcome of the proceedings that are litigated before the Superintendence. Robert Charles Means recognized this fact when he asserted that the Superintendence's "primary contribution to the development of Colombian corporate law has been through its jurisprudence."²¹⁷ The Superintendence's "administrative jurisprudence" encompasses topics of the most different vein. The entity has addressed issues such as voting procedures in the shareholders' assembly,²¹⁸ inspection of corporate books and records,²¹⁹ conversion of preferred and ordinary shares,²²⁰ preemptive rights,²²¹ as well as the impossibility to revoke dividends.²²²

VIII. CONCLUSION

The main literature produced on the subject of Latin American Corporate Governance throughout the past decade is still descriptive in nature. Although most of the key issues and obstacles to introduce appropriate governance practices have been identified, the lack of a comparative law approach is evident in most articles on the topic. The disregard of substantive and procedural differences not only between the common law and the civil law, but also among the various civil law countries in different regions of the world has led to a general loss of perspective. Indeed, proper methods of comparison demand extreme care regarding aspects such as legal translation and transplants, including functional

217. *Id.*

218. See Opinion No. 220-18843 of April 19, 2002.

219. See Opinions No. 220-3036 of January 21, 2000 and No. 220-21510 of May 30, 2001.

220. See Opinion No. 220-74265 of December 30, 2000.

221. See Opinion No. 220-002951 of February 1, 2002.

222. See Opinion No. 220-72552 of November 30, 2000.

equivalents and in-depth analysis of the manner in which the law is created (judge-made or codified). Above all, special emphasis must be placed in regards to the gap existing between law-in-the-books and its practical application. A failure to apply such methodology unavoidably results in misleading approaches that fail to address the main problems associated to legal transplants in the field of Corporate Governance.

A comparative survey of the corporate laws existing in major South American jurisdictions, provides a clear demonstration that most Corporate Governance devices aimed at protecting the interests of minority shareholders against possible expropriation by block-holders are already in place in Commercial and Corporate statutes throughout the region. Only a fine-tuning of these existing regulations in order to include more detailed substantial provisions concerning self-dealing, independent directors and certain disclosure requirements will be needed to match international standards in this subject.

The main question that arises in the field of Corporate Governance and more generally in Latin American Corporate law is not a new one. Scholars such as Phanor Eder in fact posed it almost six decades ago and still today it relates to the reasons why the minute regulation of minority shareholders' rights is largely ineffective in the region. I cannot find a more straightforward explanation than the lack of effective enforcement mechanisms that correspond to weak legal infrastructures like the ones prevailing in the region.

The formidable obstacles that these countries will face in order to effectuate a dramatic turnaround of their judiciaries will result in a costly and time-consuming process. Such delays may not be worthwhile at least in the field of corporate law, for the reforms may come too late. While this process is accomplished, an intermediate solution – which has proven to be efficient in some Latin American countries – may be suggested. Certainly, the allocation of important supervisory, correctional and even judicial powers to administrative agencies such as the Colombian Superintendence of Corporations, the Argentine Inspection of Justice or the Chilean Superintendence of Securities and Insurance may prove to be a last resort interim solution to the long-lasting and ineffective judicial processes of Latin America. The technical expertise of these agencies as well as the expeditious proceedings they have developed during the last decades have been more useful in handling Corporate Law conflicts than the ordinary courts.

Despite criticism regarding the role of these agencies, their existence is more than justified by the lack of a judiciary capable of resolving complex commercial issues on a timely fashion.

Annex A**Corporate governance legal provisions under major South American systems**

Country	Shareholders' Assembly	Shares of stock	Directors and Officers	Directors and officers' liability	Auditors	Dissenters' Rights	Corporate Distributions	Disclosure
Venezuela (Commercial Code and Capital Markets Law) References are to the Commercial Code, unless otherwise indicated)	1. Summons must be made 5 days in advance (Arts. 277, 278, 281) 2. Voting and Quorum provisions (Art. 273) 3. Super-majority requirements (Art. 280)	1. Ordinary and preferential shares may be issued (Art. 292) 2. No voting stock may be issued (Art. 292) 3. One share, one vote rule is not mandatory (Art. 292)	1. Elected by the shareholders' assembly (Arts. 253, 275) 2. Cumulative voting is not mandatory 3. Voting restrictions (Art. 286) 4. Conflict of interest regulation (Art. 269)	1. Joint and several liability (Art. 266) 2. Causes for liability (Arts. 243, 244)	1. <i>Comisario</i> (Arts. 304-311)	1. Right to withdraw (Art. 282)	1. Minimum dividend distribution requirements in public corporations (Arts. 115, 116 of the CML) 2. Share Reacquisition (Art. 263)	1. Right to examine books and records (Art. 284)
Colombia (Commercial Code, Law 222 of 1995 and Law 964 of 2005)	1. Summons must be made 15 days in advance (Arts. Art. 424, 419 C. Co.) 2. Voting and Quorum provisions (Art. 68 of Law 222) 3. Super-majority requirements (Arts. 155, 197, 388, 455 C. Co. and 3 of Law 222)	1. Ordinary and preferential shares may be issued (Arts. 381, 382 C. Co.) 2. Non-voting stock may be issued (Art. 61 of Law 222) 3. One share, one vote rule is mandatory (Art. 381 C. Co.) 4. Voting restrictions were in effect until 1995 (Art. 428 C. Co.)	1. Elected by the shareholders' assembly (Arts. 434, 436 C. Co.) 2. Cumulative voting is mandatory (Art. 197 C. Co); public companies may use other methods if they enhance minority participation (Art. 39 of Law 964) 3. Voting restrictions (Art. 185 C. Co.) 4. Fiduciary duties and conflict of interest regulation (Art. 23 of Law 222)	1. Joint and several liability (Art. 200 C. Co) 2. Causes for liability (Art. 200 C. Co) 3. Judicial actions (Art. 24 y 25 of Law 222)	1. <i>Revisor fiscal</i> (Arts. 203-217 C. Co)	1. <i>Der-echo de retiro</i> (Arts. 12-17 of Law 222) 2. Appraisal remedies (Arts. 15, 16 of Law 222)	1. Minimum dividend distribution requirements (Arts. 155, 454, 455 C. Co.) 2. Share Reacquisition (Arts. 396 C. Co and 42 of law 964)	1. Right to examine books and records (Art. 422 C. Co)
Ecuador (Company Law)	1. Summons must be made 8 days in advance (Art. 278) 2. Voting and Quorum provisions (Arts. 279, 280, 283) 3. Super-majority requirements (Art. 282)	1. Ordinary and preferential shares may be issued (Arts. 181, 183) 2. No voting stock may be issued (Art. 183) 3. One share, one vote rule is mandatory (Art. 183)	1. Elected by the shareholders' assembly (Art. 273, 275) 2. Cumulative voting is not mandatory (Art. 299) 3. Voting restrictions (Art. 285) 4. Fiduciary duties and conflict of interest regulation (Arts. 303-305)	1. Joint and several liability (Art. 297, 298) 2. Causes for liability (Art. 298) 3. Judicial actions (Art. 314) 4. Conflict of interest regulation (Art. 300)	1. <i>Comisarios</i> (Art. 316)	1. <i>Der-echo de retiro</i> (Art. 377) 2. Appraisal remedies (Art. 377)	1. Minimum dividend distribution requirements (Arts. 155, 454, 455) 2. Share Reacquisition (Art. 205)	1. Right to examine books and records (Art. 290)

Brazil (Law No. 6404 of 1976, as modified by Law No. 10.303 of 2001)	1. Summons must be made 8 days in advance (Art. 124) 2. Voting and Quorum provisions (Art. 125, 129) 3. Super-majority requirements (Art. 136)	1. Ordinary and preferential shares may be issued (Arts. 15-17) 2. No par stock may be issued (Art. 11) 3. One share, one vote rule is mandatory (Art. 110) 4. Voting limitations may be established (Art. 110)	1. Elected by the shareholders' assembly (Arts. 122, 132) 2. Cumulative voting is mandatory in some cases (Art. 141) 3. Fiduciary duties and conflict of interest regulation (Arts. 153-157)	1. Joint and several liability (Art. 158) 2. Causes for liability (Art. 158) 3. Judicial actions (Art. 159)	1. <i>Conselho Fiscal</i> (Arts. 161-165)	1. <i>Direito de Retirada</i> (Art. 136) 2. Appraisal remedies (Art. 136)	1. Minimum dividend distribution requirements (Art. 202) 2. Share Reacquisition (Art.)	1. Right to examine books and records (Art. 133)
Chile (Law 18.046 of 1981)	1. Summons must be made in 3 different newspaper ads (Art. 59). 2. Voting and Quorum provisions (Art. 61) 3. Super-majority requirements (Art. 67)	1. Ordinary and preferential shares may be issued (Art. 20) 2. No voting stock may be issued (Art. 21) 3. One share, one vote rule is mandatory (Art. 21) 4. Voting limitations may be established (Art. 21)	1. Elected by the shareholders' assembly (Art. 31) 2. Cumulative voting is mandatory (Art. 66) 3. Fiduciary duties and conflict of interest regulation (Arts. 42-44)	1. Joint and several liability (Arts. 45, 133) 2. Causes for liability (Art. 45, 50, 89)	1. <i>Inspectores de cuentas</i> (Art. 51) and/or external auditors for public corporations (Art. 53)	1. <i>Der-echo de retiro</i> (Arts. 69 bis, 70) 2. Appraisal remedies (Art. 69 bis)	1. Minimum dividend distribution requirements (Art. 79) 2. Share Reacquisition (Art. 27) 3. Examining books and records (Art. 54) General disclosure art. 46	
Argentina (Law 19.550 of 1972 and Decree 677 of 2001) References are to Law 19.550, except quoted otherwise	1. Summons must be made 10 days in advance (Art. 237) 2. Voting and quorum provisions (Art. 243, 244) 3. Super-majority requirements (Art. 244)	1. Ordinary and preferential shares may be issued (Arts. 216, 217) 2. No voting stock may be issued (Art. 217) 3. One share, one vote rule is not mandatory (there is a limit of up to 5 votes per share) (Art. 216)	1. Elected by the shareholders' assembly (Art. 255) 2. Cumulative voting is mandatory (Art. 263) 3. Fiduciary duties and conflict of interest regulation (Arts. 271-273)	1. Joint and several liability (Art. 200, 274) 2. Causes for liability (Arts. 200-274) 3. Judicial actions (Art. 276-279)	1. <i>Síndicos</i> (Arts. 284-297), and <i>Consejo de vigilancia</i> (Arts. 280, 281) Comité de auditoria (auditing committee) formed by 3 directors (required only for listed corporations (Art. 15 Decree 677/01)	1. <i>Der-echo de recesso</i> (Art. 245) 2. Appraisal remedies (Art. 245)	1. No minimum dividend distribution requirements 2. Share Reacquisition (Art. 220)	1. No direct rights to examine books and records (only if the corporation has no <i>síndicos</i>) (Art. 284)