

***By Invitation***

# Some examples of countries where minority shareholders can elect independent directors

**Mike Lubrano**



*Mike Lubrano is Principal,  
Lubrano Advisory Services LLC.*

The OECD’s “Owners of the World’s Listed Companies”, published in 2019, provides a detailed breakdown of the shareholder composition of almost 10,000 companies representing 90% of the global market capitalization.<sup>1</sup> The overall picture it paints is of concentrated ownership in most developed, emerging and frontier markets – “Ownership concentration at the company level is commonly observed across markets (Exhibit 1). In half of the world’s publicly listed companies the three largest shareholders hold 50% of the capital and in three-quarters of the companies do the three largest owners hold more than 30% of the capital. In most markets, private corporations or strategic individuals appear as the largest shareholders in individual companies.”

The potential for misalignment between dominant and minority shareholders is reflected in an impressive array of legal and regulatory mechanisms across jurisdictions intended (with varied degrees of success) to provide the latter with some means to check behavior by the company that disproportionately benefit controllers. Such measures include, but are by no means limited to *ex-ante* requirements for independent director or supermajority or majority-of-the-minority approval of certain types of transactions (especially those where the controlling shareholders may have a conflict of interest) and *ex post* means of redress, for example suits under US law for violation of controlling shareholders’ fiduciary duty to the company or UK company law actions alleging “unfair prejudice”.

Most *ex ante* approaches presuppose some significant component of the Board of Directors that is independent of the dominant shareholders. Director independence is typically defined through criteria that indicate that directors are free from personal, financial, and other relationships with controllers that would compromise their duty to act in the best interests of all shareholders. Despite the reliance on independent directors to look out for the interests of minority shareholders, most legal frameworks do not mandate that independent directors on the Board of public companies be directly elected by the minority shareholders themselves.

---

<sup>1</sup> <http://www.oecd.org/corporate/owners-of-the-worlds-listed-companies.htm>

**Exhibit 1: Ownership concentration by market**



While far from a majority approach, there are a number of jurisdictions that do provide, in one way or another, for the effective selection of independent directors by minority shareholders. What follows are some examples, including a table from OECD’s 2019 Corporate Governance Factbook<sup>2</sup>, of jurisdictions that have made forays in this area (Appendix A). The list of jurisdictions below should not be considered definitive. Nor do we proffer any judgments about the effectiveness of the various approaches. But what follows should provide some indication of the possible variations around this theme.

**BRAZIL**

In October 2001, Brazil introduced Law n. 10.303, which built upon the Corporations Law (Brazilian Companies Law 6.404 of 1976) to include rights for minority shareholders to elect independent directors.<sup>3</sup>

Under the updated Corporations Law, the OECD notes, “shareholders with an aggregate 5 - 10% (depending on the size of the company—the higher the capital base, the lower the percentage threshold to request cumulative voting) or more of the voting share capital have the option of requesting the adoption of a cumulative voting process to elect the members of the Board.”<sup>4</sup>

<sup>2</sup> <https://www.oecd.org/corporate/corporate-governance-factbook.htm>

<sup>3</sup> [http://www.cvm.gov.br/export/sites/cvm/subportal\\_ingles/menu/investors/anexos/Law-6.404-ing.pdf](http://www.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/Law-6.404-ing.pdf)

<sup>4</sup> <https://www.oecd.org/daf/ca/corporategovernanceprinciples/49289126.pdf>

The Corporations Law also entitles minority shareholders to elect one member of the Board and his/her alternate through a separate election. To do so, shareholders must own 15% or more of the voting stock, or own preferred shares without or with restricted voting rights worth at least 10% of the share capital. If neither class of shareholders can meet its individual 15% or 10% threshold, the two classes may group their shares together to reach 10% (so long as they have “continuously held their shares for at least three months prior to the general meeting”).<sup>5</sup>

The above-mentioned provisions were little used until Brazil’s securities regulator (*Comissão de Valores Mobiliários* - CVM) issued Instruction 481 in 2009 that, inter alia, requires companies to formally broadcast as an announcement to the market shareholder director nominations (through the “*Ofício Circular*”, an annual letter with suggestions and interpretations). This essentially provides minority shareholders with access to the company’s proxy.

Subsequently, the CVM approved a distance voting system under Instruction 561 of 2015, which specifies the period before the meeting to receive nominations. The distance voting system suffered significant growing pains in the first few years but today facilitates the exercise of the minority shareholder rights described above.

## **CHILE**

Chile’s Corporate Governance law approved in 2009 (Law n. 20.382) specifies the definition of independent directors and criteria for how they must be elected. Directors in Chile are not considered “independent” unless they have been elected with the approval of minority shareholders.

Prior to 2009, independent directors were defined as those elected exclusively by minority shareholders through cumulative voting practices; controlling shareholders did not participate in electing independent directors. The 2009 law ended this requirement and established “additional detailed economic and relational criteria to determine the eligibility of candidates to be designated as independent.” For instance, “a person cannot be an independent director when there has been, over the previous 18 months, a series of links with the company including economic, professional, credit or commercial dependency, as well as any kinship relationship.”<sup>6</sup> Although independent directors now do not need to be exclusively elected by minority shareholders, non-controlling shareholders’ rights are protected by Law 18045 (1981) which designates that any shareholder or group of

---

<sup>5</sup> [http://www.cvm.gov.br/export/sites/cvm/subportal\\_ingles/menu/investors/anexos/Law-6.404-ing.pdf](http://www.cvm.gov.br/export/sites/cvm/subportal_ingles/menu/investors/anexos/Law-6.404-ing.pdf)

<sup>6</sup> “Corporate Governance in Chile 2010.” OECD. Page 53.

[https://books.google.com/books?id=ikHIVTOM1O4C&pg=PA53&lpg=PA53&dq=independent+director+definition+chile&source=bl&ots=cKe0DqxUIT&sig=I9uYf2EBkHs5tfZLaJ\\_xlREjuPs&hl=en&sa=X&ved=0ahUKewjk--uH-vnTAhVCbSYKHWPYBIEQ6AEINzAE#v=onepage&q=independent%20director%20definition%20chile&f=false](https://books.google.com/books?id=ikHIVTOM1O4C&pg=PA53&lpg=PA53&dq=independent+director+definition+chile&source=bl&ots=cKe0DqxUIT&sig=I9uYf2EBkHs5tfZLaJ_xlREjuPs&hl=en&sa=X&ved=0ahUKewjk--uH-vnTAhVCbSYKHWPYBIEQ6AEINzAE#v=onepage&q=independent%20director%20definition%20chile&f=false)

shareholders that together control 10% or more of a company has the right to elect a director.<sup>7</sup>

In practice, however, controlling shareholders frequently find themselves asking minority shareholders to nominate a director. Article 146 of Chile's Companies Act (*Ley de Sociedades Anónimas*, Law 18.046) determines when a director is considered to have an interest in a transaction for the purpose of applying the procedure to approve related party/affiliated transactions regulated in article 146 of the same law. The provision is contained in the third paragraph of article 44 of the Law and states a presumption that a director has an interest in a transaction involving the controlling shareholder (and or its affiliates-/related parties) if the director would not have been elected without the votes of the controlling shareholder (and/or affiliates/related parties of the controlling shareholder).

Chilean companies "must elect at least one independent director to their board using a plurality voting system."<sup>8</sup> In practice, the independent director is often nominated by the controlling shareholder if minority shareholders do not coordinate.<sup>9</sup>

## ITALY

Director elections in Italy employ the *Voto di Lista* mechanism, akin to slate elections. Pursuant to Article 147-ter of Italy's Consolidated Law on Financial Intermediation, at least one member of the Board of Directors of public companies must be elected from the minority shareholder-nominated slate of directors that obtains the largest number of votes.<sup>10</sup> Rules issued by Consob, Italy's securities regulator, apply the same principal to election of members of the statutory audit board ("*collegio sindacale*") of public companies. According to the *Voto di Lista* mechanism, issuers must publish the lists of directors nominated by the company's Board and those nominated by one or more groups of minority shareholders 21 days prior to the meeting.

Italy's association of asset managers, *Assogestioni – associazione del risparmio gestito*,<sup>11</sup> has played a key role in recent years in raising consciousness among institutional investors of their rights under the *Voto di Lista* mechanism and in making election of directors by minority shareholders a permanent fixture of Italian corporate governance.

---

<sup>7</sup> [https://www.leychile.cl/Consulta/Exportar?radioExportar=Normas&exportar\\_formato=pdf&nombearchivo=LEY-18045\\_22-OCT-1981&exportar\\_con\\_notas\\_bcn=True&exportar\\_con\\_notas\\_originales=True&exportar\\_con\\_notas\\_al\\_pie=True&hddResultadoExportar=29472.2014-10-10.0.0%23](https://www.leychile.cl/Consulta/Exportar?radioExportar=Normas&exportar_formato=pdf&nombearchivo=LEY-18045_22-OCT-1981&exportar_con_notas_bcn=True&exportar_con_notas_originales=True&exportar_con_notas_al_pie=True&hddResultadoExportar=29472.2014-10-10.0.0%23)

<sup>8</sup> [http://www.glasslewis.com/wp-content/uploads/2017/04/Guidelines\\_MILA.pdf](http://www.glasslewis.com/wp-content/uploads/2017/04/Guidelines_MILA.pdf)

<sup>9</sup> <https://www.oecd.org/daf/ca/corporategovernanceprinciples/49289126.pdf>

<sup>10</sup> <https://www.issgovernance.com/file/policy/2015europesummaryvotingguidelines.pdf>

<sup>11</sup> <https://www.assogestioni.it/>

**MEXICO**

Mexican Securities Market Law provides minority shareholders that in the aggregate represent 10% of voting and limited voting shares the right to appoint a board member.<sup>12</sup> The 10% threshold was initially enacted when Mexican company law provided for Boards to be composed of eleven members and so amounted to something commensurate with cumulative voting.

In practice, however, the charters of most listed Mexican firms now include charter provisions that require Board approval for any shareholder to hold or vote more than a certain percentage of shares, with this threshold always below 10% and frequently lower.<sup>13</sup> These charter provisions in effect empower controllers to keep off the Board the nominees of any but the most determined groups of minority shareholders. Their legality has been challenged, with investors petitioning the Mexican securities regulator (*Comisión Nacional Bancaria y de Valores* – CNBV) and the Mexican Stock Exchange to require listed companies to delete them. So far, neither the CNBV nor the Exchange has ruled on such petitions.

**SWEDEN**

The Swedish Code of Corporate Governance, while not formally part of Nasdaq Stockholm's rules and therefore not legally binding, set out recommendations of best practices. The Code was updated in November 2015 and ensures minority shareholder rights to elect at least two independent directors.

At least two of the directors who are independent of the company and its management must also be independent of the company's major shareholders. "Major shareholders" are shareholders directly or indirectly controlling 10% or more of the shares or votes in the company.<sup>14</sup> The nomination committee's nominations for the chair and other directors are to be presented in the AGM notice (at least four weeks prior to the AGM) and on the company's website. At the AGM any shareholder may make new proposals regarding the number of directors and the remuneration thereof.<sup>15</sup>

The Swedish Code of Corporate Governance recommends that Swedish companies establish a nomination committee. This committee should have at least three members, which in practice tend to represent major shareholders.<sup>16</sup> The Code specifies, "At least one member is to be independent of the company's largest shareholder, in terms of votes or any group of

---

<sup>12</sup> <https://www.oecd.org/daf/ca/corporategovernanceprinciples/42098080.pdf>

<sup>13</sup> <http://www.prnewswire.com/news-releases/cartica-management-llc-urges-mexican-regulators-exchange-and-issuers-to-abolish-shareholder-unfriendly-practices-and-charter-provisions-300398550.html>

<sup>14</sup> [http://www.corporategovernanceboard.se/UserFiles/Archive/496/The\\_Swedish\\_Corporate\\_Governance\\_Code\\_1\\_December\\_2016.pdf](http://www.corporategovernanceboard.se/UserFiles/Archive/496/The_Swedish_Corporate_Governance_Code_1_December_2016.pdf)

<sup>15</sup> [https://group.skanska.com/4ad467/siteassets/corporate-governance/special\\_features\\_of\\_swedish\\_corporate\\_governance\\_by\\_sven\\_unger.pdf](https://group.skanska.com/4ad467/siteassets/corporate-governance/special_features_of_swedish_corporate_governance_by_sven_unger.pdf)

<sup>16</sup> [http://www.glasslewis.com/wp-content/uploads/2017/04/Guidelines\\_SWEDEN.pdf](http://www.glasslewis.com/wp-content/uploads/2017/04/Guidelines_SWEDEN.pdf)

shareholders who act in concert in the governance of the company.”<sup>17</sup> Two additional provisions protect minority shareholder influence on nominations: members of the Board of Directors may not constitute a majority of the nominations committee, and no more than one Director representing a major shareholder may be on the nominations committee.

#### **TURKEY**

Turkey’s company law allows, but does not require, a listed company’s articles of association to provide shareholders who (together with related parties) own less than 5% of the company’s stock the right to elect one or more directors to the Board. Such provisions must limit the percentage of the Board elected by such shareholders to no more than half its members. The directors elected through this mechanism may be elected by individual minority shareholders or collectively, provided again that none of the shareholder participating in such election controls more than 5% of the total shares (together with any related parties).

*The author wishes to thank Julia Hermann, Senior Strategy Analyst at Cartica Management, for her comments.*

---

<sup>17</sup>[http://www.corporategovernanceboard.se/UserFiles/Archive/496/The\\_Swedish\\_Corporate\\_Governance\\_Code\\_1\\_December\\_2016.pdf](http://www.corporategovernanceboard.se/UserFiles/Archive/496/The_Swedish_Corporate_Governance_Code_1_December_2016.pdf)

## Appendix A: Board representation of Minority shareholders

Jurisdiction		Requirement / recommendation
	Required for re-election	
<b>Brazil</b>	Allowed	<p><b>One or two</b> members of the board may be elected separately by minority shareholders, pursuant to the following rules:</p> <ul style="list-style-type: none"> <li>- Minority shareholders holding voting shares that represent 15% or more of the voting capital are entitled to appoint one member for the board; and</li> <li>- Minority shareholders holding non-voting preferred shares or preferred shares with limited voting rights that represents 10% or more of the total capital stock are entitled to appoint one member to the board</li> <li>- if neither the holders of shares with voting rights nor the holders of preferred shares without voting rights or with restricted voting rights achieve the percentages mentioned above, they are allowed to aggregate their shares in order to jointly elect a member for the board of directors, as long as their shares represent at least 10% of share capital; and</li> <li>- in the case of state-owned enterprises, minority shareholders have the right to elect one representative for the Board with no minimum share capital requirement.</li> </ul>
<b>India</b>	Allowed	Companies Act, 2013 provides for nomination of one director by small shareholders. In this context, a small shareholder is someone holding shares of nominal value of not more than twenty thousand rupees.
<b>Israel</b>	Recommended for initial appointment Required for re-election	<b>All</b> outside directors must be appointed by a majority of the minority.
<b>Italy</b>	Required	<b>At least one</b> board member must be elected from the slate of candidates presented by shareholders owning a minimum threshold of the company's share capital. His/her appointment is not a necessary condition for the valid composition of the board (i.e. the board composition is still valid if only one slate has been presented and the board is consequently made up of only directors elected from that slate).
<b>Portugal</b>	Required	The articles of association of public listed companies must provide that: i.) a <b>maximum of one-third</b> of board members are appointed within candidates proposed by a group of shareholders holding between 10 and 20% shareholding; or ii) that minority shareholders representing at least 10% of the share capital appoint <b>at least one</b> director.
<b>Spain</b>	Allowed	Shares that are voluntarily grouped to constitute share capital amounting to or exceeding the sum resulting from dividing the capital by the number of members of the board of directors, shall be entitled to designate the number of members deduced from the proportion of share capital so grouped, rounding any fractions. In other words, depending on the number of directors, shareholders can pool their shares in order to appoint a number of directors to the board in proportion to the share capital they hold in accordance with the proportional representation system For instance, if minority shareholders possess 100 shares and the board has 12 members, they may pool the 100 shares divided by 12 in order to designate a member of the board.
<b>Turkey</b>	Allowed	The minority shareholders (holding 5% of the equity capital for listed companies) may be given the right to be represented at the board ( <b>maximum half</b> of the members of the board can be elected in this way, provided that the articles of association of the company allow.)
<b>United Kingdom</b>	Required for premium listed companies with controlling shareholders	Premium listed companies with controlling shareholders must ensure that their constitutions provide for the election of independent directors by a <b>dual voting structure</b> . This structure requires that <b>independent directors must be separately approved both by the shareholders as a whole and the independent shareholders</b> as a separate class.

Source: OECD Corporate Governance Factbook 2019

## **Disclaimer**

This document has been prepared by Institutional Investor Advisory Services India Limited (IiAS). The information contained herein is solely from publicly available data, but we do not represent that it is accurate or complete and it should not be relied on as such. IiAS shall not be in any way responsible for any loss or damage that may arise to any person from any inadvertent error in the information contained in this report. This document is provided for assistance only and is not intended to be and must not be taken as the basis for any voting or investment decision. The user assumes the entire risk of any use made of this information. Each recipient of this document should make such investigation as it deems necessary to arrive at an independent evaluation of the individual resolutions referred to in this document (including the merits and risks involved). The discussions or views expressed may not be suitable for all investors. The information given in this document is as of the date of this report and there can be no assurance that future results or events will be consistent with this information. This information is subject to change without any prior notice. IiAS reserves the right to make modifications and alterations to this statement as may be required from time to time. However, IiAS is under no obligation to update or keep the information current. Nevertheless, IiAS is committed to providing independent and transparent recommendation to its client and would be happy to provide any information in response to specific client queries. Neither IiAS nor any of its affiliates, group companies, directors, employees, agents or representatives shall be liable for any damages whether direct, indirect, special or consequential including lost revenue or lost profits that may arise from or in connection with the use of the information. The disclosures of interest statements incorporated in this document are provided solely to enhance the transparency and should not be treated as endorsement of the views expressed in the report.

## **Confidentiality**

This information is strictly confidential and is being furnished to you solely for your information. This information should not be reproduced or redistributed or passed on directly or indirectly in any form to any other person or published, copied, in whole or in part, for any purpose. This report is not directed or intended for distribution to, or use by, any person or entity who is a citizen or resident of or located in any locality, state, country or other jurisdiction, where such distribution, publication, availability or use would be contrary to law, regulation or which would subject IiAS to any registration or licensing requirements within such jurisdiction. The distribution of this document in certain jurisdictions may be restricted by law, and persons in whose possession this document comes, should inform themselves about and observe, any such restrictions. The information provided in these reports remains, unless otherwise stated, the copyright of IiAS. All layout, design, original artwork, concepts and other Intellectual Properties, remains the property and copyright of IiAS and may not be used in any form or for any purpose whatsoever by any party without the express written permission of the copyright holders.

## **Other Disclosures**

IiAS is a SEBI registered research entity (proxy advisor registration number: INH000000024) dedicated to providing participants in the Indian market with independent opinions, research and data on corporate governance issues as well as voting recommendations on shareholder resolutions of about 750 listed Indian companies (<https://www.iiasadvisory.com/iias-coverage-list>). Our products and services include voting advisory reports, standardized services under the Indian Corporate Governance Scorecard, and databases ([www.iiasadrian.com](http://www.iiasadrian.com) and [www.iiascompayre.com](http://www.iiascompayre.com)). There are no significant or material orders passed against the company by any of the Regulators or Courts/Tribunals.

This article is a commentary on general trends and developments in the securities market.

**About IiAS**

Institutional Investor Advisory Services India Limited (IiAS) is an advisory firm, dedicated to providing participants in the Indian market with independent opinions, research and data on corporate governance issues as well as voting recommendations on shareholder resolutions for about 800 companies that account for over 95% of market capitalization.

IiAS provides bespoke research, valuation advisory services and assists institutions in their engagement with company managements and their boards.

IiAS has equity participation by Aditya Birla Sunlife AMC, Axis Bank, Fitch Group Inc., HDFC, ICICI Prudential Life Insurance, Kotak Mahindra Bank, RBL Bank Limited, Tata Investment Corporation, UTI Asset Management Company Limited and Yes Bank.

IiAS is a SEBI registered research entity (proxy advisor registration number: INH000000024).