OLIGARCHS, FOREIGN POWERS, AND THE OPPRESSED MINORITY: REGULATING CORPORATE CONTROL IN LATIN AMERICA

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Corporate law and governance scholarship have traditionally focused on understanding the agency costs that result from unresolved conflicts of interest between shareholders and management. This agency problem becomes trivial when corporate ownership is concentrated, as is the case in many countries outside the United States. In this context, the more pressing agency problem results from conflicts of interest between minority shareholders and controlling shareholders seeking to divert resources at the expense of the former.

When ownership is concentrated, legal rules must seek to protect minority shareholders from controlling shareholders, rather than shareholders from managers. In many countries, minority shareholders are afforded this protection via tag-along rights, i.e., the right to be bought out by any person that seeks to acquire a controlling stake in a company. The effectiveness of such a mandatory bid rule has been the subject of vigorous debate. This debate, however, has centered on comparing the approaches followed by the United States and the European Union in regulating sale of control transactions.

Latin America offers an unexplored setting in which to address these long-standing issues. The Article starts with an examination of the shareholder structure of Latin American companies, which are characterized by high levels of ownership concentration. Families and foreign entities play a dominant role, a remarkable reflection of the region's colonial past. Latin American countries have adopted unique approaches in sales of control that attempt to protect minority shareholders without deterring some of the efficient transactions that the traditional mandatory bid rule prevents. A preliminary comparison suggests these local rules outperform the U.S. market rule and the European mandatory bid rule.

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I. INTRODUCTION

Shareholders invest their capital in publicly-traded companies seeking a financial return. Though they are putting their capital at risk in doing so, they neither seek nor wish to be involved in the management of a firm's business. They often lack the necessary knowledge and expertise to manage the business, and most do not have enough money at stake to warrant such an investment of time and effort. Instead, shareholders rely on managers to oversee the business affairs and activities of the corporation. However, those managers may not always take actions that benefit shareholders—they may shirk responsibility or creatively divert corporate resources for their own benefit. Due to the collective action problems associated with shareholders being dispersed, it is costly for shareholders to monitor and reign in these rogue managers. Much of U.S. corporate law and rules on corporate governance has been tailored to address this problem. Legal scholarship has followed suit, devoting countless articles to painstakingly explaining how legal rules and private ordering can help shareholders monitor and discipline managers.

Outside the United States, this traditional agency problem does not characterize the most pressing corporate governance issues faced by investors in publicly traded companies. Ownership of public corporations in most countries is concentrated in one or a few shareholders who exert effective control over corporate affairs. Because of the size of these controlling shareholders, they have the incentive to monitor management and are often deeply involved in corporate decision-making. In this setting, the traditional agency problem between managers and shareholders becomes overshadowed by another kind of agency problem: the exploitation of minority shareholders by controlling shareholders. Controlling shareholders may use their power to cause the corporation to take actions that benefit the controller at the expense of the minority. Protecting minority shareholders and preventing the extraction of these private benefits of control thus becomes a priority for corporate law. Part II.A will address these two kinds of agency problems and the ways in which the law seeks to manage them.

In countries where concentrated ownership is commonplace, the law can help minimize these agency problems by empowering shareholders to participate in and protect themselves from the corporate decision-making process. For example, minority shareholders can be given the right to elect members to the board of directors and to challenge certain actions by the board in court. The effectiveness and enforcement of this kind of minority shareholder protection varies across countries. An alternative mechanism to protect minority shareholders allows shareholders to "cash out" and exit at the time that a shareholder acquires a controlling stake in a corporation, limiting the extraction of private benefits of control. One way of providing this protection is to require a shareholder acquiring control of a corporation to make an offer to purchase all shares of stock, including those held by the minority, at the same price paid to the person who transferred control. Whether this type of rule is preferable to a more market-based approach that allows the acquisition of a controlling stake without an accompanying offer to minority shareholders has been the subject of vigorous scholarly debate, which is discussed in Part II.B. This debate, however, has centered on the frameworks adopted by the United States, which has a laissez-faire market rule, and the European Union, which has the traditional English mandatory benefit rule. These two approaches have been treated in the literature as two exclusive, opposing alternatives. It is not obvious why these two choices are the only options for import into other jurisdictions' corporate governance laws. This Article expands and enriches this debate by considering additional approaches to the regulation of the market for corporate control that have been overlooked in the existing literature.

Latin America offers a promising setting in which to explore those long-standing questions. There has been no systematic assessment of corporate ownership in the region, as most studies have focused on Europe, Asia, or select countries around the world. Nor has there been a rigorous comparative analysis of how different countries in the region regulate the sale of corporate control in publicly traded companies. By addressing this gap in the literature, this Article adds to the greater debate on how to best protect minority shareholders.

Before assessing a country's rules governing sale of control, one must understand the ownership structure of public corporations in that country. This background is provided in Part III, which presents an analysis on corporate ownership structure in five Latin American countries—Brazil, Chile, Colombia, Mexico, and Peru. The results reveal that the largest publicly-traded companies in these countries are characterized by high levels of ownership concentration. This confirms anecdotal evidence. Surprisingly, the state plays a limited role in the governance of these large corporations, which is most likely the result of privatization programs and neoliberal economic policies adopted in these countries over the past few decades. Foreign capital plays an important role—perhaps filling the void left by the state—but it is overshadowed by local families, which sometimes exert control over multiple corporations in a country.

Rules governing sales of control in these countries, discussed in Part IV, reflect and respond to these concentrated ownership patterns. All five countries have adopted diverse variations of the traditional mandatory bid rule, mostly shunning the U.S. market approach. Although these countries share a legal tradition and have strong cultural bonds, their approaches differ significantly from each other and from the traditional mandatory bid approach. A common thread, however, runs through all—an attempt to find a middle ground, a rule that can protect minority shareholders without deterring some efficient sales of control that are more difficult under the traditional mandatory bid rule. A preliminary comparison of the performance of these rules suggests that some of the modified versions of the mandatory bid rule may be superior to the market rule and the traditional mandatory bid rule. The implications of these findings are presented in Part V, which also explores avenues for future research.

II. CORPORATE OWNERSHIP AND CONTROL

This section summarizes the literature examining the nature of corporate ownership and how ownership structure dictates which corporate governance issues affect firm value and performance. It then describes the different approaches that have been adopted to regulate transactions in which corporate control is transferred and the factors that help evaluate these different approaches.

A. The Ownership of Publicly-Traded Companies

1. Separating Ownership and Control

The dominant and most influential theories of corporate governance have traditionally centered on the paradigm of dispersed corporate ownership, where firms are run by managers who own very small stakes in the firms they manage.[1] This separation of ownership and control gives rise to an agency problem[2] that has important implications for the operation of a firm, i.e., the possibility that the managers will make decisions that benefit themselves rather than the firm's ultimate residual owners, its shareholders.[3] The atomization and dispersion of shareholders, the principals, exacerbates

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1. *See* ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 139 (1932) (observing that corporate managers "while in office have almost complete discretion in management"). *See also* Mark J. Roe, *The Political Roots of American Corporate Finance*, 9 J. APPLIED CORP. FIN. 8, 9 (1997) ("The reigning explanation of U.S. corporate ownership continues to be one provided by [Berle and Means].").

2. An "agency problem" arises when a "principal" relies on actions taken by an "agent" and the agent's actions affect the principal's welfare. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–09 (1976) (developing a formal analysis of agency costs). In the corporate governance context, agency costs arise when shareholders (the principal) grant managers (the agent) the power to make decisions that affect the value of their investments. *See* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 769 (2017) ("Agency costs result from the separation of control and ownership that occurs when managers run a firm but must share its profits with equityholders.").

3. Managers may want to put in less effort, take perks, or overestimate their ability. *See* Rajesh K. Aggarwal, *Executive Compensation and Incentives*, *in* 2 HANDBOOK OF EMPIRICAL CORPORATE FINANCE 497, 499 (B. Espen Eckbo ed., 2008) (discussing the theory that managers' proper objective should be to maximize the value of the firm, while also noting "the soaring pay packages" of CEOs); Lucian A. Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71, 71–72 (2003) (discussing alternative approaches to executive compensation).

this problem by causing collective action problems that prevent them from effectively monitoring and restraining managers, their agents.[4] Reducing the agency costs that result from this separation of ownership and control has been a leitmotif of corporate law and governance scholarship.[5]

Various mechanisms have evolved to address this agency problem.[6] Shareholders can closely monitor the activities of their managers, but this can be expensive and impractical, particularly in situations where numerous shareholders face collective action problems.[7] Executive compensation can be designed to align managers' incentives with those of shareholders by, for example, paying managers in shares of the firm, though the effectiveness of this strategy is still a subject of vigorous debate.[8] Corporate law mediates the effectiveness of these mechanisms in addressing agency problems by affording, or not affording, certain protections to shareholders and providing, or not providing, an efficient system in which shareholders may enforce these rights against managers.[9]

In addition to these legal and market factors, an alternative solution to the managerial agency problem is that of concentrated ownership structures. Larger shareholders have the economic incentive to monitor management activities that dispersed shareholders lack, as their investment in the

4. *See* Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 740–44 (1997) (providing an overview of the agency problem that pervades the relationship between shareholders and managements).

5. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 248 (1999) (describing the principal-agent model as the dominant analytical framework in corporate governance literature); Goshen & Squire, *supra* note 2, at 769 ("For the last forty years, the problem of agency costs has dominated the study of corporate law and governance."); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 623 (2004) ("Agency cost theories of the firm dominate the modern literature of corporate law and economics.").

6. *See* Daniel R. Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 8 (1978) ("Various market mechanisms exist . . . to minimize this divergence of interests between managers and shareholders.").

7. Dispersed shareholders with small interests in the corporation have little incentive to incur monitoring costs. *See* Marco Becht, Patrick Bolton & Ailsa Roell, *Corporate Governance and Control*, *in* 1 A HANDBOOK OF THE ECONOMICS OF FINANCE 1, 1–2 (George M. Constantinides et al. eds. 2003) (discussing the collective action problems among shareholders).

8. *See* Bebchuk & Fried, *supra* note 3, at 89 (noting that "managerial influence can move compensation arrangements away from optimal contracting outcomes"); Aggarwal, *supra* note 3, at 499; Fischel, *supra* note 6, at 9 ("Managers have a further incentive to maximize profit if their compensation is in some way linked to performance-stock options are a common example of this type of arrangement.").

9. *See* Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1126–28 (1998) (discussing shareholder rights stemming from corporate laws, including voting rights and "antidirector rights"). Conversely, legal systems that afford few protections to shareholders, or in which enforcement of legal rights is costly, exacerbate agency problems by making it more difficult and costlier for shareholders to monitor and control managers. *See* Shleifer & Vishny, *supra* note 4, at 750–53 (discussing the varieties of shareholder rights in different countries).

company is large enough to justify additional resources to closely monitor a firm's operations.[10] This monitoring can reduce the agency problem between managers and shareholders and enhance firm value.[11]

Thus, it is not surprising that the widely-held corporation appears to be an anomaly rather than the norm.[12] A classic study on ownership concentration in the United States found that in 31% of Fortune 500 firms, members of the board of directors held more than 10% of the firm's stock.[13] A more recent study found that 96% of the firms in a sample of publicly traded U.S. issuers had a single shareholder owning more than 5% and that blockholders as a group held, on average, 39% of the issuers' stock (with the largest blockholders owning, on average, 26%).[14] Ownership concentration is even more prevalent outside the United States. A study that surveyed ownership patterns in the twenty-seven most developed economies found that that just 36% of issuers surveyed were widely-held, i.e., did not have a shareholder controlling more than 20% of the voting power.[15] More recent studies have documented similar corporate ownership patterns in different regions across the world.[16]

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10. *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 565, 573 (2015) ("Controllers play a constructive governance role because their substantial equity investment encourages them to monitor management more effectively than imperfect markets."); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy,* 119 HARV. L. REV. 1641, 1651 (2006) ("[A] controlling shareholder may police the management of public corporations better than the standard panoply of market-oriented techniques employed when shareholdings are widely-held."); Andrei Shleifer & Robert W. Vishny, *Large Shareholders and Corporate Control*, 94 J. POL. ECON. 461, 464–65 (1986) (presenting a formal model of the corporate governance role of large shareholders).

11. For an overview of the literature addressing the relationship between the presence of large shareholders and firm value, see Becht et al., *supra* note 7.

12. *See* Lucian A. Bebchuk, *Efficient and Inefficient Sales of Control*, 109 Q. J. ECON. 957, 957–58 (1994) ("In many publicly traded corporations—both in the United States and (even more so) in other countries—a significant number of shares are concentrated in the hands of a controlling shareholder.").

13. Randall Morck, Andrei Shleifer & Robert W. Vishny, *Management Ownership and Market Valuation*, 20 J. FIN. ECON. 293, 297 (1988).

14. Clifford G. Holderness, *The Myth of Diffuse Ownership in the U.S.*, 22 REV. FIN. STUD. 1377, 1389 (2009). The author of that study documented similar block ownership patterns in a sample of non-US firms from Western Europe and East Asia. *Id.*

15. Rafael La Porta, Florencio López de Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471, 491 (1999).

16. *See* Marco Becht & Colin Mayer, *Introduction* to THE CONTROL OF CORPORATE EUROPE 1, 19 (Fabrizio Barca & Marco Becht eds., 2002) (reporting that over 43.5%, 20%, and 34.5% of votes are held by controlling shareholders in 50% of Dutch, French, and Spanish companies, respectively); Stijn Claessens, Simeon Djankov, & Larry H.P. Lang, *The Separation of Ownership and Control in East Asian Corporations,* 58 J. FIN. ECON. 81, 99–100 (2000) (documenting ownership concentration in East Asian corporations ranging from 6.90% in Japan to 32.84% in Thailand, with more than two-thirds being controlled by a single shareholder); Mara Faccio & Larry H.P. Lang, *The Ultimate Ownership of Western*

2. Large Shareholders and Corporate Governance

Some of the studies examining ownership patterns across countries have documented a relationship between ownership concentration and the extent of the legal protection afforded to investors in different countries.[17] Generally, concentrated ownership appears to be more pervasive in countries with weak shareholder protection, while widely-held companies prevail in countries that afford investors greater protections.[18] This correlation between ownership concentration and investor protection suggests that concentrated ownership arises as a response to the agency problems resulting from poor protection of shareholder rights.[19]

The existence of large shareholders, however, begets a different corporate governance problem—large shareholders may extract wealth from minority shareholders if they cause the firm to take actions that benefit themselves at the expense of the company and its minority shareholders.[20] A

European Corporations, 65 J. FIN. ECON. 365, 378 (2002) (finding that Western European firms are most likely to be widely-held (36.93%) or family controlled (44.29%) and that widely-held firms are especially important in the U.K. and Ireland, while family control is more important in continental Europe); Karl V. Lins, *Equity Ownership and Firm Value in Emerging Markets*, 38 J. FIN. & QUANT. ANAL. 159, 161–62 (2003) (finding that managers and their families' voting rights average 30% in a sample of emerging market issuers and are the largest blockholders in two-thirds of the firms).

17. Najah Attig, Sadok El Ghoul & Omrane Guedhami, *Do Multiple Large Shareholders Play a Corporate Governance Role? Evidence from East Asia*, 32 J. FIN. RES. 395, 397 (2009); Mike Burkart, Denis Gromb & Fanusto Panunzi, *Large Shareholders, Monitoring, and the Value of the Firm*, 112 Q. J. ECON. 693, 695 (1997); Simeon Djankov et al., *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430, 433 (2008); Luc Laeven & Ross Levin, *Complex Ownership Structures and Corporate Valuations*, 21 REV. FIN. STUD. 579, 581–82 (2008); Erik Lehman & Jurgen Weigand, *Does the Governed Corporation Perform Better? Governance Structure and Corporate Performance in Germany*, 4 EUR. FIN. REV. 157, 157–58 (2000); Shleifer & Vishny, *supra* note 4, at 737–83; AMRITA DHILLON & SILVIA ROSSETTO, CORPORATE CONTROL AND MULTIPLE LARGE SHAREHOLDERS 4–5 (2009).

18. *See* La Porta et al., *supra* note 15, at 496 (finding that widely-held companies are more common in countries with good shareholder protection); La Porta et al., *supra* note 9, at 1145–51 (finding that concentrated ownership is prevalent worldwide and attributing this ownership structure to weak legal regimes); Mike Burkart et al., *Legal Investor Protection and Takeovers*, 69 J. FIN. 1129, 1155 (2014) (concluding that the "optimal controlling block is larger when legal investor protection is weak").

19. *See* Steen Thomsen, Torben Pedersen & Hans Kurt Kvist, *Blockholder Ownership: Effects on Firm Value in Market and Control Based Governance Systems*, 12 J. CORP. FIN. 246, 266 (2006) (finding that average levels of blockholder ownership are higher in Continental Europe than in the United States and the United Kingdom, which suggests that the gains associated with ownership concentration are higher in Continental Europe, where investor protection is lower).

20. *See generally* Shleifer & Vishny, *supra* note 4 (surveying research on corporate governance, "with special attention to the importance of legal protection of investors and of ownership concentration in corporate governance systems around the world"). The presence of large shareholders can also negatively affect firm value due to overmonitoring—managers are less likely to spend effort in learning about firm specific opportunities if they will be held up by large shareholders. *See* Burkart et al., *supra* note 17, at 695 (discussing the effects of large shareholder monitoring efforts on management incentives). This cost is less of a concern where the large shareholder is effectively in control.

controlling shareholder may enter into self-dealing transactions,[21] engage in tunneling,[22] use the firm to enhance his social and political status,[23] or employ family members.[24] These benefits derived by a large, controlling shareholder at the exclusion, and sometimes expense, of minority shareholders are commonly referred to as private benefits of control.[25]

These private benefits of control, in addition to the economic rights that stock ownership affords, can be substantial.[26] Empirical studies have sought to quantify these private benefits of control by examining the premia received by controlling shareholders when they sell their controlling block,[27]

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21. Djankov et al., *supra* note 17, at 431.

22. "Tunneling" refers to transactions within a business group or a pyramidal ownership scheme on terms favoring the ultimate controlling shareholder. *See, e.g.*,Vladimir Atanasov, Bernard Black & Conrad S. Ciccotello, *Law and Tunneling*, 37 J. CORP. L. 1, 5–8 (2011) (explaining cash flow, asset, and equity tunneling); Simon Johnson et al., *Tunneling*, 90 AM. ECON. REV. PAPERS & PROC. 22, 22–23 (2000) (discussing how tunneling may violate fiduciary duties).

23. *See, e.g.*, Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 J. POL. ECON. 1155, 1161–62 (1985) (positing that shareholders receive a nonpecuniary income by deploying firm assets to suit their personal preferences).

24. Goshen & Hamdani, *Corporate Control and Idiosyncratic Vision*, *supra* note 10, at 571.

25. *See id.* at 570 ("The prevailing explanations of concentrated ownership focus primarily on the availability of private benefits of control."). This problem intensifies when a shareholder exercises effective control over corporate decision-making while holding a small fraction of the equity claims on the corporation's cash flows. *See* Lucian A. Bebchuk, Reinier Kraakman & George Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP 445, 451 (Randall K. Morck ed., 2000) (finding that pyramid structures allow minority shareholders to control firm assets); Stijn Claessens et al., *Disentangling the Incentive and Entrenchment Effects of Large Shareholdings*, 57 J. FIN. 2741, 2757–59 (2002) (recognizing an entrenchment effect when there is a 15% gap between control rights and cash-flow rights). This divergence between voting and economic rights may be achieved through a variety of mechanisms*.* *See* Bebchuk et al., *supra*, at 447 ("[T]hree basic mechanisms that permit a company's controller to retain only a minority of the cash-flow rights attached to the firm's equity: differential voting rights structures, pyramid structures, and cross-ownership structures . . . .").

26. *See* Nuria Alcalde & Inés Pérez-Soba, *Has the EU Takeover Directive Improved Minority Shareholder Protection? The Spanish Evidence*, 17 EUR. BUS. ORG. L. REV. 261, 264 (2016) ("[T]he stakes that the large shareholders possess give them enough control to enjoy private benefits that are not available to the rest of the shareholders."); Michael J. Barclay & Clifford G. Holderness, *The Law and Large-Block Trades*, 35 J. L. & ECON. 265, 268–70 (1992) (explaining blockholders use of voting power to influence management creates exclusive pecuniary and nonpecuniary corporate benefits); Clifford G. Holderness, *A Survey of Blockholders and Corporate Control*, 9 ECON. POL'Y REV. 51, 54–55 (2003) (defining exclusive consumption and enjoyment of corporate benefits by blockholders as private benefits of control resulting in a larger premiums); Simone M. Sepe, *Private Sale of Corporate Control: Why the European Mandatory Bid Rule is Inefficient* 8 (Ariz. Legal Studies Publ'ns, Discussion Paper No. 10-29, 2010) ("Controlling blocks of stock are, thus, worth more than other stock and trade at a control premium over the market price . . . . The largely dominant economic view is that ownership of a control interest permits to extract 'private benefits' unavailable to other shareholders . . . .").

27. The control premium represents the amount that the acquirer is willing to pay over and above the current market price of the target's stock in order to acquire the seller's controlling stake.

and by comparing differences in the market value of voting and non-voting shares issued by the same firm.[28] Notably, these control premia are lower in countries that have stronger protections for minority shareholders and higher in countries that provide weaker protections to minority shareholders.[29] The magnitude of these private benefits of control explains why ownership concentration is associated with lower valuations for companies in countries that afford lower levels of protections to shareholders.[30]

Two mechanisms can restrict the ability of controlling shareholders to exploit these private benefits of control. First, a market-based response allows additional blockholders to monitor the largest shareholder to deter the corporation from engaging in value destroying activities.[31] Empirical evidence suggests that the presence of multiple blockholders can enhance firm value in this context.[32] However, this solution does have its

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28. *See* Rui Albuquerque & Enrique Schroth, *Quantifying Private Benefits of Control from a Structural Model of Block Trades*, 96 J. FIN. ECON. 33, 44–47 (2010) (estimating private benefit of control by studying block trades to be between 10% and 15% where the ownership of the buyer rises from below 20% to above 20%); Michael J. Barclay & Clifford G. Holderness, *Private Benefits from Control of Public Corporations*, 25 J. FIN. ECON. 371, 372–73 (1989) (finding that negotiated block trades occur at a 20% premium to the market price, reflecting private benefits of control); Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537, 550–52 (2004) (estimating private benefits of control in thirty-nine countries using controlling block sale and finding on average the value of control to be 14%); Tatiana Nenova, *The Value of Corporate Voting Rights and Control: A Cross-Country Analysis*, 68 J. FIN. ECON. 325, 331–35 (2003) (reporting value of control-block vote as a share of total firm value for firms in eighteen countries).

29. *See* Dyck & Zingales, *supra* note 28, at 579–82 (finding that countries with better accounting standards, more anti-director rights, and better quality of law enforcement have lower private benefits of control); Nenova, *supra* note 28, at 342–43 (finding that countries that afford poor protection to minority shareholders have higher control premia and lax takeover laws that do not ensure the equal treatment of control and minority shares). *See also* Goshen & Hamdani, *supra* note 10, at 572 ("Concentrated ownership appears to thrive where weak legal protections allow a controlling owner to line her own pockets by taking advantage of minority shareholders.").

30. *See, e.g.*, Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer & Robert Vishny, *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147, 1163 (2002) (finding that companies with controlling shareholders have higher valuations in countries that afford greater levels of investor protection); Lins, *supra* note 16, at 162 (finding that firm valuation is lower when voting rights of a controlling shareholder exceed its cashflow rights and that this relationship is stronger in countries with low investor protection where corporate governance is more important); Thomsen et al., *supra* note 19, at 266 (finding no significant association between blockholder ownership and firm value in the United States and the United Kingdom, but a negative one in Continental Europe).

31. *See generally* La Porta et al., *Corporate Ownership Around the World*, *supra* note 15; Marco Pagano & Ailsa Röell, *The Choice of Stock Ownership Structure: Agency Costs, Monitoring and the Decision to go Public*, 113 Q. J. ECON. 186, 187–225 (1998).

32. *See, e.g.*, Attig et al., *supra* note 17, at 397 (documenting a positive relationship between the presence of multiple large shareholders and firm value in a sample of east Asian companies); Laeven & Levin, *supra* note 17, at 581–82 (finding in a sample of British and European firms that firms with several blockholders have higher market valuations than firms with only one large shareholder); Lehman & Weigand, *supra* note 17, at 157–58 (finding in a sample of German firms that a single blockholder has

shortcomings. For this approach to be effective, the blockholder must be sufficiently large to be able to create a credible coalition with smaller shareholders. Additionally, the biggest shareholder must not have an outright controlling stake, whereby it can always win unilaterally, and the remaining shareholders cannot be too atomized, so that they can effectively organize.[33] There is always the possibility that, rather than monitoring each other, the largest shareholders may, in fact, collaborate to form controlling coalitions to share the private benefits of control.[34]

Second, legal rules can help curtail controlling shareholders from extracting private benefits and opportunistically expropriating minority shareholders. Corporate law can provide minority shareholders certain rights to protect themselves against actions undertaken by controlling shareholders and grant minority shareholders a greater voice in corporate affairs.[35] Examples of such provisions include proportional representation on the board of directors, cumulative voting rights, the ability to call extraordinary shareholders' meetings, the right to judicially challenge corporate decisions, and the power to require the company to purchase their shares upon the occurrence of certain fundamental transactions.[36] Court-enforced fiduciary duties that controlling shareholders owe minority shareholders can also provide protection against abuse of control.[37] A simpler and more mechanical approach is to provide minority shareholders with exit rights before a shareholder assumes control of the corporation, an alternative discussed in the following section.

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no effect on valuation, but that a second blockholder has a positive effect on valuation).

33. *See* DHILLON & ROSSETTO, *supra* note 17, at 4–5 (detailing a level of risk between that preferred by liquidity shareholders and the initial owner).

34. *See* Jeffrey Zwiebel, *Block Investments and Partial Benefits of Corporate Control*, 62 REV. ECON. STUD. 161, 162–63 (1995) (explaining how investors may work together to extract maximum benefit from their individual control rights).

35. *See* Dyck & Zingales, *supra* note 28, at 539 (explaining how the right to sue management and a common law legal origin are legal ways through which investors gain leverage over controlling shareholders).

36. *See* La Porta et al., *supra* note 9, at 1126–28 (discussing shareholder voting and antidirector rights).

37. For example, wasting corporate resources in excessive managerial perquisites, diverting corporate opportunities, engaging in self-dealing, and extracting private benefits at the exclusion and detriment of minority shareholders may breach those fiduciary duties owed by controlling shareholders to minority shareholders. *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PENN. L. REV. 785, 789–90 (2000) (analyzing the duties owed by controlling shareholders toward non-controlling shareholders under Delaware law).

B. Transferring Corporate Control

A change in the control of a publicly-traded company can generally be accomplished in two ways: (i) by purchasing a controlling stake directly from an existing shareholder or (ii) by purchasing a sufficient number of outstanding shares from different shareholders. These two transactional settings involve specific corporate governance issues and are subject to distinct regulatory frameworks.

1. Tender Offer Regulation

For issuers that are widely-held and have no controlling shareholder, the market for corporate control presents a solution to the agency problem between managers and shareholders.[38] If an issuer's manager underperforms, the market value of the issuer's stock will be significantly lower than it would be if the issuer was properly managed.[39] In this case, an outsider may conduct a tender offer to acquire a majority of the shares of the issuer.[40] Once this outsider gains control, it can replace management and adopt corporate policies that enhance firm value.[41] The possibility of such a takeover occurring, in turn, provides incentives to managers who would likely prefer to prevent a tender offer from taking place.[42]

To illustrate the different procedural and substantive rules that generally govern this tender offer process, we can briefly consider the Williams Act, which governs tender offers in the U.S.[43] First, the rules require a tender offer

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38. *See* Alcalde & Pérez-Soba, *supra* note 26, at 264 (noting that when ownership is dispersed, the goal of takeover regulation "is to protect small shareholders from the manager's discretionary behavior" and address the agency problem that arises due to the fact that "small shareholders lack sufficient incentives to supervise the managers").

39. *See* Fischel, *supra* note 6, at 5 ("Poor performance of a company's securities in the capital market is a common indication of poor management.").

40. *See id.* ("The lower the market price of the securities compared to what it would be with better management, the more attractive the firm is to outsiders with the ability to take the firm over."); Edmund-Philipp Schuster, *The Mandatory Bid Rule: Efficient, After All?*, 76 MOD. L. REV. 529, 529 (2013) ("In widely-dispersed companies, control over a company can be obtained through a takeover bid addressed to all target shareholders.").

41. *See* Fischel, *supra* note 6, at 9 ("The market for corporate control and the threat of cash tender offers in particular are of great importance in creating incentives for management to maximize the welfare of shareholders.").

42. *See* Alcalde & Pérez-Soba, *supra* note 26, at 264 (noting that when ownership is dispersed, "the focus of takeover regulation should be on facilitating the transfer of control of poorly performing companies and on minimising the costs of hostile takeovers, thereby generating sufficient pressure to discipline management").

43. 15 U.S.C. §§ 78m(d)–(e), 78n(d)–(f). For a description of the structure and principal provisions of the Williams Act, see Fischel, *Efficient Capital Market Theory*, *supra* note 6, at 9–21; Gary E. Humes, *Private Solicitation under the Williams Act*, 66 CORNELL L. REV. 361, 363–65 (1981) (noting how the structure of the Williams Act aims at providing information to shareholders and ensuring that tender

statement disclosing the identity of the bidder, its financial statements, its sources of funds for the offer, and its intent and plans once it gains control.[44] These disclosures allow shareholders to determine the fairness of the offered price and whether they want to continue as shareholders under the new controller. Second, the rules give shareholders the opportunity to consider the offer without being subject to coercion. For example, tender offers must remain open for at least twenty days[45] and, if any changes are made to its terms, the offer must remain open for at least ten days following such modification.[46] The rules also provide a number of substantive protection to security holders,[47] including a proration requirement,[48] withdrawal rights,[49] and the "best price rule."[50] This framework seeks to help shareholders manage their collective action problems and create an auction period to facilitate the emergence of competing offers.[51]

2. Regulating Sales of Control

Acquiring control via a tender offer is not feasible when the target issuer has a controlling shareholder.[52] In these situations, the control of a corporation can only be acquired by directly negotiating with the controlling shareholder and agreeing to a price, which will incorporate a control premium.[53] In situations where there is a controlling shareholder, the agency

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offers are procedurally fair).

44. Exchange Act Rule 14d-1, 17 C.F.R. § 240.14d-1 (2016).

45. Exchange Act Rule 14e-1(a), 17 C.F.R. § 240.14e-1 (2016).

46. Exchange Act Rule 14e-1(b), 17 C.F.R. § 240.14e-1(b) (2016).

47. *See* Fischel, *supra* note 6, at 20.

48. Under this requirement, if too many shares tender, every tendering shareholder is entitled to have her shares purchased *pro rata*. Exchange Act § 14(d)(6), 15 U.S.C. § 78n(d)(6); Exchange Act Rule 14d-8, 17 C.F.R. § 240.14d-8 (2016).

49. Exchange Act Rule 14d-7, 17 C.F.R. § 240.14d-7 (2016). That is, a shareholder may withdraw tendered shares at any time until the end of the offer.

50. Exchange Act Rule 14d-10(a)(2), 17 C.F.R. § 240.14d-10(a)(2) (2016). If the offeror raises the price during the offer, every shareholder receives the higher price.

51. Whether regulations should encourage this auction period has been debated in the literature. *See generally* Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23 (1982); Peter Cramton & Alan Schwartz, *Using Auction Theory to Inform Takeover Regulation*, 7 J. L. ECON. & ORG. 27 (1991); Frank H. Easterbrook & Daniel Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1 (1982).

52. *See* Schuster, *supra* note 40, at 529 ("Where a company is controlled by a single shareholder, potential acquirers will typically first have to negotiate with this blockholder when seeking control over the company, as the success of the transaction will ultimately depend on this blockholder's willingness to sell.").

53. *See* JAMES D. COX & THOMAS LEE HAZEN, THE LAW OF CORPORATIONS 326 (Thomson West, 3d ed. 2010) ("A purchaser of a controlling interest in a corporation often pays a premium above the prevailing market price for the stock."); Lucian A. Bebchuk, *supra* note 12, at 957–58 ("When a

problem between shareholders and managers takes a back-seat to the agency problem between controlling shareholders and minority shareholders.[54] As a result, the legal framework governing these transfers of control often focus on the rights of minority shareholder against the controlling shareholder.[55] The remainder of this section will present and compare the two principal regulatory approaches to the sale of corporate control—the market rule and the mandatory bid rule.[56]

a. Market Rule

Under the "market rule," a controlling shareholder is free to sell its control block at any price, and minority shareholders have no rights in such transaction. In other words, the acquirer is not obligated to make an offer to purchase the minority shares or offer them any type of consideration.[57]

This is the prevailing rule in the United States, where the regulatory framework established by the Williams Act does not apply to privately negotiated transactions involving large and sophisticated investors.[58] The

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significant number of shares are concentrated in the hands of a controlling shareholder . . . a buyer . . . generally cannot obtain control unless the existing controller agrees to sell some or all of its shares to the buyer in a sale-of control transaction."); Sepe, *supra* note 26, at 6 ("Unlike hostile takeover, sale-of-control transactions are the result of direct negotiations conducted outside the stock exchange between the current owner of a controlling block and a potential buyer."). *See also supra* notes 29–31 and accompanying text.

54. *See* Alcalde & Pérez-Soba, *supra* note 26, at 264 ("This agency problem between shareholders and managers is less relevant when the ownership structure is concentrated and the managers are appointed and supervised by large shareholders . . . . [i]n contexts where the ownership structure is concentrated, takeover regulation has to deal primarily with . . . protecting the minority shareholders from potentially being expropriated by large blockholders in the event of a takeover.").

55. *See id.* ("Under these circumstances, agency problems between minority and large shareholders become more relevant . . . . When these control stakes are sold, together with the private benefits of the control, the buyers will be willing to pay a higher premium (a control premium) which minority shareholders will not receive, and, more importantly, this control premium could be paid at their expense.").

56. *See* William D. Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505, 515 (1965) (discussing the mandatory bid rule); Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, *supra* note 12, at 958 (discussing the debate regarding the desirability of rules providing minority shareholders with certain rights to participate in sale-of-control transactions, such as the mandatory bid rule); Hubert de La Bruslerie, *Equal Opportunity Rule vs. Market Rule in Transfer of Control: How Can Private Benefits Help to Provide an Answer?*, 23 J. CORP. FIN. 88, 88–89 (2013) (describing both rules); George B. Javaras, *Equal Opportunity in the Sale of Controlling Shares: A Reply to Professor Andrews*, 32 U. CHI. L. REV. 420, 425–26 (1965) (analyzing the debate between the rules); Schuster, *supra* note 40, at 530 (discussing the mandatory bid rule).

57. *See* Bebchuk, *supra* note 12, at 964 ("Under the [market rule] the seller is free to sell its control block at any price that the acquirer is willing to pay, and minority shareholders enjoy no rights in connection with the transaction."); Burkart et al., *supra* note 18, at 1151 (describing the market rule); Schuster, *supra* note 40, at 535 (discussing the mandatory bid rule).

58. Bebchuk, *supra* note 12, at 958, 964; Burkart et al., *supra* note 18, at 1151; Humes, *supra* note

rights of the minority shareholders in these types of transactions are governed by the corporate law of each state, which generally allows the acquirer to negotiate directly with these shareholders to purchase their stake at a price including a control premium, effectively bypassing minority shareholders.[59]

Though minority shareholders lack procedural protections at the time that a sale of control occurs, they are generally protected by a set of judicially-enforced duties and doctrines against expropriation from a controlling shareholder.[60] Under these fiduciary principles, although the sale of a control block at a premium price is not wrong per se, it can become wrongful under special circumstances.[61] Whether such fiduciary principles provide enough protection to shareholders in these situations will depend on the level of protection afforded to minority shareholders in a given country and how costly it is for shareholders to enforce their rights.[62]

b. Mandatory Bid Rule

Under the equal opportunity rule, also known as the mandatory bid rule (MBR), minority shareholders are entitled to participate in a sale of control

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43, at 366–67; Schuster, *supra* note 40, at 535.

59. Although federal securities law does not preclude states from adopting an alternative to the market rule, only two states have adopted such alternatives. De La Bruslerie, *supra* note 56, at 89; Schuster, *supra* note 40, at 536. *See also* COX & HAZEN, *supra* note 53, at 330–31 ("[E]very stockholder, including the controlling stockholder, is at liberty to dispose of her shares at any price as long as there is no cause to believe or suspect the sale will proximately harm the corporation . . . .").

60. *See* Michael J. Barclay & Clifford G. Holderness, *The Law and Large-Block Trades*, 35 J. L. & ECON. 265, 268–70 (1992) (discussing the lack of protection for minority stockholders for block trades); Fischel, *supra* note 6 (noting that the Williams Act does not apply to pre-tender sales, and discussing the various other duties that may apply); Schuster, *supra* note 40, at 536 (discussing the principles of fiduciary duties with regard to non-controlling shareholders). Some scholars have argued that these fiduciary duties require letting minority shareholders participate in the control premium received by a controlling shareholder that sells his control block. *See* Andrews, *supra* note 56, at 515 ("The rule to be considered can be stated thus: whenever a controlling stockholder sells his shares, every other holder of shares (of the same class) is entitled to have an equal opportunity to sell his shares, or a prorate part of them, on substantially the same terms.").

61. ROBERT CLARK, CORPORATE LAW 478 (Aspen Pub. 1986). *See also* COX & HAZEN, *supra* note 53, at § 12:1 ("Notwithstanding the courts' rejection of a per se equal opportunity rule for control premiums . . . fiduciary duties may give rise to an obligation to share a control premium under certain situations."). For example, a controlling shareholder cannot knowingly or recklessly sell its controlling stake to an individual who intends to loot the corporation. *Id.* at § 12:2.

62. Private benefits tend to be higher in countries where the fiduciary and disclosure standards imposed on controlling shareholders are lax and lower in countries where the legal system provides adequate enforcement of minority shareholders' rights. *See supra* notes 29–33 and accompanying text; *see also* Clas Bergström, Peter Högfeldt & Johan Molin, *The Optimality of the Mandatory Bid Rule*, 13 J. L. ECON. & ORG. 433, 447 (1997) (discussing the policy-maker's regulation dilemma); Luigi Zingales, *What Determines the Value of Corporate Votes*, 110 Q.J. ECON. 1047, 1071–72 (1995) (providing a comparative discussion on disclosure enforcement and shareholder suits).

on the same terms afforded to the controlling shareholder, meaning the acquirer has to make an offer to purchase all shares held by minority shareholders at a fair price, often determined in relation to the price paid to the controller-seller.[63] The MBR thus allows minority shareholders who would otherwise be compelled to continue under a new controlling shareholder to exit before such exchange of control is consummated.[64] Moreover, any premium received by the controlling shareholder in the sale of control transaction is shared with the minority shareholders.[65] This rule, which has its origins in English law,[66] applies to companies across the European Union.[67]

Procedurally, there are three key elements in the MBR: (1) when the duty to make an offer is triggered, (2) the number of shares that need to be acquired, and (3) the price at which the offer must be made. Under the traditional version of the MBR, an entity acquiring a controlling stake in a company must make an offer to acquire all remaining shares at the same price paid for the control block. For example, in the European Takeover Directive, the duty to make an offer to the minority is triggered when the bidder obtains "control" over a listed company, though each member state can define the ownership threshold that yields such "control."[68] The Takeover Directive also requires member countries to determine the price to be paid by the bidder by making reference to the highest price that the bidder has paid in prior acquisitions during a specified period preceding (and including) the sale of control transaction.[69]

Spain's regulation of sales of control is a helpful illustration of the

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63. Alcalde & Pérez-Soba, *supra* note 26, at 265; Bergström et al., *supra* note 62, at 433; Burkart et al., *supra* note 18, at 1151.

64. Alcalde & Pérez-Soba, *supra* note 26, at 262; Bergström et al., *supra* note 62, at 434.

65. Schuster, *supra* note 40, at 533.

66. De La Bruslerie, *supra* note 56, at 88.

67. *See* Schuster, *supra* note 40, at 531–32; *see also* Alcalde & Pérez-Soba, *supra* note 26, at 266–67 n.8 ("The mandatory bid rule in the European Directive requires the acquirers to make a tender offer to all shareholders once the former have accumulated a certain percentage of the shares. Also, it dictates the price of the tender offer, thereby giving the minority shareholders the opportunity to exit the company on fair terms. The European Directive permits each Member State to determine the threshold of the buyer's equity stake that triggers the compulsory bid offer.").

68. *See* de La Bruslerie, *supra* note 56, at 89 ("A definition of a controlling stake is needed to trigger the EOR. Most countries chose to apply a threshold of 30% of the voting rights."). *See also* Schuster, *supra* note 40, at 532 (noting that most member states rely on a threshold of around thirty to thirty-3% of the voting rights); Sepe, *supra* note 26, at 19–21 (explaining the European MBR's mandatory offer price rule has led to disagreement amongst member states due to "the different costs that the MBR may impose on the prospective buyer depending on the mechanics of price determination").

69. Schuster, *supra* note 40, at 533. Thus, the price that needs to be offered to minority shareholders will be equal or greater to than the price received by the controlling shareholder.

traditional MBR approach.[70] Consistent with the goals set forth in the European Directive, Spanish law adopts an equal treatment approach to sales and transfers of corporate control.[71] A person acquiring control of a company must make an offer to acquire all the issuer's outstanding shares, voting and non-voting alike.[72] Control is broadly defined to include ownership of 30% or more of the voting rights of an issuer or the ability to elect a majority of the board of directors.[73] The offer price must be as high as the highest price paid by the acquirer in the twelve months preceding this mandatory tender offer.[74] The regulations provide procedural guidelines that govern these tender offers.[75]

c. Comparing the Market and Mandatory Bid Rules

Although the market rule facilitates transfers of corporate control and reduces the transaction costs associated with them, it sometimes allows inefficient transfers to proceed.[76] This can occur in situations where the acquisition is driven by the purchaser's ability to extract higher private benefits of control than the seller, even though the economic value of the

70. In Spain, the market for corporate control of publicly traded companies is governed by legislation enacted by the Spanish Parliament in response to the European Union Directive 2004/25/EC on tender offers and takeovers. These rules are contained in the Directive 2004/25/EC of the European Parliament and of the Council of April, 21 2004 on takeover bids. Directive 2004/25, of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, 2004 O.J. (L 144) 12 (EC) [hereinafter EU Directive 25]. *See supra* notes 68–69 and accompanying text (explaining how the European MBR works in practice).

71. EU Directive 25, *supra* note 70, at art. 5.

72. Real Decreto 1066/2007, de 27 de julio, sobre de las ofertas públicas de adquisición de valores art. 3 (1)-(2) (B.O.E. 2007, 1066) (Spain) [hereinafter Real Decreto 1066]; *see* Alcalde & Pérez-Soba, *supra* note 26 (providing a general overview of the Spanish legislation on tender offers and take-overs).

73. Real Decreto 1066, *supra* note 72, at art. 4(1). An exception is made in situations where other shareholders own the same or more voting rights. *Id.* at art. 4(2).

74. *Id.* at art. 9(1). If the highest price paid by the offeror is below the lower end of the market price range during the corresponding period, then that market price sets the low end of the tender offer price. *Id.* at art. 9(4)(c).

75. *Id.* at art. 13(3). These procedural requirements equally apply to voluntary tender offers. *Id.* Tender offers must be open for at least fifteen days but not more than seventy days. *Id.* at art. 23(1). The offeror may subsequently extend the acceptance period so long as it does not exceed this seventy-day ceiling. *Id.* at art. 23(2). The offer may be modified at any time at least five days prior to the end of the acceptance period, so long as the modifications improve the offer (e.g., by providing a better price). *Id.* at art. 31(1). Shareholders may withdraw their acceptances at any time prior to the last day of the offer. *Id.* at art. 34(3). If more shares are tendered than those sought by the offeror, the offeror must acquire shares *pro-rata* from all shareholders. *Id.* at art. 38. *See also supra* notes 43–54 and accompanying text (explaining how the procedural rules are structurally similar to those of the United States).

76. *See* Bebchuk, *supra* note 12, at 971 ("Inefficient transactions may take place under the [market rule] because, under this rule, a transaction may impose a negative externality on the minority shareholders."). An efficient transfer is a transfer that "creates new economic value." De La Bruslerie, *supra* note 56, at 92.

issuer's equity will be lower under its management.[77] By contrast, under the MBR, inefficient transfers never take place.[78] Since it forces controlling shareholders to share the control premium with minority shareholders, the MBR prevents inefficient transactions driven by the planned extraction of private benefits.[79]

On the other hand, by requiring the acquirer to make an offer to purchase the shares of all shareholders at a price that includes the control premium, the MBR will cause the total purchase price to exceed the acquirer's willingness to pay.[80] Even if the transaction is still economically efficient from the acquirer's perspective, it may lack the necessary liquidity and financing to undertake a larger acquisition of the target's stock.[81] The increased transaction costs under the MBR can discourage some value-creating transactions or efficient transfers of control.[82] The intuition is that, since the controlling shareholder has to share the control premium with the minority, the economic value created by the acquirer's takeover has to be

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77. *See* Schuster, *supra* note 40, at 549 ("Where [the buyer] creates higher [private benefits of control], on the other hand, inefficient transfers are possible . . . . The bidder can therefore impose negative externalities on the minority shareholders.").

78. *See* Alcalde & Pérez-Soba, *supra* note 26, at 265 ("[T]he market rule is . . . inferior to [the MBR] in discouraging inefficient transfers."); Bebchuk, *supra* note 12, at 971 ("Thus, under the [MBR] all of the transactions that occur must make all parties, including minority shareholders, better off. Consequently, all transfers that take place under this rule must be efficient.").

79. *See* de La Bruslerie, *supra* note 56, at 92 ("The EOR system . . . protects [minority shareholders] from inefficient transfers of control. Even if new controlling blockholders continue to appropriate privately a proportion of the benefits, they must offer a higher price to the former controlling shareholder in order to satisfy the constraint imposed by the EOR."); Schuster, *supra* note 40, at 533 (noting that the mandatory bid rule thwarts the ability of an acquirer to "exploit minority shareholders by siphoning-off assets and engaging in self-dealing to the detriment of minority shareholders").

80. *See* Clas Bergström et al., *The Regulation of Corporate Acquisitions: A Law and Economics Analysis of European Proposals for Reform*, 1995 COLUM. BUS. L. REV. 495, 518 ("[T]he mandatory bid rule may substantially increase the acquiring costs for potential bidders and thereby discourage takeover attempts.").

81. *See* Javaras, *supra* note 56, at 426 ("[E]ven if the capital market did function perfectly and the purchaser could arrange the financing, a rational businessman might not want to buy all the shares at a premium price justified by the investment potential. It might be sensible to decline to buy more than the bare amount necessary for control on the principles of diversification of risk and of opportunity.").

82. *See* Alcalde & Pérez-Soba, *supra* note 26, at 265 ("The market rule is superior to the [MBR] in facilitating efficient transfers of control (that is, control transfers in which the new controller has a greater ability, compared to the existing controller, to manage and produce value in the target firm. . . .")); de La Bruslerie, *supra* note 56, at 92 ("[T]he condition for a transfer of control under the [MBR] is more demanding than the simple economic efficiency constraint. It leads to the ruling out of some efficient transfers of control."); Schuster, *supra* note 40, at 534–45 ("Probably the most common objection to the MBR is based on the 'chilling effect' it has on transfers of corporate control."); Ying Wang & Henry Lahr, *Takeover Law to Protect Shareholders: Increasing Efficiency or Merely Redistributing Gains?*, 43 J. CORP. FIN. 288, 292 (2017) ("Despite its positive effects for minority shareholders, the [MBR] may reduce the efficiency of the market for corporate control . . . .").

large enough to compensate the controlling shareholder for the partial loss of its control premium.[83] Thus, whether the MBR or the market rule is optimal will hinge on the proportion of efficient transfers that is blocked under the MBR.[84]

d. Assessing which Rule is Optimal

In sum, the MBR is superior to the market rule in preventing inefficient transfers to acquirers seeking to exploit private benefits of control, but is inferior to the market rule in that it prevents certain value-enhancing transactions.[85] Which rule is best thus depends on the prevalence of each type of transaction, which in turn depends on various country-specific factors, such as levels of ownership concentration and legal protection afforded to shareholders.[86]

Regarding ownership concentration, the MBR has bite when ownership is more concentrated. In countries where ownership is generally dispersed, the choice between the market rule and the MBR is less consequential and carries far less policy significance.[87] Even if ownership is concentrated, the MBR yields positive effects only if there are significant private benefits of

83. *See* Bebchuk, *supra* note 12, at 972 ("The [MBR] impedes efficient transfers because it requires [the existing controlling shareholder] to forgo any advantage over the minority shareholders in the event of a control transfer even though the [existing controlling shareholder] has an advantage over the minority shareholders in the absence of a transfer."); Schuster, *supra* note 40, at 552–53 ("Consequently, transfers can only happen under a MBR, if [the acquirer] creates efficiency gains that allow him to pay a multiple of [controlling shareholder's private benefits of control], as [it] has to pay the same high price to all outside shareholders . . . . It is this effect that makes the MBR prevent efficient takeovers that would take place under the [market rule].").

84. *See* Bebchuk, *supra* note 12, at 971 ("[I]n terms of facilitating efficient transfers, the [MBR] is inferior to the [market rule]; the former prevents more efficient transfers than the latter."); de La Bruslerie, *supra* note 56, at 90 ("The theoretical analysis has not definitely ruled over the optimal regime to develop transfer of control."); Schuster, *supra* note 40, at 552–53 ("Whereas inefficient transfers cannot take place under a MBR, the MBR does block some efficient transfers."); Schuster, *supra*, at 530–31 ("The main point of criticism is that the [mandatory bid rule] prevents some desirable transactions, and thus creates inefficiency costs which are unlikely to be off-set by the rule's (undisputed) advantages over the deregulatory approach in certain situations.").

85. *See* Alcalde & Pérez-Soba, *supra* note 26, at 265 ("[T]he market rule is superior to the equal opportunity rule in facilitating efficient transfers of control . . . but inferior to it in discouraging inefficient transfers. The equal opportunity rule, however, does not allow inefficient transfers, but has the potential of blocking some efficient transfers.").

86. *See* de La Bruslerie, *supra* note 56, at 92 ("The analysis of the efficiency of the transfer of control is made by comparing the situation with and without an equal opportunity rule."); Schuster, *supra* note 40, at 553 ("In order to calculate the aggregate efficiency costs associated with the two rules, one would need to observe the likelihood of the relevant situations.").

87. *See* de La Bruslerie, *supra* note 56, at 91 ("The EOR rule has particular importance in the European context where a firm's ownership is concentrated . . . . In contrast to the blockholder system, the dispersed shareholder system is less affected by the introduction of the mandatory bid rule.").

control to be gained. If these private benefits are small or non-existent, then the market rule is preferred, as other rules protect shareholders against the extraction of private benefits of control.[88]

Which rule is optimal in a country where ownership is concentrated and where private benefits of control are significant? The extent of ownership concentration will play an important role. The advantage of the MBR relative to the market rule decreases as the shares owned by the controlling shareholder increases, since the more the controller owns, the less potential additional purchases of stock are required by the MBR.[89] Differences in the nature of private benefits also play an important role, but in a subtle way. What matters most is not necessarily the magnitude of private benefits, but their distribution. For the MBR to be superior, one needs the variation of private benefits across potential controlling shareholders to be substantial. In other words, if private benefits across potential controlling shareholders are similar, the MBR will not bring about more value than the market rule, regardless of the average level of these private benefits.[90] It is because of this last factor that most scholars have concluded that the MBR is less desirable than the market rule.[91]

A factor that has received less attention in the literature is the structure of the MBR being analyzed. Most of the existing theoretical models comparing the market rule and the MBR have assumed an MBR structured in its traditional form – upon gaining control of an issuer, the acquirer must make an offer (i) to all minority shareholders (ii) for all their shares at (iii)

88. *See* de La Bruslerie, *supra* note 56, at 92 (*"*[I]n a pure Market Rule system with no protective regulation, the system efficiently protects outside shareholders [if there are] no private benefits before or after the transfer of control . . . ."); Sepe, *supra* note 26, at 39–41 (noting it is plausible "that prospective buyers will be more likely motivated to seek control for increasing the company share value rather than extracting higher DPB" and thereby leave all parties "better off absent the MBR").

89. *See* Bebchuk, *supra* note 12, at 972–73 ("The expected efficiency costs of the [MBR] decrease as . . . the number of shares held by the controller . . . increases.").

90. *See* Bebchuk, *supra* note 12, at 974 ("The expected efficiency costs of the [market rule] are smaller than those of the [MBR] if the maximal difference between controllers in their private benefits of control . . . is sufficiently small."); Bergstrom et al., *supra* note 62, at 435 (arguing that "unless the difference in private benefits is large, the target shareowners encounter a loss from implementation of a MBR").

91. *See id.* at 447 ("[I]t is the similarity rather than the substantial difference of private benefits between competing teams which is the most likely scenario."); de La Bruslerie, *supra* note 56, at 89 ("Historically a large strand of the literature is in favor of the Market Rule."); Schuster, *supra* note 40, at 530–31 ("The classical assessment of the [MBR], particularly the assessment by law and economics scholars, is rather negative."); Sepe, *supra* note 26, at 28 (arguing that in Europe the [MBR] is likely to be inferior to the market rule because the size of the private benefits "extracted by prospective buyers tends to be equal to that extracted by incumbent controllers because 'both parties face the same legal rules and quality of law enforcement'").

the same price received by the controlling shareholder.[92] This has resulted in a debate mainly centered on the United States and the United Kingdom, and later the United States and the European Union. However, there may be modified versions of the MBR that serve the goal of protecting minority shareholders while preventing fewer efficient transactions by, for example, altering the proportion of shares that need to be acquired by the purchaser or the consideration that needs to be paid to the minority shareholders. Some of these alternatives, which are illustrated later in the Article, can be superior to the market rule and traditional MBR approaches.[93]

C. What Should We Expect in Latin America?

Traditionally, listed companies in Latin America have been characterized by high degrees of ownership concentration.[94] A 2003 Organisation for Co-Operation and Development study found that the largest single shareholder in listed companies in Argentina, Brazil, Chile, Colombia, Mexico, and Peru held, on average, 53% of total shares.[95] Similar patterns were documented in an earlier study of corporate ownership around the world.[96]

These studies, however, suffer from certain methodological limitations. First, the data used in these studies is mainly derived from professional finance databases, limiting the sample to the issuers available in those databases.[97] Second, these databases, and consequently the studies, do not

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92. Bebchuk, *supra* note 12, at 968; Bergström et al., *supra* note 62, at 436–37; *see also* Schuster, *supra* note 40, at 532–33 ("Clearly this largely simplified definition of the MBR fails to fully take into account other important questions, such as the definition of control or the availability of exceptions. These questions are outside the scope of the analysis provided here.").

93. *See infra* Part IV.

94. ALBERTO CHONG & FLORENCIO LÓPEZ-DE-SILANES, CORPORATE GOVERNANCE IN LATIN AMERICA 25–27 (2007); Francisco Reyes, *Corporate Governance in Latin America: A Functional Análisis*, 39 U. MIAMI INTER-AM. L. REV. 207, 225 (2008).

95. *See* Organisation for Economic Co-operation and Development [OECD], *White Paper on Corporate Governance in Latin America* 46–48 (2003), https://www.oecd.org/corporate/ca/corporategovernanceprinciples/18976210.pdf [hereinafter OECD White Paper].

96. *See* MIERTA CAPAUL, CORPORATE GOVERNANCE IN LATIN AMERICA 3 (2003) ("According to a cross-country study measuring the ownership of the three largest shareholders in the ten largest private nonfinancial firms, Mexico and Colombia have the second and third highest concentration of all countries surveyed (after Greece). Brazil occupies rank number ten and Peru number 12 out of 49."); La Porta et al., *Law and Finance*, *supra* note 9, at 1145–48 (presenting data on ownership concentration by legal origin).

97. *See* OECD White Paper, *supra* note 95, at 46 ("For Brazil, Chile, Colombia and Peru the data comes from ECONOMATICA, an Investment Analysis Data Base and for Argentina and Mexico the data comes from ADR issuing companies."); La Porta et al., *supra* note 9, at 1145–48 (presenting data on ownership concentration by legal origin, but noting several methodological difficulties).

examine the identity of the shareholders in a rigorous manner to establish whether there are any familial, contractual, or other relationships between shareholders or to account for the existence of pyramid or cross-ownership structures, which are common in these countries.[98]

One of the most rigorous studies that has examined corporate ownership in Latin America focused on forty issuers from Argentina and Mexico and found that all these issuers had a shareholder holding at least 20% of their voting stock.[99] A more recent in-depth study in Brazil found that, on average, the largest shareholder held over 35% of the voting capital and over 45% once shareholder agreements were factored in.[100] These controlling shareholders have traditionally been predominantly families or the state,[101] but, in recent years, there appears to be a trend towards foreign ownership.[102] It is noteworthy that, from experience, although many studies have closely examined ownership concentrations in different regions of the world, none have focused on a set of countries from Latin America.

If these high levels of ownership concentration are still prevalent in the region, one can expect that the principal corporate governance issue in Latin America should revolve around conflicts between controlling and minority shareholders.[103] In this context, protecting minority shareholders against abuses by majority shareholders becomes more important. As it turns out, countries in Latin America have traditionally afforded poor legal protection and rights to enforcement to shareholders.[104] A 2008 study formulated a series of indices to measure the strength of minority shareholder protection provided by the laws in different countries against self-dealing by a majority

98. La Porta et al., *supra* note 9, at 1146.

99. La Porta et al., *supra* note 15, at 495–96.

100. Erica Gorga, *Changing the Paradigm of Stock Ownership from Concentrated Towards Dispersed Ownership? Evidence from Brazil and Consequences for Emerging Countries*, 29 NW. J. INT'L L. & BUS. 439, 463, 466 (2009).

101. *See* CAPAUL, *supra* note 96, at 3 ("The listed sector in Latin America consists, to a large extent, of family-owned and family-run firms or (partially) privatized companies."); La Porta, López-de-Silanes & Shleifer, *supra* note 15, at 495–96 (finding that in their sample 80% of the twenty Argentinean large shareholders and 100% of the Mexican large shareholders were families); Reyes, *supra* note 94, at 225 ("[The OECD] acknowledges family control as the prevailing structure for non-listed small and medium sized-concerns in this region.").

102. *See* OECD White Paper, *supra* note 95, at 48 ("Although domestic families are still very important players, control has been passing to teams of executives and to foreign companies.").

103. *Id. See also* La Porta et al., *Investor Protection and Corporate Valuation*, 75 J. FIN. 1147, 1169 (2002) (providing evidence "that indirectly supports the importance of expropriation of minority shareholders by controlling shareholders in many countries, and for the role of the law in limiting such expropriation").

104. *See* CHONG & LÓPEZ-DE-SILANES, *supra* note 94, at 7–19 (discussing how Latin American corporate law has generally done a poor job in protecting investors).

shareholder.[105] Latin American countries, in this regard, generally fared below the world average, as illustrated in Table 1 below.[106]

Table 1. Regulation of Self-Dealing in Latin America[107]

Country	Ex-ante control	Ex-post control	Anti-self-dealing index
Argentina	0.33	0.35	0.34
Bolivia	0.00	0.28	0.14
Brazil	0.22	0.33	0.27
Chile	0.50	0.75	0.63
Colombia	0.83	0.31	0.57
Ecuador	0.00	0.15	0.08
Mexico	0.19	0.15	0.17
Panama	0.17	0.15	0.16
Peru	0.25	0.65	0.45
Uruguay	0.08	0.28	0.18
Venezuela	0.08	0.10	0.09
World	0.36	0.52	0.44
Common Law	0.58	0.74	0.66

The presence of controlling shareholders and lack of legal protection for minority shareholders suggest that private benefits of control are being extracted in these corporations.[108] As it turns out, Latin American companies have among the highest measures of control premia in the world.[109] Rules

105. *See* Djankov et al., *supra* note 17, at 433–34 (describing the construction of indices to measure the strength of *ex-ante* protections (e.g. preventing a transaction) and *ex-post* protections (e.g. seeking compensation in court)).

106. *Id.* at tbls. 2 & 3 (providing context for these figures, Table 1 also provides the average index value for all countries in the study sample and countries of the common-law legal tradition).

107. *Id.* at tbls. 2 & 3.

108. *See* CHONG & LÓPEZ-DE-SILANES, *supra* note 94, at 28 ("[T]he concentration of ownership in Latin America may be linked to the great potential for the extraction of private benefits from control.").

109. *See* Dyck & Zingales, *supra* note 28, at 550 ("Overall, the average control premium is 14% . . . . In 10 of our 39 sample countries, we find that the control premia exceed 25% of equity value. These high private benefit countries include Argentina, Austria, Colombia, Czech Republic, Israel, Italy, Mexico, Turkey, and Venezuela (of these Brazil has the highest estimated value of 65% . . .)."); Nenova, *supra* note 28, at 327 ("Control-block votes are valued at more than a quarter of company market capitalization in Brazil, Chile, France, Italy, Mexico, and South Korea."). It is worth noting, however, that the number of observations in these studies for countries in the region tends to be relatively low. For example, the sample analyzed by Dyck and Zingales includes five firms in Argentina, eleven in Brazil, seven in Chile, five in Mexico, four in Venezuela and three in Peru. Nenova's sample includes five in

governing the market for corporate control could thus provide a last line of defense to protect minority shareholders from controlling shareholders by adopting variations of the MBR to regulate the sale of corporate control.[110]

III. CORPORATE CONTROL IN LATIN AMERICA

The first part of this section provides a description of the design of the database employed in this study, the manner in which the data was collected, and the construction of the relevant variables. The second part presents evidence on the ownership structure of the largest publicly-traded issuers in five Latin American countries—Brazil, Chile, Colombia, Mexico, and Peru. These five countries were chosen because they have the largest market capitalization of listed domestic companies both in aggregate value and as a percentage of the country's gross domestic product ("GDP"), as shown in Table 2.

Table 2. Listed Domestic Companies in Latin America (2016)[111]

	Total Number	Market capitalization *in US$ millions*	*% of GDP*
Brazil	338	758,558.92	42.23
Mexico	137	350,809.55	33.51
Chile	214	212,479.79	86.01
Colombia	68	103,818.62	36.75
Peru	217	81,088.97	42.19

Mexico, seven in Chile, and 141 in Brazil.

110. It is worth noting that few studies have focused on the role of rules governing the market for corporate control in protecting minority shareholders. Most studies have focused on those sections of the corporate laws that govern the management and decision-making of the firm (i.e., shareholder meetings, election of the board of directors, etc.). *See, e.g.,* La Porta et al., *supra* note 9; Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 REV. FIN. STUD. 467, 476 (2010) (discussing the modified "oppressed minority" component, which asks whether minority shareholders can challenge resolutions of the board and/or shareholders if they are "unfair, prejudicial, oppressive, or abusive"). *See also* OECD White Paper, *supra* note 95, at 15–30; CAPAUL, *supra* note 96, at 5–13; CHONG & LÓPEZ-DE-SILANES, *supra* note 94, at 9–19; Reyes, *supra* note 94, at 229–35.

111. Indicators Database, THE WORLD BANK GROUP, https://data.worldbank.org/indicator (2019) (search the following in "All Indicators" for 2016: (1) Market capitalization of listed domestic companies (current US$) (CM.MKT.LCAP.CD), (2) Listed domestic companies, total (CM.MKT.LDOM.NO) and (3) Market capitalization of listed domestic companies (percent of GDP) (CM.MKT.LCAP.GD.ZS)). Argentina would come sixth based on these measures with ninety-three issuers aggregating a total of $63,601.12 million in market capitalization that represents 11.66% of that country's GDP.

A. Construction of Data

This section provides a brief overview of how the dataset was constructed. The first section explains how companies from each of the five countries were selected for inclusion in the dataset. The second section details the sources employed to obtain information on each of these issuers. The last section describes the data that was collected and the variables that were constructed using these various sources.

1. Assembling a List of Firms

The sample of companies consists of those companies whose equity securities were publicly traded and included in each country's major stock market index as of the first quarter of 2016. These broad indices generally include the largest and most liquid equity securities trading in a given market and are designed to provide a representative sample of the country's equities market.

Brazil's major stock index, the Bovespa Index, consists of the largest and most liquid equity securities that trade in the Brasil Bolsa Balçao.[112] The Índice de Precios y Cotizaciones ("IPC") of the Mexican Stock Exchange ("Bolsa Mexicana de Valores") is an index of the largest and most liquid stocks that trade on that exchange.[113] Colombia's major stock index, the COLCAP, consists of the most liquid equity securities listed in the Colombian Stock Exchange ("Bolsa de Valores de Colombia").[114] The main stock index of Chile is the Índice de Precio Selectivo de Acciones ("IPSA") which includes the most widely-traded stocks that trade in the Santiago Stock Exchange ("Bolsa de Comercio de Santiago").[115] Finally, the S&P/BVL Peru General Index ("PGI") is Peru's broad benchmark index and is

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112. The *Brasil Bolsa Balçao* was formerly known as the Sao Paulo Stock Exchange or *Bolsa de Valores do Estado de São Paulo*. Since some issuers have both their common and preferred shares included in the Bovespa Index, the number of issuers is lower than the size of the index. For a description of the Bovespa Index, see Benjamin Miranda Tabak, *The Random Walk Hypothesis and the Behavior of Foreign Capital Portfolio Flows: the Brazilian Stock Market Case*, 13 APPLIED FIN. ECON. 369, 370 (2003); BM&FBOVESPA, BM&FBOVESPA INDICES: CONCEPTS AND PRACTICES MANUAL (2014), http://www.bmfbovespa.com.br/en_us/products/indices/broad-indices/bovespa-index-ibovespa.htm (find "Concepts and Practices" Manual on right-hand below "Know More") (describing Bovespa Index).

113. For a description of the IPC, see *Types of Indices*, BOLSA MEXICANA DE VALORES, https://www.bmv.com.mx/en/indices/main/ (last visited Oct. 20, 2019); *S&P/BMV IPC*, S&P DOW JONES INDICES, https://us.spindices.com/indices/equity/sp-bmv-ipc (last visited Sept. 9, 2019).

114. For a description of the COLCAP, see BOLSA DE VALORES DE COLOMBIA, METODOLOGÌA PARA EL CÀLCULO DEL INDICE COLCAP (2018); *Stock Market*, BANCO DE LA REPUBLICA, http://www.banrep.gov.co/en/stock-market (last updated Oct. 18, 2019).

115. See *S&P IPSA (CLP)*, S&P GLOBAL, https://us.spindices.com/indices/equity/sp-ipsa-clp (last visited Sept. 9, 2019), for a description of the IPSA.

composed of stock trading in the Lima Stock Exchange ("Bolsa de Valores de Lima").[116]

The aggregate list constructed from these five indices based on their composition as of January 2016 includes 182 issuers—fifty-seven from Brazil, forty-two from Chile, eighteen from Colombia, thirty-four from Mexico, and thirty-one from Peru. This list is limited to domestic companies, and thus excludes foreign issuers that have listed securities in these countries. A list of all the firms included in the database is presented in the appendix.

2. Gathering Ownership Information

For each firm, I collected ownership data as of December 31, 2015, or as close as possible to this date. To obtain this information, I relied on different publicly-available sources that varied depending on the country. These sources are described below.

For Brazilian issuers, I relied on the Formulário de Referência ("Reference Form" or "FRE"), a disclosure document which publicly-traded issuers must file electronically with the Comissão de Valores Mobiliários ("CVM") on a yearly basis and then update periodically throughout the year.[117] As part of its FRE, an issuer must identify any shareholder (or group of shareholders) that control the issuer and list every shareholder or group of shareholders that own 5% or more of a class of shares, as well as those individuals or entities that control these shareholders.[118]

For Mexican issuers, I relied on the annual reports filed yearly by issuers with the Comisión Nacional Bancaria y de Valores ("CNBV").[119] These annual reports must include a list of shareholders owning 10% or more of the social capital of the issuer and identify the shareholders or group of shareholders that exercise control or significant influence over corporate affairs.[120] To gather ownership data for Chilean issuers, I relied on annual

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116. *See S&P/BVL Peru Select Index*, S&P GLOBAL, https://us.spindices.com/indices/equity/sp-bvl-peru-select-index-pen (last visited Sept. 9, 2019) (describing the PGI).

117. *See* COMISSÃO DE VALORES MOBILIÁRIOS [CVM], INSTRUÇÃO CVM NO. 480 art. 24 (2009) (Braz.), http://www.cvm.gov.br/legislacao/instrucoes/inst480.html (then click the link for "Instrução CVM 480 (texto consolidado)").

118. *Id.* at Annex 24, §§ 15.1–15.2; CAPAUL, *supra* note 96, at 3.

119. *See* COMISIÓN NACIONAL BANCARIA Y DE VALORES [CNBV], DISPOSICIONES DE CARÁCTER GENERAL APLICABLES A LAS EMISORAS DE VALORES Y A OTROS PARTICIPANTES DEL MERCADO DE VALORES [GENERAL PROVISIONS APPLICABLE TO THE ISSUERS OF SECURITIES AND OTHER PARTICIPANTS OF THE SECURITIES MARKET] art. 33(I)(b)(1) (2003) (Mex.) [hereinafter CNBV ISSUER GUIDELINES].

120. The *Instructivo para la Elaboración del Reporte Anual* contains the information about shareholders that needs to be furnished by the issuer in its annual report filed with the CNBV. CNBV ISSUER GUIDELINES, Comisión Nacional Bancaria y de Valores, Gobierno de México, Instructivo para la

reports, which must be prepared on an annual basis and made available to shareholders and the public on the company's website.[121] In these reports, an issuer must identify any shareholders that own 10% of the voting capital (grouping family members together) and indicate whether there is a controlling shareholder or group of shareholders exercising control through an agreement, as well as the percentage of the issuer's stock owned by such controller.[122]

Similarly, for Colombian firms, I relied on their annual reports, which are posted in the companies' corporate websites, where issuers are required to disclose information on their shareholders and controlling entities.[123] I used a mix of sources to obtain ownership information on issuers from Peru: I reviewed each company's annual report filed with the Lima Stock Exchange[124] and consulted shareholder information which is available at the website of the Superintendencia del Mercado de Valores ("SMV").[125]

3. Assessing Ownership Structure

Using the sources described in the prior section, I compiled information on each firm's ownership structure. For each company, I collected the number of shareholders that beneficially own 10% or more of the voting power, as well as the number of shareholders that hold 20% or more, 30% or more, and 40% or more of the voting power. I also calculated the total amount of voting power held by the largest shareholder or group of shareholders acting in concert.

Ascertaining who ultimately controls a company can be complicated by several factors. Effective control is often obtained through pyramiding and cross-ownership schemes, which demands an examination of the relationship

Elaboración del Reporte Anual, Annex N, pt. II(C)(4)(c).

121. *See* COMISIÓN PARA EL MERCADO FINANCIERO, NORMA DE CARÁCTER GENERAL NO. 30, ESTABLECE NORMAS DE INSCRIPCIÓN DE EMISORES Y VALORES DE OFERTA PÚBLICA EN EL REGISTRO DE VALORES; SU DIFUSIÓN, COLOCACIÓN Y OBLIGACIONES DE INFORMACIÓN CONSIGUIENTES, DEROGA NORMAS DE CARÁCTER GENERAL QUE INDICA § II(C.1) (2019) (Chile).

122. *Id.* § II(C.2)(4)(a). For a discussion of the definition of "control person" under Chilean law, *see infra* notes 188–191.

123. Superintendencia de Valores Res. 400, art. 1.1.3.7 (1995) (Colom.); *see also* CAPAUL, *supra* note 96, at 3 ("In Colombia . . . issuers must comply with numerous, often confusing laws, rules and regulations issued by different regulators and fragmented supervision leads to arbitrage between different superintendencies.").

124. For company reports by Peruvian issuers, see *Empresas con valores listados*, BOLSA DE VALORES DE LIMA, http://www.bvl.com.pe/mercempresas.html (last visited Oct. 20, 2019).

125. To access issuer information from Peru, including shareholding data, see *Datos Generales*, SUPERINTENDENCIA DEL MERCADO DE VALORES, http://www.smv.gob.pe/Frm_LisDatos Generales?data=B5C77F8C6BF989E2D2220F8ED366A4EF1CB0260F56 (last visited Oct. 20, 2019) (search by issuer using the search bar).

between shareholders in order to determine who ultimately holds control rights.[126] Moreover, determining beneficial ownership is complicated by the prevalent use of private holding companies and investment vehicles for tax purposes.[127] Careful reading of the companies' annual reports and regulatory filings helps address these concerns.

One of the principal goals of this part of the study is to identify those issuers that have a controlling shareholder and those which are deemed to be widely-held. According to the literature, an issuer will be deemed widely-held if it does not have any owners with significant control rights.[128] Although defining such a threshold can be arbitrary, most of the existing literature has assumed that ownership of 20% of the voting shares is enough to ensure control, though some studies have used 10% as the threshold.[129] I assume that individuals belong to the same family group if they have the last name or if it is noted by the issuer in its annual report or in a regulatory filing.[130] Where the ultimate owner of a corporation is an unlisted firm, I tried to trace that firm's owners using various online resources.

Following the approach used in the literature examining ownership of non-U.S. companies, I categorized shareholders into the following groups: family (including individuals); financial; corporate; state (including national governments, local authorities and government agencies); and miscellaneous (including non-profits, employee profit sharing plans, cooperatives, etc.).[131] Additionally, shareholders were categorized based on their nationality (i.e., foreign or domestic).

B. Who Owns Corporate Latin America?

This section presents an overview of who, if anyone, ultimately controls the Latin American issuers included in the sample. Before proceeding to a more detailed country-by-country discussion, it is helpful to summarize the main findings for the 182 issuers that were analyzed and highlight some notable trends. The principal findings are summarized in Table 3.

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126. *See supra* note 28 (explaining several studies conducted in multiple countries that identified various factors and mechanisms that result in greater or lower levels of control).

127. OECD White Paper, *supra* note 95, at 49; CAPAUL, *supra* note 96, at 4.

128. Claessens, Djankov & Land, *supra* note 16, at 94–95.

129. *Id.*; Faccio & Lang, *supra* note 16, at 369; La Porta et al., *supra* note 15, at 476–80.

130. *See* Faccio & Lang, *supra* note 16, at 388 ("We assumed that individuals are in the same family if they have the same last names, a convention that understates family affiliation.").

131. This approach follows the existing literature. *See, e.g.*, Faccio & Lang, *supra* note 16, at 373; Holderness, *supra* note 14, at 1396. In situations where it was not possible to identify the owners of an unlisted firm, the firm was classified as a family. *See* Faccio & Lang, *supra*. Financial and corporate shareholders are classified based on whether they are widely-held.

Table 3. Corporate Control in Latin America

	(1) Issuers	(2) 50%+	(3) 20%+	(4) Family	(5) Foreign	(6) State
Brazil	57	31	46	25	9	7
Chile	42	30	40	29	9	0
Colombia	18	13	17	5	2	4
Mexico	34	17	28	21	5	0
Peru	31	19	27	13	12	0
Total	182	110	158	93	37	11

The ownership of these Latin American corporations is extremely concentrated. Over 60% (110 of 182) of the issuers in the sample have a shareholder controlling a majority of 50% or more of the voting stock. A total of 158 issuers (or 86.8% of the sample) have a shareholder owning 20% or more of the voting power. These figures are slightly higher if we consider shareholder agreements that provide that shareholders will act in concert.[132] After factoring in such agreements, 121 issuers (66.5%) have a group of shareholders controlling 50% or more of the voting power, while 161 issuers (88.5%) have shareholders controlling at least 20% of the voting power.

Families play a critical role in the governance of these Latin American firms, controlling ninety-three of the 182 firms (51.1%) in the sample. There are two leading explanations for the phenomenon of family control in publicly-traded firms.[133] First, the competitive advantage theory proposes that controlling family shareholders might be able to maximize value for all shareholders by, for example, exploiting their political influence for the firm's advantage.[134] Alternatively, the private benefits of control theory proposes that controlling families may exercise their power to maximize value for family shareholders at the exclusion or detriment of the minority by, for example, diverting resources or engaging in nepotism.[135] Future

132. The impact of these agreements on the concentration of control rights is discussed in more detail in each country's section.

133. *See* Belen Villalonga & Raphael Amit, *Family Control of Firms and Industries*, 39 FIN. MGMT. 863, 863–64 (2010) (discussing the competitive advantage and private benefits of control theories).

134. *See* Marianne Bertrand & Antoinette Schoar, *The Role of Family in Family Firms*, 20 J. ECON. PERSP. 73, 75–77 (2006) (discussing the theory that family-controlled firms embrace long-term success and noting that family-controlled firms often have political connections); *see also* Randall Morck, David Stangeland & Bernard Yeung, *Inherited Wealth, Corporate Control, and Economic Growth: The Canadian Disease*, *in* CONCENTRATED CORPORATE OWNERSHIP 319, 347 (2000) (stating that there is plentiful "anecdotal evidence" of wealthy families influencing national governments).

135. *See* Bertrand & Schoar, *supra* note 134, at 78–80 (discussing how family values can conflict with the firm's monetary objectives); *see also* Michael Burkart, Fausto Panunzi & Andrei Shleifer, *Family*

scholarship might compare control premiums between family and non-family firms in the region to ascertain which explanation best describes family control in Latin America.

Surprisingly, the government appears to play a very limited role in the governance of the Latin American firms in the sample.[136] Only eleven of the 182 companies (6%) in the dataset are controlled by state entities. And in three of the five countries (Chile, Mexico, and Peru), the state plays no role at all. In the two countries that it does, the state involvement is mainly limited to the energy sector (four issuers in Colombia and four in Brazil). And in Colombia, one of these government-controlled entities was privatized soon after the data was collected for this project.[137]

Foreign entities play a more active role than the state. These foreign entities control thirty-seven of the firms in the sample, or just over 20%. Twenty-five of these foreign controllers are from Continental Europe, led by Spanish and French firms, which control eight and seven issuers, respectively.[138] Six of the foreign controllers are from the United States, one is from the United Kingdom, and one is from Japan.[139] This trend towards foreign ownership is illustrated by the recent privatization of Isagen, a Colombian issuer which was state-controlled at the time the data was recorded, but subsequently acquired by a Canadian entity.[140]

1. Brazil

Thirty-one of the fifty-seven Brazilian issuers in the sample (54.4%) have a shareholder that outright controls over 50% of the voting power. Families, foreign capital, and state entities play an important role, controlling twelve, eight and seven of these thirty-one issuers. Of the remaining twenty-six issuers that do not have an outright controlling shareholder, fifteen have at least one shareholder that owns more than 20% of the voting stock.[141] Twelve of these fifteen large shareholders are families, while one is a foreign entity.

Firms, 58 J. FIN. 2167, 2168–69 (2003) (explaining that controlling families may retain control at the expense of profits).

136. Traditionally, the state has played an important role in the governance of firms in Latin America. *See, e.g.*, CAPAUL, *supra* note 96, at 3 ("The listed sector in Latin America consists, to a large extent, of family-owned and family-run firms or (partially) privatized companies.").

137. *See infra* note 158 and accompanying text.

138. The remaining eleven controlling entities from Continental Europe are from Italy (five), Belgium (three), Portugal (one), and Norway (one).

139. Four of the foreign controllers are from Latin America itself—three Brazilian and one Mexican.

140. *See infra* note 158.

141. Notably, in six of these fifteen cases, the largest shareholder has entered into agreements with other shareholders, covering at least 50% of the voting power.

A total of eleven issuers have no shareholder owning more than 20% of the voting stock and could be deemed to be widely-held. However, for two of these issuers, the largest shareholder has entered into agreements with other shareholders, covering over 39% and 51%, respectively, of the issuer's voting stock. This ultimately leaves nine out of fifty-seven issuers, or about 15% of the sample, that have no controlling shareholder and that could be deemed to be widely-held under the 20% threshold.[142]

2. Chile

Thirty of the forty-two Chilean issuers (71.4%) have a shareholder owning more than 50% of the voting capital.[143] Of the remaining twelve issuers, ten have a controlling shareholder that owns at least 20% of the voting power.[144] The vast majority of these controlling shareholders, twenty-nine out of the forty, are families.[145] Foreign capital also plays an important role, with nine of these forty issuers being controlled by foreign entities.[146] Two of the forty issuers that have a controlling shareholder are controlled by widely-held entities.[147] The government does not own a controlling stake in any of the Chilean issuers in the sample.

This leaves two issuers that could be deemed to be widely-held. For one of these issuers, the largest shareholders have entered in shareholder agreements with various individuals owning 60% of the issuer's voting stock.[148] The remaining issuer has a shareholder that owns 14.38% of the voting stock, but who, according to the issuer's annual report, is not deemed to be a controlling shareholder and has not entered into any agreements with

142. If we employed a 10% threshold instead to measure control, only three issuers would be deemed widely-held.

143. Of these thirty controlling shareholders, nine are foreign entities, twenty are local families and one is a widely-held corporation. Four issuers have a shareholder that has between 40% and 50% of the voting capital (two of them above 49%), all of which shareholders are classified as families.

144. For one of these two issuers, there was a shareholders' agreement covering 57.5% of the voting stock.

145. The Luksic family controls five of these issuers.

146. Two of these issuers are in the financial sector (banking and insurance), two are in the water sector and five are in the energy sector.

147. One issuer, CAP S.A., has a shareholder that holds 31% of the voting stock, Invercap S.A., a private company owned by various investors, none of which has more than 1% of the capital. Mitsubishi, a foreign entity, owns 19.27% of CAP's voting stock, but has no agreement with Invercap. Another issuer, *Inversiones La Construccion*, is controlled by the *Cámara Chilena de la Construcción*, a trade association with 2,700 members.

148. A family that owns 13.04% of the voting stock of Sidgo Koppers SA has entered into agreements with other individuals who in the aggregate own an additional 60% of the issuer's voting stock.

other shareholders.[149] Thus, there is only one Chilean issuer in the sample that, in effect, has no controlling shareholder and can be deemed to be widely-held under the 20% definition of control.[150]

3. Colombia

Thirteen of the eighteen Colombian issuers have a shareholder controlling over 50% of the voting power. Four of the remaining five issuers have shareholders owning 28.71%, 34.79%, 35.65%, and 46.57% of their voting stock, respectively.[151] These four issuers belong to a corporate group and, including cross-holdings within the group, the largest shareholders in these four issuers would hold 34.13%, 43.10%, 48.02%, and 52.09%, respectively. In sum, seventeen of the eighteen issuers examined have shareholders controlling at least a third of the voting power. Only one issuer, the Colombian Stock Exchange, has no shareholder owning more than 10 or 20% of the voting power.[152]

Government entities control four of these seventeen issuers, all of which are in the energy sector.[153] One of these state-controlled issuers was subsequently privatized and acquired by a foreign entity.[154] Two issuers are controlled by foreign entities,[155] while five issuers are controlled by three local families.[156] The remaining six issuers[157] belong to Grupo Empresarial Antioqueno, a conglomerate formed by interlocking ownership structures designed to prevent hostile acquisitions.[158]

149. This issuer, Grupo Security SA, belongs to the financial industry.

150. If we instead used a 10% threshold to measure control, no issuers would be deemed widely-held.

151. These are Bancolombia, Grupo Argos, Grupo Nutresa, and Grupo Sura.

152. The diluted ownership structure of the Bolsa Colombiana de Valores is mandated by law, which prohibits any individual or entity from owning 10% or more of the voting power of a stock exchange. *See* L. 27/90 art. 2(a), febrero 20, 1990, DIARIO OFICIAL [D.O.] (as modified by L. 510/99 art. 54(a), agosto 3, 1999, DIARIO OFICIAL [D.O.]).

153. These are Ecopetrol (oil and gas), Empresa de Energía de Bogotá (energy), Interconexion (energy), and Isagen (energy).

154. Isagen was privatized during the first quarter of 2016, when the Colombian government sold its controlling stake to Canada's Brookfield Asset Management. *See* Oscar Medina & Christine Jenkins, *Canada's Brookfield Buys Colombia's Isagen for $2 Billion*, BLOOMBERG NEWS, Jan. 13, 2016 (reporting that Colombia sold majority stake in Isagen to Brookfield).

155. Almacenes Éxito and Cemex Latam are controlled by entities from France and Mexico, respectively.

156. The Angulo Family controls three of these issuers (Grupo Aval, Banco de Bogotá, and Corficolombiana).

157. These include Bancolombia, Celsia, Grupo Argos, Cementos Argos, Grupo Nutresa, and Grupo Sura.

158. *See* Andres Schipani, *Colombia's Sindicato Antiogueño Has Become a Force for the Country's Good*, FIN. TIMES (Mar. 23, 2014).

4. Mexico

Half of the thirty-four issuers in the Mexican sample have a shareholder that outright controls a majority of the voting stock.[159] Eleven other issuers have a shareholder controlling between 20% and 50% of its voting stock.[160] Thus, there are six issuers (17.65% of the sample) that have no shareholder owning more than 20% of the voting stock and that qualify as widely-held entities.[161] Families control twenty-one of the issuers,[162] while foreign entities control five of the thirty-four issuers in the sample. As in Chile, the state appears to play no role in the governance of the publicly-traded issuers in the sample.

5. Peru

Over 60% of the thirty-one Peruvian issuers in the sample (or nineteen) have a shareholder that outright controls a majority of the voting stock. Twenty-seven issuers (87%) have a shareholder that owns at least 20% of the voting stock. Four issuers (14.8% of the sample) potentially qualify as being widely-held, as they have no shareholder controlling 20% or more of the voting stock, although it is difficult to make the determination with the available data for two of them.[163] Families and foreign entities play an equally important role in the control of Peruvian issuers, controlling thirteen and twelve issuers (48.15% and 44.44%), respectively. [164] As in Chile and Mexico, the Peruvian state plays no role in the governance of the publicly-traded issuers included in the sample.

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159. Detailed ownership information was not available for El Puerto de Liverpool. The issuer's report state that no person has more than 10%, but there are five trusts that together hold 61.8% of the voting power. Based on a review of the issuer's report, it is likely that Max Michel, Enrique Brémond, and their families are behind these trusts.

160. In two of these issuers, Grupo Bimbo and Arca Continenatal, the largest shareholder has entered into agreements with other blockholders covering at least 50% of the stock (61% and 51%, respectively).

161. However, in two of these cases, the largest shareholder has entered into agreements with other blockholders covering more than 20% of the stock.

162. Three of these issuers are controlled by the Slim family, two are controlled by the Vigil family and two are controlled by the Michel Garza families.

163. Ferreycorp SAA and Bolsa de Valores de Lima can be deemed to be widely-held. One issuer, Credicorp Ltd, has a subsidiary that owns around 15% of the issuer's stock, and the Romero family owns at least 14.03% directly in the issuer. Another issuer, Empresa Agroindustrial Pomalca, appears to have no shareholder owning more than 15%, but some news reports suggest that Grupo Oviedo (who owns 11.54% according to the data) controls the company.

164. The Rodriguez Pastor and Brescia families each control two issuers in the sample.

IV. REGULATING THE MARKET FOR CORPORATE CONTROL

The results presented in the preceding section indicate that ownership of control rights in publicly-traded firms in these Latin American countries is highly concentrated in the hands of a few wealthy families and foreign companies. These ownership patterns have critical implications for the role that the law should play in the growth and development of the capital markets in these countries. One such implication, that the law should afford protection to minority shareholders against self-serving actions taken by the majority, has been explored in the literature.[165] Unfortunately, the existing literature suggests that Latin American countries have historically fallen short on this front.[166]

A second implication of these ownership patterns relates to the regulation of the market for corporate control. A third party who wishes to acquire a controlling stake in a public company would likely have to negotiate with an existing shareholder. Similarly, a controlling shareholder that wishes to dispose of its holdings may prefer to sell that controlling stake to a third party, rather than to the public, in order to receive a control premium from the acquirer. The possibility of granting tag-along rights to minority shareholders in the sale of control transactions provides an opportunity to enhance the rights of minority shareholders beyond the limited protections afforded by corporate governance codes across the region.

The first part of this section presents a survey of the legal framework surrounding the market for corporate control in Brazil, Chile, Mexico, Colombia, and Peru, with a focus on regulations governing transfers of control. This survey is followed by a discussion of how these rules protect minority shareholders during a transfer of control, relative to the U.S. and European approaches discussed earlier in the Article.

A. Approaches to Sales of Control in Latin America

This section provides a brief overview of the laws governing the market for corporate control in Brazil, Chile, Colombia, Mexico, and Peru. The discussion is focused on those provisions that might protect minority shareholders in transactions where an acquirer seeks control of a company either by purchasing a stake from an existing majority shareholder or by

165. *See supra* notes 38–40 and accompanying text (explaining different mechanisms through which agency problems between managers and shareholders may be alleviated).

166. *See supra* notes 108–112 and accompanying text (explaining how Latin American countries have high measures of control premia and market capitalization).

aggregating shares of a widely-held firm. Provisions that more generally regulate tender offers will be discussed to the extent they play a role in transactions involving transfers of control.

Table 4. Rules Governing Sales of Control in Latin America[167]

	(1)	(2)	(3)	(4)	(5)
	Trigger (Sc>=)	Mandatory Tender Offer	Amount	Price	Non-Voting
Spain	30%	Yes	100%	100%	Yes
Mexico	30%	Yes	Sc	100%	No
	50%*	Yes	100%	100%	Yes
Colombia	25%	Yes	Sc	100%	No
Chile	25%	If premium >10%	Sc	100%	No
Brazil	50%	Yes	100%	80%	No
Peru	25%*	Yes	Sc<x<100%	100%	Yes

All five countries have adopted a variation of the MBR. This is not surprising, given the high levels of ownership concentration documented earlier and the poor protection that corporate law otherwise provides shareholders in these countries.[168] Notably, the regulatory structures are diverse and present interesting alternatives to the European MBR model around which the literature has traditionally centered. Table 4 summarizes the key provisions of the different regimes. This diversity in regulatory approaches to transfers of corporate control in Latin America underscores the inadequacy of an approach that focuses solely on the European and U.S rules in examining and assessing the optimal role of the law in this type of transaction. As the discussion that follows will highlight, the modifications to the MBR adopted in some of these countries directly address the drawbacks and inefficiencies associated with the MBR.

167. "S_C" denotes the size of the stake being acquired by the purchaser. Column (1) indicates the ownership level that triggers the obligation to make an offer to purchase the minority shares, an obligation that may be conditional, as noted in Column (2). A "*" denotes that the percentage might be lower Sc is deemed to be a controlling stake. The percentage of minority shares that must be purchased and the price at which these must be purchased are presented in columns (3) and (4), respectively. Column (5) indicates whether non-voting shares must be targeted in the tender offer.

168. *See supra* notes 108–112 and accompanying text (explaining analysis conducted in several countries illustrating high control premia and lack of shareholder protections).

1. The "Traditional" MBR: Colombia and Mexico

Mexico's regulation of the sale of control closely mirrors the European MBR approach. A person who seeks to obtain 30% or more of the voting capital of an issuer must acquire those shares by making an offer to all shareholders[169] at the same offer price.[170] In the event that too many shares tender, every tendering shareholder is entitled to have its shares purchased pro rata.[171] However, there is no obligation to make an offer to acquire all of the issuer's outstanding shares when an acquirer seeks to obtain 30% or more of the issuer shares, as long as the acquirer is not gaining control of the issuer.

If an acquirer does seek control of the issuer, then the tender offer must be made for all outstanding shares of the issuer, including non-voting shares.[172] A person is deemed to "control" an issuer if it owns more than 50% of the voting rights or has the power to either (i) decide matters in the shareholder meetings or elect a majority of the board or (ii) direct the issuer's management and corporate policies.[173] Thus, a person acquiring less than 50% of the voting rights could be deemed to be acquiring control over the issuer. If the acquirer has, prior to commencing a tender offer, entered into a stock purchase agreement with an existing shareholder, the tender offer price may not be lower than such price.[174]

Colombia's approach resembles that of Mexico. A person who seeks to obtain 25% or more of an issuer's voting stock must acquire those shares by making an offer to all holders of voting stock at the same price.[175] Unlike in

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169. Ley del Mercado del Valores [LMV], art. 98, Diario Oficial de la Federación [DOF] 30-12-2006, últimas reformas DOF 09-01-2019 (Mex.) [hereinafter LMV]. A statement must be issued upon the acquisition of at least 10% of a class of voting shares, accompanied with a statement disclosing the intentions of the acquiring party. *Id.* at art. 109. The offer must remain open for at least twenty days. *Id.* at art. 97(1). An offer may be modified at any time; however, if the modification is material, the offer period must be extended by at least five days and shareholders may withdraw any tendered shares. *Id.* at art. 97(IIII).

170. *Id.* at art. 98(II).

171. *Id.* at art. 97(II).

172. *Id.* at arts. 98(I), 98(III)(b). If following the tender offer less than 12% of the issuer's capital stock is publicly-held, the acquirer must make a new tender offer for these publicly-held shares at the same price as the original tender offer. CNBV ISSUER GUIDELINES, *supra* note 119, at art. 16.

173. LMV, *supra* note 169, at art. 2(III).

174. *Id.* at art. 100.

175. D. 2555 arts. 6.15.2.1.1–6.15.2.1.4, julio 10, 2010, DIARIO OFICIAL [D.O.] (Colom.), http://www.suin-juriscol.gov.co/viewDocument.asp?id=1464776. The tender offer period must be between ten and thirty days long. *Id.* at art. 6.15.2.1.7. Offer must begin at least five days following the public announcement of the offer. *Id.* at art. 6.15.2.1.7. The offeror may extend the offer period once, but as amended it cannot be greater than thirty days and the extension must be made three or more day prior to expiration. *Id.* at art. 6.15.2.1.7. Any increases to the offer price will apply to those shareholders who have already tendered their shares. *Id.* at art. 6.15.2.1.16.

Mexico and the European Union, there is no requirement to acquire non-voting stock or to make an offer for all outstanding voting shares, even if the purchaser is acquiring 50% or more of an issuer's voting stock or otherwise gaining control over the issuer. If the offeror has acquired securities in the past three months, the offer price cannot be lower than the highest price paid by the offeror during that period.[176] Similarly to Mexico, if there is a stock purchase agreement in place with an existing shareholder, the price cannot be lower than the price in the agreement.[177] Moreover, if too many shareholders tender, the offeror must acquire shares pro rata from all tendering shareholders.[178]

Though they initially appear to be more flexible, in practical terms, Mexico's and Colombia's approaches closely mirror those of E.U. members like Spain. Even if a transaction does not require the acquirer to make a tender offer for all voting shares, the selling controlling shareholder will likely require, as part of the stock purchase agreement, the buyer to make a tender offer for all the issuer's voting stock, not just for the controlling stake being transferred.[179] This is because if a tender offer is made just for the controlling stake, there is the risk that other shareholders will tender, which would result in the selling controlling shareholder retaining some of its shares due to proration rules.[180] Thus, a person who acquires control of an issuer by purchasing securities from a controlling shareholder will likely have to provide the minority shareholders of the issuer the same price offered to the controlling shareholder.[181] In this sense, the analysis of the Mexican and Colombian approaches closely tracks that of the traditional MBR presented earlier.[182]

2. A "Hybrid" Approach: Chile

Chile, on the other hand, has adopted a hybrid approach to the regulation of transfers of control. The key distinguishing feature of the Chilean approach is not the structure and mechanics of the MBR itself, but the type of transactions that trigger a duty to make an offer to purchase the minority's shares.

A person acquiring control of a Chilean publicly-traded company must

176. *Id.* at art. 6.15.2.1.10(1).

177. *Id.* at art. 6.15.2.1.10(2).

178. *Id.* at art. 6.15.2.1.17.

179. *See* Bebchuk, *supra* note 12, at 968–70 (establishing the equivalence of the complete acquisition version and the proration version of the MBR).

180. *Id.*

181. *Id.*

182. *See supra* Part II.B.2.c (assessing the effectiveness of the traditional MBR).

do so via a tender offer extended to all shareholders.[183] This tender offer must be extended to all shareholders and if too many shares tender, the offeror must acquire shares on a pro rata basis among those tendered.[184] What constitutes "control" is broadly defined to include not just directly or indirectly having the majority of votes in shareholder meetings and the power to elect a majority of the members of the board of directors,[185] but also the ability to have "decisive influence in the management of the corporation."[186] There is a presumption that a party has a "decisive influence" if it owns 25% or more of the voting capital.[187] If too many shares tender, the offeror must acquire shares on a pro rata basis among those tendering.[188] Since the terms of this offer must treat all shareholders equally, minority shareholders would be entitled to receive a control premium in a transaction involving the acquisition of control from a large shareholder.[189]

However, this obligation to make a tender offer to all shareholders does not apply in situations in which the purchaser is acquiring a controlling stake from an existing controlling shareholder if (i) the shares have a "stock market

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183. *See* Law No. 18045 art. 199(a), Octubre 21, 1981, DIARIO OFICIAL [D.O.] (Chile) [hereinafter Chilean Securities Law] (requiring that the tender procedure contemplated in the title apply to acquisition of a publicly traded company). An entity intending to gain control of a corporation, must inform the public of its goal through a statement indicating the price and conditions of the negotiation, and report them to the Commission and stock exchanges. *Id.* at art. 54. SVS General Ruling No. 104 contains the required information that must be disclosed. SUPERINTENDENCIA DE VALORES Y SEGUROS [SVS], NORMA DE CARÁCTER GENERAL NO. 104, ESTABLECE NORMAS RESPECTO DE TOMA DE CONTROLO Y DE LAS OFERTAS PÚBLICAS DE ADQUISICION DE ACCIONES (OPAS) (2001) (Chile), http://www.svs.cl/institucional/legislacion_normativa/normativa2.php. Tender offers must remain open for a period between twenty and thirty days. Chilean Securities Law, *supra* at art. 205. Prior to beginning the offer, the offeror must furnish a prospectus to the target's shareholders. *Id.* at art. 203. This offer period may be extended once for at least five and for no more than fifteen additional days. *Id.* at art. 205. Offers are irrevocable and can only be modified to increase the price offered or the number of shares sought. *Id.* at art. 210. Any increase to the offer price will also benefit those shareholders who had already tendered. *Id.* at art. 210. Shareholders may withdraw their tendered shares at any time before the closing of the offer. *Id.* at art. 211. Competing offers are allowed but must be published within ten days of the end of the original offers and have final date that matches that of the original offer. *Id.* at art. 206.

184. *Id.*, at art. 208.

185. *Id.* at art. 97(a).

186. *Id.* at art. 97(b). A mandatory tender offer is also triggered following a transaction in which the acquirer gains control over two-thirds or more of the issuer's voting stock. This offer must be made at a price no lower than the price that the shareholders would be entitled to receive under withdrawal rights under the Chilean Corporate Code. *Id.* at art. 199(b).

187. *Id.* at art. 99. Exceptions are made if (i) there is another shareholder (or group of shareholders) with greater voting power or (ii) the party has 40% or less of the voting power and shareholders owning at least 5% have in the aggregate greater voting power. *Id.* at art. 99(a)–(b). The SVS may determine other exceptions based on the specific facts. *Id.* at art. 99(c).

188. *Id.* at art. 208.

189. *Id.* at art. 209.

presence"[190] and (ii) the transfer price is not "substantially greater" than the market price.[191] Under applicable regulations, a transfer price is deemed to be "substantially greater" than the market price when the former represents a premium of at least 10% over the latter.[192] This effective ceiling on the premium that a controlling shareholder may receive at the exclusion of the minority disincentivizes transactions formulated to exploit the minority, while encouraging desirable, value-enhancing transactions.[193]

How accurate and reliable this ceiling is as a measure of the control premium will depend on the reliability of the market price itself, which explains the "stock market presence" requirement for this exception. Whether shares have a stock market presence is determined by a liquidity test that initially solely focused on trade volume, but that was recently expanded to include issuers that retain a market maker.[194] As a result, a significant number of publicly-traded firms in Chile (i.e., those having a stock market presence) is governed by a hybrid system—a market rule regime when the premium received by the controlling shareholder is less than 10% and a traditional MBR regime when that premium is above 10%.

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190. *Id.* at art. 199(2).

191. *Id.*

192. SVS, NORMA DE CARACTER GENERAL NO. 101, DETERMINA PRECIO DE UNA ACCIÓN PARA QUE SEA CONSIDERADO SUSTANCIALMENTE SUPERIOR AL DE MERCADO (2000) (Chile), http://www.svs.cl/normativa/ncg_101_2000.pdf. This threshold, which is determined via rule-making, must be between 10% and 15%. Chilean Securities Law, *supra* note 183 at art. 199. For purposes of this calculation, the market price is the average price in the period running from ninety days to thirty days before the acquisition. *Id.*

193. *See* Francisco Pfeffer Urquiaga, *Nuevas Regulaciones en las Tomas de Control y Oferta Publica de Adquisicion de Acciones*, 28 R.CH. D. 113, 138–39 (2001) (explaining when a takeover bid is required by regulations).

194. SVS, NORMA DE CARÁCTER GENERAL NO. 327, ESTABLACE REQUISITOS PARA QUE UN VALOR SEA CONSIDERADO DE PRESENCIA BURSATIL (2012) (Chile), http://www.svs.cl/normativa/ncg_327_2012.pdf. Under this rule, a share has stock exchange presence if it: (i) is registered in the Securities Registry, (ii) is listed on a stock exchange, and (iii) has an adjusted presence of at least 25% or a market maker, as defined in the applicable rules. The adjusted presence is the percentage of the preceding 180 trading sections in which the aggregate trading volume in the stock has amounted to at least one thousand *Unidades de Fomento* (about U.S. $40,000). *Id.* The *Unidades de Fomento* is an indexed unit of account which is defined relative to the Chilean peso and is linked to the official consumer price index that measures the true cost of living (i.e., inflation) in Chile. *See* Fernando Lefort & Klaus Schmidt-Hebbel, *Indexation, Inflation and Monetary Policy: An Overview*, *in* INDEXATION, INFLATION, AND MONETARY POLICY 1, 5–7 (Fernando Lefort & Klaus Schmidt-Hebbel eds., 2002), http://si2.bcentral.cl/public/pdf/banca-central/pdf/v2/001_018 Introduccion.pdf (describing the creation of the *Unidades de Fomento* and its effects). The 2012 modification of the rule, driven mainly by tax-related issues, substantially expanded the set of issuers deemed to have a stock market presence. *See* Carlos Alvarado & Cristián Cuevas, *Market Makers y Provisión de Liquidez en Chile* 2–3, (Mar. 2014) (SVS Working Paper), https://www.svs.cl/portal/publicaciones/610/articles-16538_doc_pdf.pdf (noting that SVS Norma de Caràcter General No. 327 modified the requirements to have a stock market presence with the aim of increasing liquidity in the Chilean market).

Firms that do not have a stock market presence are effectively governed by the traditional MBR.[195] An assessment of the Chilean framework would thus require a series of rigorous analyses that take into account how different issuers and different transactions are covered by different rules, which is beyond the scope of this Article.

3. One Modified "MBR" Approach: Brazil

Brazil has adopted a modified version of the MBR. A person who acquires control of an issuer must provide minority shareholders of the issuer the opportunity to sell their stakes at a price equivalent to at least 80% of the price paid to the controlling shareholder in the underlying transfer of control.[196] The definition of control under Brazilian law is quite narrow: a "controlling shareholder" is a person that holds the majority of voting rights in shareholders meetings and can cause the election of the majority of company managers.[197] These tag-along rights are implemented through a tender offer for the acquisition of all voting shares held by all non-controlling shareholders of the issuer.[198]

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195. Acquirers are not obligated to purchase all outstanding shares, but rather to make an offer to all shares and then purchase from all shareholders on pro-rata basis. *See supra* notes 183–184. As discussed earlier, however, this type of framework still closely mirrors the traditional MBR. *See supra* note 187 and accompanying text.

196. Lei No. 6.404 art. 254-A, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.12.1976 (Braz.) [hereinafter Brazilian Corporations Law]; CVM, INSTRUÇÃO CVM 361 art. 29, § 4 (2002) (Braz.), http://www.cvm.gov.br/legislacao/instrucoes/inst361.html [hereinafter INSTRUÇÃO CVM 361]. Alternatively, the acquiring party may offer the minority shareholders the option to stay by offering them a premium equal to the difference between the market value of the shares and the price paid to the controlling shareholder. Brazilian Corporations Law, *supra*, at art. 254(4); INSTRUÇÃO CVM 361, *supra*, at art. 30, § 2.

197. Brazilian Corporations Law, *supra* note 196, at art. 116; INSTRUÇÃO CVM 361, *supra* note 196, at art. 3.

198. Brazilian Corporations Law, *supra* note 196, at art. 254; INSTRUÇÃO CVM 361, *supra* note 196, at art. 29. This offer must be registered within thirty days of the triggering transaction. INSTRUÇÃO CVM 361, *supra* note 196, at art. 29. Although only voting shares are granted tag-along rights by law, and just to 80% of the price paid for the controlling stake, it is not uncommon for publicly-held companies' by-laws to grant such rights to preferred shares or to increase the tag-along percentage to 100% of the total price paid by the purchaser to the controlling shareholder, a response to listing rules governing certain segments of the *Brasil Bolsa Balçao*, the principal securities exchange. In September 2017, a new set of listing rules for the Novo Mercado were approved. *Listing Segments: Novo Mercado*, BM&FBOVESPA, http://www.bmfbovespa.com.br/en_us/listing/equities/listing-segments/novo-mercado (last visited Sep. 12, 2019) (moving to B3.COM.BR on Nov. 14, 2019). These new rules, which became effective on January 2018, mandate that the same conditions provided to majority shareholders in the transfer of an issuer's control must be extended to all shareholders. *See Novo Mercado Listing Regulation*, BM&FBOVESPA, http://www.bmfbovespa.com.br/lumis/portal/file/fileDownload.jsp?fileId=8AA8D0975ECA76A9015EE8D90B9F3D11 (last visited Sep. 12, 2019). For a description of the different listing segments of the BOVESPA, see Gorga, *Changing the Paradigm of Stock Ownership*, *supra* note 100, at 450–53.

The Brazilian approach to the MBR differs from the European one in two important aspects. Brazil's version of the MBR is triggered when the acquirer is obtaining at least 50% of the voting stock, which is substantially higher than the 50% ownership threshold adopted in Spain.[199] Thus, transactions involving less than 50% of the voting stock are subject to a market rule, rather than Brazil's version of the MBR. Second, once the MBR is triggered, an offer to purchase must be made to the minority shareholders, but they are entitled to receive just 80% of the price received by the controlling shareholder (though the acquirer may offer more, of course).[200]

This approach represents a legislative compromise between a rule that allows minority shareholders the opportunity to receive the full control premium, as in Europe, and one that allows the controlling shareholder to receive the entirety of such premium, as in the United States. Consider, for illustration purposes, a firm T with one hundred shares of common stock outstanding, each trading at ten dollars per share, their economic value under S management. T's controlling shareholder S, who owns fifty of those shares, sells such stake to B at fifteen dollars per share, representing a premium of five dollars per share. Following such transfer of control, B would need to make an offer to purchase T's remaining fifty shares at a price of at least twelve dollars per share. Thus, T's minority shareholders are entitled to receive a premium of two dollars, less than the full premium of five dollars they would be entitled to receive under the traditional MBR, but more than they would be entitled to receive under the market rule.

In some situations, the minority shareholders may be better off choosing not to sell their shares in the ensuing tender offer, effectively retaining a market rule system for that sale of control transaction. For example, assuming that B acquires S's shares at a price of twelve dollars per share, the ensuing offer to the minority could be at a price as low as $9.60 per share, which is lower than the market price. The minority would be better off rejecting this offer.[201] In this sense, Brazil's approach mirrors that of Chile–transactions involving low premiums would effectively be governed by the market rule. The second example is more significant. Let us return to the example where B purchases S's shares at fifteen dollars per share, but now assume that B will make better use of T's assets, thus increasing the economic value of T's shares to thirteen dollars (so that two dollars represent

199. *See supra* notes 73–78 and accompanying text.

200. *See supra* note 196 and accompanying text.

201. This assumes that T's market price would not go down below ten, which could occur if market prices accurately reflect economic value and the acquisition by B was value destroying. It is likely, however, that under those particular circumstances the CVM would intervene.

the private benefits of control). In this case, T's minority shareholders will be better off rejecting the offer and keeping their shares of T. Under the traditional MBR, T's minority shareholder would have been entitled to receive fifteen dollars, an offer they would have accepted. However, such increased cost of acquisition might have deterred B from pursuing this desirable transaction in the first instance.

Brazil's approach thus provides some protection to minority shareholders, while imposing lower costs on these transfers of control, possibly preventing fewer efficient, value-enhancing transfers relative to the traditional MBR. The performance of the Brazilian version of the MBR relative to the market rule and the traditional MBR is considered in Section B below.

4. A Second Modified "MBR" Approach: Peru

In Peru, an entity intending to acquire, or increase shares to, a "significant participation" in a publicly-traded company must effectuate a public offer to all the company's shareholders, though not necessarily for all the voting stock.[202] A "significant participation" includes the direct or indirect ownership of 25% of the issuer's capital or the right to either elect the majority of the board of directors or amend the issuer's bylaws.[203]

Generally, an acquirer seeking to obtain a significant participation must obtain such participation by conducting a tender offer directed to all shareholders for the number of shares it wishes to acquire.[204] If more shares are tendered than those being sought, the offeror must acquire shares pro rata among all tendering shareholders.[205] Up to this point, Peru's approach mirrors the Colombian and Mexican approaches discussed earlier.

What distinguishes the Peruvian framework is that an acquirer may effectuate the required tender offer after it acquires a significant participation, if it acquires such participation from another party (somewhat

202. Decreto Supremo No. 093-2002-EF [Legislative Decree 093-2002-EF] art. 68, Junio 12, 2002 EL PERUANO: DIARIO OFICIAL 224673 (Pe.) [hereinafter Peruvian Securities Law]; COMISIÓN NACIONAL SUPERVISORA DE EMPRESAS Y VALORES [CONASEV], RESOLUCIÓN CONASEV NO. 009-2006-EF/94.10, REGLAMENTO DE OFERTA PÚBLICA DE ADQUISICIÓN Y DE COMPRA DE VALORES POR EXCLUSIÓN [CONASEV RESOLUTION NO. 009-2006-EF/94.10] art. 9, EL PERUANO: DIARIO OFICIAL 313907 (2002) (Pe.) [hereinafter CONASEV RESOLUTION NO. 009-006-EF-94.10]. The Peruvian securities market law contains just a few sections governing the acquisition of control of a public company, thus delegating the regulation of the exchange of control and tender offers to rulemaking by regulators. *See also* Peruvian Securities Law, *supra*, at art. 71.

203. CONASEV RESOLUTION NO. 009-006-EF-94.10, *supra* note 202, at art. 1(16). An acquirer must make a tender offer to intends to reach a participation of 25%, 50%, or 60%. *Id.* at art. 4.

204. *Id.* at art. 6.

205. *Id.* at art. 27.

similar to the Brazilian rule).[206] Thus, a transaction involving a transfer of control can take place outside a tender offer context, so long as it is followed by a tender offer to the minority.[207] The subsequent tender offer price must be at least as high as that determined by an appraising entity,[208] subject to the condition that the appraised value cannot be lower than that of the transaction or transactions that triggered the mandatory tender offer.[209] However, this tender offer does not need to include all outstanding shares held by the minority, but rather a number determined by a statutory formula.[210] To illustrate the operation of this rule, Table 5 presents the number of additional shares that must be bought by an acquirer that owns no prior stake in the issuer and is trying to purchase a controlling stake of a given size from an existing shareholder.[211]

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206. *Id.* at arts. 6(a), 8.

207. This obligatory tender offer must be conducted within four months of the triggering transaction. *Id.* at art. 44. An acquirer can avoid having to conduct a subsequent tender offer by having the acquirer reach an agreement beforehand with a group of controlling shareholders whereby these shareholders agree to tender their shares in a voluntary tender offer. Such tender offer, however, has to comply with a number of substantive and procedural requirements that could make this strategy less attractive. For example, if the number of shares tendered are higher than those being sought by the acquirer, the acquirer has to prorate its purchase across all tendered shares, including those of the controlling shareholder. Effectively, this course of action would indirectly adopt a traditional MBR approach. *See supra* note 187 and accompanying text.

208. *See* CONASEV RESOLUTION NO. 009-006-EF-94.10, *supra* note 202, at art. 44. The appraising entity must value the shares as of the date the triggering event occurred, following generally accepted valuation methods. *Id.* at art. 48. These methods include liquidation value, book value, and recent market price, among others.

209. *Id.* at art. 48.

210. The formula is:

$$\frac{\mathrm{X}}{\mathrm{Y}} * (\mathbf{1} - \boldsymbol{Z})$$

X is the percentage of participation acquired in the past three years; Y is the percentage owned by third parties before the acquisitions that triggered the mandatory tender offer duty; and Z is the percentage of participation of the bidder after the event that triggers the obligation to perform an OPA. *See id.* at Annex 1.

211. For an explanation and illustration of this rule, see CONASEV RESOLUTION NO. 009-006-EF-94.10, *supra* note 202; CONASEV, RESOLUCIÓN CONASEV NO. 020-2006-EF/94.10, MODIFICAN EL REGLAMENTO DE OFERTA PÚBLICA DE ADQUISICIÓN Y DE COMPRA DE VALORES POR EXCLUSIÓN, EL PERUANO: DIARIO OFICIAL 317791 (2006) (Pe.). For example, say that A, the acquirer, purchases 25% of an issuer's capital stock from B, the issuer's former controlling shareholder. Prior to such acquisition, A had no prior holdings in the issuer. In this case, X=25%, Y=100% and Z=25%. Thus, following this acquisition, A would have to make a tender offer for 18.75% of the outstanding shares held by third parties.

Table 5. Mandatory Offers under Peruvian Law[212]

Controlling Stake	Additional Shares	Total Shares
25.00%	18.75%	43.75%
30.00%	21.00%	51.00%
50.00%	25.00%	75.00%

Like Brazil, Peru has adopted a modified version of the MBR, but following a very different strategy. Peru's MBR is potentially triggered at a relatively low level of ownership—25% vs. 50% in Brazil—and the offering price in the mandatory tender offer has to be at least the same as that of the privately negotiated transaction, compared to just at least 80% in Brazil.[213] While in Brazil the subsequent offer must be made for all outstanding shares, in Peru the number of shares subject to this mandatory offer is substantially lower. Someone who has acquired 50% of an issuer's stock would need to make an offer to all minority shareholders for 25% of the remaining shares, rather than to the remaining 50%, as is the case in Brazil.[214]

Peru's version of the MBR, like Brazil's, represents a compromise between the market rule and the traditional version of the MBR adopted in Europe. By providing that the mandatory offer only needs to be made for some, but not all, of the minority-held shares, the Peruvian MBR provides some protection to minority shareholders (who receive the control premium for some of the shares they own), but reduces the social costs associated with this protection (by not forcing the acquirer to purchase all the minority shares), thus preventing fewer efficient transactions relative to the traditional MBR. The performance of the Peruvian version of the MBR relative to the market rule, the traditional MBR and the Brazilian version of the MBR is considered in Section B below.

B. Assessing the Modified Approaches to Sales of Control

This section provides a preliminary assessment of the performance of the Brazilian and Peruvian versions of the MBR relative to the market rule and the traditional MBR.[215] The results of this assessment indicate that in certain settings these modified versions of the MBR outperform the market rule and the traditional European version of the MBR.

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212. This table illustrates the additional number of shares an acquirer must purchase (second column) upon acquiring a controlling stake of a given size (first column).

213. *See supra* notes 196, 202 and accompanying text.

214. *See supra* text accompanying note 212.

215. A thorough assessment would require more rigorous theoretical modeling (allowing, for example, for a more diverse set of assumptions), and will be the subject of a separate article.

Imagine a publicly traded company, C, whose entire capital stock consists of one hundred shares of common stock.[216] A controlling shareholder, S, owns Sc shares, while the other 100-Sc shares are held by the public.[217] Let us assume that a controlling shareholder's value of its shares has two components: the intrinsic or economic value of the shares under S's control (Sc *V_S) and the private benefits S derives from controlling C (B_S).[218] Consequently, S would only sell its stake at a price per share that is at least:

$$V_S + \frac{Bs}{Sc}.$$

Minority shareholders value each of their shares at V_S, the economic value of T's common stock under S's management. Finally, suppose there is a potential buyer, B, under whose management the economic value of C's shares would be V_B. If B controlled C, it would derive private benefits of control amounting to B_B.

A transaction that transfers control of C from S to B is socially desirable if the sum of the economic value of C's equity under B's management plus B's private benefits of control is greater than the sum of the economic value of C's equity under S's management and S's private benefits of control[219]:

$$100V_B + B_B > 100V_S + B_S$$

$$V_B - V_S > \frac{B_S}{100} - \frac{B_B}{100}$$

Any attempt by B to gain control of C would involve an initial negotiation between B and S, during which they would agree on a price, P, that would fall somewhere between the average value of S for its stake in C and the average value of B for S's stake in C. The final price will be determined by the information available to the parties and the bargaining power between them, but for simplicity, we assume that the price will be equal to the seller's reservation value, which corresponds to a price per share

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216. This is a simplified version of the model developed in Bebchuk, *supra* note 12, at 971. Considering the existence of non-voting stock would add an additional wrinkle to the analysis, given the varying rights given to its holders in different countries.

217. The minimum size of a controlling stake varies from country to country. Throughout this section it is assumed that Sc is large enough to trigger any applicable mandatory offer obligations.

218. The size of this control premium generally varies according to a number of factors. *See supra* notes 22–38 and accompanying text.

219. There are two potential motivations behind B's interest in acquiring control of C. First, B could manage C in a way that will increase C's economic value (i.e. V_B>V_S). Second, B may be able to secure higher private benefits from controlling C (i.e. B_B>B_S). Of course, it could be that both of these motivations are simultaneously playing a role in B's decision or that only one of those conditions is met.

equal to:

$$V_S + \frac{Bs}{Sc}.$$

Under a market rule, the transfer of the Sc shares from S to B will take place as long as:

$$S_C * V_B + B_B > S_C * [V_S + \frac{Bs}{Sc}]$$

$$V_B - V_S > \frac{B_S}{S_C} - \frac{B_B}{S_C}$$

If there were no private benefits from control or such benefits were homogenous, transfers would occur only when $V_B > V_S$ and would never occur if $V_B < V_S$. However, the existence of private benefits of control adds a wrinkle to the analysis. If $B_B > B_S$ (B values more control than S) and $V_B > V_S$ (B can maximize the values of the company more than S), we will get the desired outcome. Things get trickier when $V_B < V_S$, so that a transfer of control may not necessarily be socially optimal, but $B_B > B_S$, so that the transfer may nonetheless occur due to the private benefits of control.[220] Since $S_c < 100$, the constraint under the market rule in this type of situation is less tight than the condition for an optimal transfer. This highlights one of the drawbacks of the market rule: it allows certain undesirable transactions driven by private benefits of control to take place.[221]

Let us now consider the traditional version of the MBR that mandates that the acquirer offer the same price paid to the controlling shareholder for all (minority-held) outstanding shares. This in effect forces B to purchase all the issuer's shares, not just those needed to exercise control (i.e., S_C).[222]

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220. Whether this is likely to occur will depend on: (1) the differences in private benefit of control, (2) the difference in value, and (3) the number of additional shares that need to be purchased beyond those that provide control.

221. *See* de La Bruslerie, *supra* note 56, at 92 ("The EOR system . . . protects [minority shareholders] from inefficient transfers of control. Even if new controlling blockholders continue to appropriate privately a proportion of the benefits, they must offer a higher price to the former controlling shareholder in order to satisfy the constraint imposed by the EOR."); Bergström et al., *supra* note 80, at 515 ("The guarantee that small shareholders will receive the same price offered to any shareholder, including insiders, will raise the average price offered to small shareholders . . . . [and result in] smaller net gains . . . ."); Schuster, *supra* note 40, at 533 (noting that the mandatory bid rule thwarts the ability of an acquirer to "exploit minority shareholders by siphoning-off assets and engaging in self-dealing to the detriment of minority shareholders").

222. Throughout these illustrations it is assumed that the minority shareholders of C will accept the mandatory tender offer conducted by B. This assumption may be somewhat problematic in situations where the offering price can be lower than the price at which the controlling stake was sold. For a more thorough explanation of these issues, *see supra* Part C.

Under this traditional version of the MBR, the transfer from S to B will occur if:

$$100V_B + B_B > 100 * [V_S + \frac{Bs}{Sc}]$$

$$V_B - V_S > \frac{B_S}{S_C} - \frac{B_B}{100}$$

Under this framework, if $V_B < V_S$ but $B_B > B_S$, for a transfer to take place, B will need to value the control benefits considerably more than S, since $S_C < 100$.[223] This is how inefficient transactions made for the purpose of exploiting the minority are discouraged by the MBR.[224] However, since $S_C < 100$, certain desirable transactions might be discouraged under this rule. To illustrate this, let us assume that both B and S would derive the same private benefits of control ($B_B = B_S$) and that that the economic value of C's equity would be marginally higher under B's management ($V_B=V_S+\varepsilon$). Although a transfer is efficient under this assumption, it might not occur since such a transfer effectively forces B and S to share the private benefits with the minority shareholders.[225]

Next, we can consider the modified version of the MBR that has been adopted in Peru. Under this framework, upon acquiring Sc from S, B would need to make an offer at the same price received by the controlling shareholder to acquire pro rata from all minority shareholders a number of shares determined by a statutory formula. Let us assume that Y represents the number of minority shares that must be subsequently acquired by B. In this scenario, the transfer of control would occur if:

$$(Sc + Y)V_B + B_B > (Sc + Y) * \left[V_S + \frac{Bs}{Sc}\right]$$

$$V_B - V_S > \frac{Bs}{Sc} - \frac{B_B}{Sc + Y}$$

Since $S_c + Y > S_c$ and $S_c + Y = 100$, this rule represents a midpoint between the market rule and the MBR. Fewer undesirable transfers are allowed under this framework than under the market rule, but more of these transfers are allowed relative to the MBR. On the other hand, Peru's rule

223. The assumption made about the transaction price is important here. If the price agreed to by the parties was equal to the buyer's valuation, then this type of transfer would never occur.

224. *See* Javaras, *supra* note 56 and accompanying text; *supra* note 82 and accompanying text.

225. *See supra* notes 83–86 and accompanying text.

blocks fewer desirable transactions than the MBR but still does prevent some efficient transfers unlike the market rule. The relative performance of the Peruvian rule, the MBR, and the market rule are illustrated at the end of this section.

Finally, let us now consider the modified Brazilian version of the MBR. Like the traditional MBR analyzed above, B has to make an offer to acquire all one hundred shares, but the price it needs to offer for the minority shares (100-Sc) does not need to be the same price received by the controlling shareholder for its (Sc) shares. Assuming that the price offered to the minority is the statutory minimum of 80% of the price offered to the controller and that all minority shareholders accept this offer, under this rule the transfer occurs if:

$$100V_B + B_B > Sc * \left[V_S + \frac{Bs}{Sc}\right] + (1 - Sc) * 0.8 * [V_S + \frac{Bs}{Sc}]$$

$$V_B - \left(\frac{80 + .2S_C}{100}\right)V_S > (0.2 * \frac{B_S}{100} + 0.8 * \frac{B_S}{Sc}) - \frac{B_B}{100}$$

The intuition behind this inequality is not as plain as that of the other rules, and it is easier to describe through an example. To better illustrate how these different rules operate, assume that the controlling stake being transferred consists of fifty shares. Under this assumption, the transfer of control is socially desirable, if condition (1) holds:

(1) Efficiency Condition: $(V_B - V_S) - (\frac{B_S}{100} - \frac{B_B}{100}) > 0$

Whether the transfer of control takes place or not will depend on the rule governing the transaction. The relevant conditions for each of the four rules (which are enumerated (2) – (5)) are as follows:

(2) U.S. Market Rule: $(V_B - V_S) - (\frac{2B_S}{100} - \frac{2B_B}{100}) > 0$

(3) European MBR: $(V_B - V_S) - (\frac{2B_S}{100} - \frac{B_B}{100}) > 0$

(4) Brazilian MBR:[226] $(V_B - V_S) - (\frac{1.8*B_S}{100} - \frac{B_B}{100} + .05 * V_S) > 0$

(5) Peruvian MBR:[227] $(V_B - V_S) - (\frac{2B_S}{100} - \frac{1.333B_B}{100}) > 0$

226. Recall that we are assuming that all minority holders would accept this offer. This is a problematic assumption if the premium offered to the seller is relatively low.

227. To simplify discussion, let us assume that B owns no equity in C. Under Peruvian law, B would have to make an offer to acquire twenty-five of the remaining fifty shares held by the minority at the same price paid to S (i.e., B will need to purchase seventy-five of the one hundred shares at that same price).

To illustrate the relative performance of these rules, we can consider their application under different scenarios. Start with a situation in which the buyer can derive higher benefits of control than the existing controlling shareholder (B_B=125; B_S=75).[228] Whether a transfer from S to B is socially desirable will depend on how the value of C's equity under B's ownership compares to the value of C's equity under S's ownership. Assume that under S's ownership the value of C's equity is one thousand (ten per share) and that C's equity value under B's ownership would be lower. Table 6 indicates whether the transfer occurs under each of the rules under different possible values of C's equity under B's management ranging from nine hundred to one thousand (nine to ten per share).[229]

Table 6. Relative Performance of Transfer Rules[230]

Assumptions: B_S=75; B_B=125; V_S=10.

	V_B =							
	9	9.1	9.3	9.5	9.7	9.9	10	Score
(1) Efficient	-0.50	-0.40	-0.20	0.00	0.20	0.40	0.50	
(2) MR	0.00	0.10	0.30	0.50	0.70	0.90		
(3) MBR	-1.25	-1.15	-0.95	-0.75	-0.55	-0.35	-0.25	
(4) Brazil	-0.60	-0.50	-0.30	-0.10				
(5) Peru	-0.84	-0.74	-0.54	-0.34	-0.14	0.06	0.16	

The transfer from S to B is socially desirable if V_B is greater than 9.5 and is not desirable if V_B is lower than 9.5. Under the market rule, the transfer occurs for all values of V_B, including those in the lower end of the range in which the transfer is not socially desirable. Overall, the market rule leads to the right outcome, or score, in five of the seven scenarios. The MBR does not fare much better, however, as it leads to the right outcome in four of the seven scenarios. Although the MBR does not allow inefficient transfers (unlike the market rule), it prevents the transfer of control under all the

228. Under these assumptions, the implied value of the private benefits of control is between 7.5% and 12.5%. This is in the lower end of the estimates documented in the literature.

229. The entries in Table 6 and Table 7 show results for conditions (1) – (5) for different values of V_B under the set assumptions made regarding the other variables for each table. A negative result (red) means that the condition does not hold and the transfer of control should or will not occur. A positive (green) result means that the condition holds and the transfer of control should or will occur. In situations where an equality arises (value equal to zero, coded as, yellow), it is assumed that the transfer should or will occur. The score indicates the proportion of times that each rule (conditions (2)-(5)) achieves the socially desirable outcome (condition (1)).

230. *See*, *e.g.*, Carlos Berdejo, *Revisiting the Voting Prohibition in Bond Workouts*, 89 TUL. L. REV. 541, 545–48 (2015) (drawing lessons from the Chilean and Brazilian bond markets and regulations to inform possible reforms to the U.S. securities laws).

assumptions, including those in which the transfer is socially desirable. These examples illustrate the drawbacks of each of these rules that were discussed earlier.[231] The modified versions of the MBR fare better under this set of scenarios. Both the Peruvian and Brazilian versions of the modified MBR block all inefficient transfers (i.e., when is V_B low). The Brazilian MBR allows all efficient transfers to go through, thus leading to the right outcome in all seven scenarios, while the Peruvian version does block one efficient transfer, thus leading to the right outcome in six of the seven scenarios.

Now consider a set of scenarios where both S and B derive the same level of private benefits of control (B_B=75; B_S=75) and in which the value of C's equity under B's ownership is at least as high as the value of C's equity under S's ownership. Under these assumptions, a transfer of control will always be socially desirable. Assume that, under S's ownership, the value of C's equity is nine hundred (nine per share) and that its value under B's ownership can range from nine hundred to one thousand (nine to ten per share). Table 7 summarizes whether the transfer occurs under each of the rules under different assumptions regarding the value of C's equity under B management ranging from nine hundred to one thousand (i.e., nine to ten per share).

Table 7. Relative Performance of Transfer Rules[232]

Assumptions: B_S=75; B_B=75; V_S=9

	V_S =							
	9	9.1	9.3	9.5	9.7	9.9	10	Score
(1) Efficient	0.00	0.10	0.30	0.50	0.70	0.90	1.00	--
(2) MR	0.00	0.10	0.30	0.50	0.70	0.90	1.00	7/7
(3) MBR	-0.75	-0.65	-0.45	-0.25	-0.05	0.15	0.25	3/7
(4) Brazil	-0.15	-0.05	0.15			0.75	0.85	6/7
(5) Peru	-0.50	-0.40	-0.20	0.00	0.20	0.40	0.50	5/7

The market rule always leads to the right outcome, as it allows the transfer of control in all scenarios. On the other hand, the MBR fairs poorly in these scenarios, as it blocks efficient transfers when the differences between V_B and V_S are small (since the private benefits of control are being shared with the minority). The MBR leads to the right outcome in three of

231. *See supra* Part 0.

232. *See* Berdejo, *supra* note 230, at 545–48 (drawing lessons from the Chilean and Brazilian bond markets and regulations to inform possible reforms to the U.S. securities laws).

the seven scenarios. Although the Brazilian and Peruvian modified versions of the MBR do not outperform the market rule in the latter's most favorable setting, they do fare better than the traditional version of the MBR, leading to the right outcome in six and five of the seven scenarios respectively.

A more rigorous theoretical analyses of the relative performances of these rules must be conducted before one can draw any final conclusions, and the relative performance of the rules is likely to vary depending on the assumptions made with respect to the different variables involved in the model. However, these examples suggest that, at the very least, the modified versions of the traditional MBR that have been adopted in Latin America can effectively address some of its limitations and provide a more attractive alternative to the market rule.

V. CONCLUSION

Latin America's corporate world is a reflection of the region's colonial past: an economy dominated by a few powerful families and funded by European capital. Why corporate ownership in the region remains so concentrated despite multiple legal reforms and how foreign capital came to replace the state's corporate governance role in the wake of the region's neo-liberal reforms are fascinating and timely questions that warrant further consideration. From a legislative perspective, Latin American countries seem to have made significant strides, at least with regards to regulating the sale of corporate control. The approaches followed in some of the region's countries reject the U.S. and European alternatives, finding a middle ground that seeks to more efficiently protect minority shareholders. The preliminary evidence suggests that some of the region's rules may outperform their U.S. and European counterparts.

These findings add a new layer to the greater debate on how to best protect minority shareholders, a debate that has long been dominated by the U.S. and European perspectives. To this end, future work should try to add an empirical dimension to our understanding of the regulatory framework in the region in this area. Some possibilities include documenting how sale of control transactions are structured, what minority shareholders are offered relative to controlling shareholders, and how often minority shareholders accept these mandatory tender offers. Another possibility is to examine the role of private ordering and the extent to which issuers and investors contract around these rules by, for example, granting minority shareholders greater protections in the bylaws or articles of incorporation.[233]

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233. Recent rulemaking in Brazil's largest stock exchange presents an exciting natural experiment

More broadly, on a methodological level, this study is part of the growing, but still underdeveloped, literature employing the tools of comparative law to further examine the theoretical underpinnings of corporate and securities law and how to import experiences from foreign legal systems to improve a country's laws.[234] This Article highlights why future normative work exploring optimal regulatory schemes should also draw from experiences outside the United States, Europe, and the developed world.[235]

VI. APPENDIX: LIST OF ISSUERS BY COUNTRY

Brazil

Ambev	Gerdau
Banco de Brasil	Hypermarcas
BB Seguridade	ITAU Unibanco Holdings
Bco Santander (Brasil)	ITAUSA Investimentos ITAU
BMFBovespa	JBS
BR Malls	Klabin
Bradesco	Kroton Educacional
Bradespar	Localiza Rent A Car
BRF	Lojas Americanas
CCR SA	Lojas Renner
CESP – Cia Energetica de Sao Paolo	Marfrig Global Foods
CETIP	Metalurgica Gerdau
Cia Brasileaira de Distribuicao	MRV Engenharia e Participacoes
Cia Energetica de Minas Gerais – CEMIG	Multiplan – Empreend Imobiliarios
Cia Paranese de Energia	Natura Cosmeticos
COPEL	Petroleo Brasileiro

to test the value of the protection provided by the traditional MBR relative to the more scaled level of protection afforded by Brazil's default rules.

234. *See, e.g.*, CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (2013); MATHIAS SIEMS & DAVID CABRELLI, COMPARATIVE COMPANY LAW: A CASE- BASED APPROACH (Mathias Siems & David Cabrelli eds., 1st ed. 2013); Ruth V. Aguilera et al., *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US*, 14 CORP. GOVERNANCE: INT'L REV. 147 (2006); John Armour & David A. Skeel Jr., *Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727 (2007).

235. *See* Berdejo, *supra* note 230, at 545–48 (drawing lessons from the Chilean and Brazilian bond markets and regulations to inform possible reforms to the U.S. securities laws).

Cia Saneamento Basico Est Sao Paulo
Cia Siderugica Naciona
Cielo Sa
Cosan
CPFL Energia
Cyrela Brazil Realty
Ecorodovias Infraestructura e Logistica
EDP – Energias do Brasil
Embraer
ENGIE Brasil Energia
Equatorial Energia
Estacio Participacoes
Fibria Celulose
PETROBRAS
Qualicorp
Raia Drogasil
Rumo Loistica Operadora Multimodal
Smiles
Suzano Papel e Celulose
Telefonica Brasil
TIM Participacoes
Tractebel Energia
Ultrapar Participacoes
Usinas Sid de Minas Gerais (USIMINAS)
VALE
WEG

Chile

AES Gener
Aguas Andinas
Antarchile
Banco de Chile
Banco de Creditoo e Inversiones
Banco Santander
Banmedica
Besalco
Bupa
CAP
CENCOSUD
Coca Cola Embonor
Colbun
Compania Cervecerias Unidas
Compania Sudamericana de Vapores
Embotelladora Andina
Empresa Nacional De Electricidad
Empresa Nacional de Telecomunicaciones
Empresas CMPC
Empresas Copec
Parque Arauco
Enersis Chile
Engie Energia Chile
FORUS
Gas Natural Chile
Grupo Security
Inversiones Aguas Metropolitanas
Inversiones La Construccion
Itau CorpBanca
LATAM Airlines Group
Quinenco
Ripley Corp
S.A.C.I. Falabella
Salfacorp
Sidgo Koppers
Sociedad Matriz - Banco de Chile
Sociedad Matriz - SAAM
Sociedad Quimica Minera de Chile
Sonda
Vina Concha y Toro
Vina San Pedro Tarapaca
Watts

Colombia

Almacenes Éxito
Avianca Holdings
Banco de Bogotá
Bancolombia
Celsia
Cementos Argos
Cemex Latam
Colombia Stock Exchange
Corficolombiana
Davivienda
Ecopetrol
Empresa de Energía de Bogotá
Grupo Argos
Grupo Aval
Grupo Nutresa
Grupo Sura
Interconexion
Isagen

Mexico

Arca Continental
Banregio Grupo Financiero
CEMEX
Coca-Cola FEMSA
Controladora Comercial
El Puerto de Liverpool
Empresas ICA
Fomento Economico Mexicano
Genomma Lab Internacional
Gentera
GRUMA
Grupo Aeropuertario del Norte
Grupo Aeropuertario del Pacifico
Grupo Aeropuertario del Sureste
Grupo Bimbo
Grupo Carso
Grupo Elektra
Grupo Financiero Banorte
Grupo Financiero Inbursa
Grupo Financiero Santander Mexico
GRUPO LALA
Grupo Mexico
Grupo SIMEC
Grupo Televisa
Industrial Penoles
Industrias CH
Infraestructura Energetica Nova
Kimberly-Clark de Mexico
Mexichem
OHL Mexico
Promotora y Operadora de Infraestructura
Wal-Mart de Mexico

Peru

Alicorp
Andino Investment Holdings
Austral Group
BBVA Banco Continental
Bolsa de Valores de Lima
Cementos Pacasmayo
Compania de Minas Buenaventura
Compania Minera Atacocha
Corporacion Aceros Arequipa
Credicorp Ltd
Ferreycorp
Grana Y Montero
Inretail Peru Corp
Intercorp Financial Services
Inversiones Centenario
Luz Del Sur
Minera Milpo
Minsur
Refineria la Pampilla (Relapasa)
Sociedad Minera Cerro Verde

Edegel
Empresa Agro Industrial Casa Grande
Empresa Agroindustrial Pomalca
Empresa Siderurgica de Peru
Enel Distribucion Peru
ENGIE Energia Peru
Sociedad Minera el Brocal
Southern Copper Corp
Union Andina de Cementos
Union de Cervecerias Peruanas Backus y Johnston
Volcan Compania Minera