



**Organisation for Economic Co-operation and Development**

*in co-operation with the World Bank Group*

**The Legal, Regulatory and Institutional Framework for  
Enforcement Issues in Latin America:  
A comparison of Argentina, Brazil, Chile, Colombia, Panama and  
Peru**

*The Tenth Meeting of the  
Latin American Corporate Governance Roundtable*

*1-2 December 2009*

*Santiago, Chile*

**Acknowledgements:** This synthesis report was prepared by Andreas Grimminger of eStandardsForum/Financial Standards Foundation, with assistance from Carolina Azar and contributions from Cheng Feng and Anuja Pande of the same institution, based upon questionnaire results for six countries. The OECD wishes to thank the numerous individuals from the regulatory institutions who provided information to respond to these questionnaires.

# **The Legal, Regulatory and Institutional Framework for Enforcement Issues in Latin America**

## **A comparison of Argentina, Brazil, Chile, Colombia, Panama and Peru**

### **A follow-up to the 2004 comparison paper**

*"How effectively agreements are enforced is the single most important determinant of economic performance."* Douglass North, Nobel Laureate in Economics

This paper sets out the results of an OECD survey submitted to the regulators responsible for the enforcement of corporate governance-related provisions in six Latin American markets (Argentina, Brazil, Chile, Colombia, Panama and Peru)<sup>1</sup>. The comparison is a follow-up to a similar survey in 2004. This year's survey was expanded by including Panama and new survey questions aimed at identifying strengths and weaknesses of each framework.

The survey and subsequent comparison paper are intended to gauge the degree of enforcement of legal provisions related to the recommendations put forward in the OECD's Principles of Corporate Governance. It employs a broad definition of what constitutes corporate governance-related offenses, following the OECD's Principles.<sup>2</sup> In aiming to present a usable comparison of corporate governance-related enforcement practices in the region, the paper faces the challenge of trying to determine the effectiveness of different enforcement practices. This is in part due to the difference in institutions involved in the enforcement across the participating countries, the different types of offenses that different countries characterize as corporate governance offenses, the distinct administrative procedures and sanctions, and lastly the varying ability to release information.

The purpose of this paper is hence less to be a quantitative comparison and certainly is not meant to serve as an assessment of the quality of enforcement practices across different jurisdictions. Rather, it can hopefully be used to identify common and differing approaches to enforcement challenges in the region as well as common objectives, obstacles and initiatives. The annex to this report provides more details from the answers of the regulators. The original answers can be made available upon request.

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<sup>1</sup> The Mexican regulator was invited to participate in the survey. However, it declined, citing relatively recent changes in its corporate governance framework and legal constraints related to confidentiality and disclosure of enforcement actions for a significant period of time.

<sup>2</sup> The scope of the OECD Principles ranges from more market-related offenses such as share price manipulation and insider trading to more company-related ones such as shareholder rights, disclosure practices and fiduciary duties of company's institutions.

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## **Executive Summary: Key Findings & Main Developments since 2004**

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### **Institutional Framework**

- Sizable budget increases across all countries (from 36% in Chile to 138% in Argentina) with the exception of Peru; staff numbers have grown everywhere except for Peru, most notably in Brazil and Argentina (plus 37% and 34% respectively).
- The Superintendencia Financiera has acted as the unified market and financial regulator in Colombia since the end of 2005.
- Since 2008, a centralized enforcement department, the Superintendencia de Processos Sancionadores, has been active in Brazil.
- There is a continued lack of specialized judicial institutions; however, there is a tentative movement towards the establishment of dedicated specialized administrative agencies with quasi-judicial powers.
- Appeals processes are still lengthy across most countries.

### **Administrative Procedures**

- The “Termos de Compromiso”, settlements that allow Brazil's Securities and Exchange Commission (CVM) to cease an administrative proceeding if the accused party commits to correcting the irregularity and pays a fine, are on the rise in Brazil.
- The number and amount of fines and sanctions are difficult to compare, due to different conventions of reporting and categorizing fines, sanctions and distinct administrative procedures, as well as legal and administrative reporting constraints.
- However, where numbers are comparable, such as in Brazil and Chile, an upward trend in the number of sanctions, if not the amounts being fined, is apparent.

### **Self-Regulatory enforcement**

- The Autoregulador del Mercado de Valores (AMV) took over SRO functions from the Bolsa de Valores de Colombia in 2006, acting as a self-regulator for financial intermediaries.
- Since 2009, the Bolsa de Valores de Lima no longer acts as an SRO.

### **Areas of Strength & Priorities for Improvement**

- Minority shareholder rights and related party transactions were seen by all participants as two of the highest priorities for improvement.
- Insider trading and the use of privileged information were emphasized by some to be an area of strength and by others to be a priority for improvement.
- The enforcement of disclosure requirements is seen as both a strength and a weakness of the enforcement framework by different participants.

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## **Trends & Conclusions**

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- Significant increases in budgetary resources as well as staffing for most regulators; still, adequate resources continue to be a concern for most regulators.
- Judicial process is seen as key obstacle to effective enforcement.
- Despite the creation of the AMV in Colombia, the role of SROs appears to be stagnant, and with the exception of Brazil, focused on financial intermediaries.
- The identification of strengths and priorities by the participating regulators suggests possibilities for cooperation and exchange of information on successfully implemented programs in the areas of insider trading, use of privileged information, and enforcement of disclosure requirements.
- The need to improve efforts to combat abusive related party transactions is a clear additional priority for protection of minority shareholder rights.

## I. Institutional Framework for Enforcement

The main change in the institutional framework for the enforcement of corporate governance (CG) in the region has been the merger in Colombia of the Superintendencia de Valores and the Superintendencia Bancaria into the Superintendencia Financiera (SFC) in November 2005. The other five participants in the survey still have dedicated Securities Regulators. No changes occurred with respect to the appointment and potential removal of the commission heads. In all cases they are appointed by the President/Executive Branch and as was the case five years ago, the head can be removed freely in Chile and Colombia, while Argentina, Brazil, Peru and Panama grant fixed-term appointments between 3 and 7 years.

*Main institutional change has been the creation of Colombia's Superintendencia Financiera*

**Table 1: Main enforcement institutions**

	Argentina	Brazil	Chile	Colombia	Panama	Peru
<b>Main enforcement body</b>	National Securities Commission (CNV)	Securities and Exchange Commission (CVM)	Superintendencia of Securities and Insurance (SVS)	Colombian Financial Superintendency (SFC)	National Securities Commission (CNV)	National Securities Commission (CONASEV)
<b>Budget (2008) (million US\$)<sup>3</sup></b>	8.63	90.67	16.69	58.25	1.90	8.6
<b>increase in Budget 04-08<sup>4</sup></b>	138%	84.6%	36%	NA	NA	-17.2%
<b>No of employees (2004 &amp; 2009)</b>	142 190	363 500	246 262	NA 732	44 53	144 142
<b>Increase in Staffing</b>	34%	37%	6.5%	NA	20%	- 1.3%
<b>Listed Companies (Sep 09)<sup>5</sup></b>	108	387	236	88	33	238
<b>Enforcement staff</b>	14	30	10	28	5	NA

**Budgets** have seen sizable increases over the last few years. While a large amount of the change in dollar terms since 2004 can be attributed to the strengthening of exchange rates throughout the region, the increase in local currency terms, adjusted for inflation, is still noteworthy. Unsurprisingly, Brazil posts the highest 2008 budget at US\$90.6 million (up 84% in adjusted local currency terms), followed by the merged Colombian regulator at US\$58.2 million, Chile with US\$16.6 million (up 36%), Argentina at US\$8.63 million (up 138%) Peru at US\$8.6 million (down 17%), and Panama at US\$1.9 million (no comparison numbers). These budget figures do not take into account differences in the cost of living, and have not been reviewed for

*Highest budget in Brazil; increase in adjusted local currency terms across all countries except Peru*

<sup>3</sup> exchange rate as of October 1, 2008

<sup>4</sup> Budgetary increase was calculated by adjusting budget in local currency terms for inflation and then calculating increase. Source IMF: Inflation, average consumer prices (Index: Year 2000 = 100). Historical exchange rate for 2004 budget where necessary was October 1, 2004.

<sup>5</sup> Source: FIAB – Informe Mensual – Septiembre 2009. The number of listed companies is intended to give an approximation of the market size, and should not be put into direct relation to the number of employees at each supervisor, as they do not necessarily reflect the number of people dedicated to supervise listed companies and corporate governance.

differences such as overhead costs, ownership vs. rent of facilities, differing institutional responsibilities, etc. **Staff numbers** might be more meaningful. Colombia's SFC has 732 current employees, but due to the merger, numbers are not comparable to 2004. Brazil's Comissão de Valores Mobiliários (CVM) has a staff of 500 (plus 37%), Chile 262 (plus 6.5%), Argentina 190 (plus 34%), Peru 142 (minus 1.3%), and Panama 53 (plus 20%).

*Staff numbers have been growing at most regulators*

With respect to dedicated **enforcement departments**, significant change occurred in Brazil. The Superintendência de Processos Sancionadores (Sanction Processing Department, SPS) was created in 2008 to unify and accelerate enforcement activities. It works with a select group of federal attorneys to process the cases brought along by the CVM's different divisions. The SPS has 22 inspectors and 8 prosecutors at the CVM's branch of the Federal Attorney Office. In addition, the Inspections Department, responsible for external inspections has a staff of 42. Peru spreads enforcement responsibilities over four divisions and additionally has a three-member Tribunal Administrativo dealing specifically with sanctioning CG violations. Colombia, with its unified regulator, also now has two divisions responsible for CG enforcement. The 15-member Dirección de Gobierno Corporativo supervising all financial sector participants, and the 13-member Dirección de Supervisión a Emisores responsible for issuers of securities. Argentina, Chile and Panama have centralized enforcement departments with 14, 10 and 5 employees respectively.

*New Sanction Processing Department centralizes enforcement in Brazil*

The **judicial process** continues to be a key concern (see below) for the successful enforcement of corporate governance. Responses for all six countries indicated that apart from a few exceptions, judges do not receive training in capital market matters. Consequently, there are no specialized courts. However, there are tentative signs pointing towards the establishment of dedicated specialized administrative agencies with quasi-judicial powers. Brazil still has a specialized commercial court in Rio de Janeiro, which to date has not been replicated elsewhere in Brazil. Panama has, following the 2003 Financial Crimes Law, three public prosecutors who work directly with a specified court and can request the support of the relevant supervisory authorities, although they seem to be focusing more on criminal investigations. Similarly, Colombia has the Fiscalía General de la Nación, which is a unit investigating financial crimes. The Colombian answer points out that corporate governance disputes are normally settled in the Arbitration Court subject to clauses established in the company by-laws. In Peru, the above-mentioned Tribunal Administrativo of the Comisión Nacional Supervisora de Empresas y Valores (CONASEV) is an administrative body specialized on financial and capital market matters.

*Tentative signs pointing towards the establishment of dedicated specialized administrative agencies with quasi-judicial powers*

Answers to the **length of appeal processes** were incomplete. The Chilean Superintendencia de Valores y Seguros (SVS) reports that appeals questioning the legality of a sanction take less than six months, while appeals of fines take an average of six years and up to a maximum of ten years. Peru reports three years on average, Colombia between 655 days for regular procedures and up to 999 days for disciplinary procedures. Information provided for Argentina by the Instituto Argentino para el Gobierno Corporativo suggests an average between three months and one year. In Panama it takes at least a year, and while Brazil's answer did not include numbers, it pointed out that typically cases are settled between the parties prior to conclusive judgments in order to avoid the usually lengthy appeals process.

*Incomplete data on length of appeal processes, where available pointing to long procedures*

For comparison purposes, the World Bank's Doing Business factor for Enforcing Contracts is used as one indicator of the general environment with respect to enforcement. The World Bank's factor consists of three dimensions measuring the efficiency of the judicial system in resolving a commercial dispute (before local courts).<sup>6</sup>

**Table 2: Doing Business 2010 – Enforcing Contracts**

<b>Enforcing Contracts</b>	<b>Argentina</b>	<b>Brazil</b>	<b>Chile</b>	<b>Colombia</b>	<b>Panama</b>	<b>Peru</b>
<b>Procedures (No.)</b>	36	45	36	34	31	41
<b>Time (days)</b>	590	616	480	1346	686	428
<b>Cost (% of claim)</b>	16.5	16.5	28.6	52.6	50	35.7
	<b>Mexico</b>	<b>Norway</b>	<b>South Korea</b>	<b>United States</b>	<b>Latin America &amp; Caribbean</b>	<b>OECD Average</b>
<b>Procedures (No.)</b>	38	33	35	32	39.7	30.6
<b>Time (days)</b>	415	280	230	300	707	462.4
<b>Cost (% of claim)</b>	32	9.9	10.3	14.4	31.3	19.2

As can be seen, while the number of procedures are more or less similar across the region, time and cost vary widely and are significantly over the OECD average and the numbers of leading economies in this area, such as Norway, South Korea and the United States.

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<sup>6</sup> For a more detailed explanation visit:  
<http://www.doingbusiness.org/MethodologySurveys/EnforcingContracts.aspx>.

## II. Administrative procedures

All six countries surveyed have clear and detailed **due process to sanction**. In Argentina, Brazil and Panama, the Board of Commissioners takes the ultimate decision to fine or sanction. In Colombia, the two commissioners entitled to sanction are the Superintendente Delegado for conglomerate risk and corporate governance for all financial sector participants; and the Superintendente Delegado for issuers of securities. In Peru, sanctions proposals are submitted to the Tribunal Administrativo of CONASEV which makes the final decision. In Chile this authority legally rests with the superintendent who has established a 3-member committee to decide cases.

**Principal offences** are widely similar across countries. **Insider trading** on privileged information is a principal offence in all countries surveyed. **Price and market manipulation** in Argentina, Chile, Colombia, Panama and Peru; Violation of **disclosure requirements** in Argentina, Brazil, Colombia and Peru; **Breach of fiduciary duties** of directors in Brazil and Chile. Abuse of **minority shareholder rights** is a principal offence in Peru. Furthermore, since 2005 Peru has included the requirement for listed companies to disclose compliance with CONASEV's corporate governance principles as part of the general disclosure requirements.

*Principal offences are widely similar; an exception is the compulsory CG code compliance statement as part of disclosure requirements in Peru*

### Sanctions by the Securities Regulators

#### *Summary Findings*

The amount of information provided on **finances and sanctions** has been very uneven in this year's survey. This applies to the level of detail of answers regarding the types of fines and sanctions, as well as the type of violation they were issued for, and the range of dates. To ensure comparability, only sanctions leading to fines and suspensions/disqualifications were included, and reprimands/warnings were excluded.

Despite above mentioned caveats, some valuable insights can be gained from the data provided. Brazil, Chile and Peru have seen a significant **increase in the number of sanctions** imposed compared to the survey five years ago. When comparing the corporate governance related sanctions by Colombia's SFC to the sanctions issued by its predecessor, a slight upward tendency can be identified. In Argentina this does not seem to be the case, and Panama had no comparison data. Brazil, and to a slightly lesser degree Chile, appear to have the **ability to issue the highest fines** by a wide margin in the period surveyed, thereby confirming the findings from five years ago. Data was particularly incomplete in this section, however. In terms of **number of fines appealed**, and the **number of appeals processed**, stark differences emerge in Brazil, Chile and Peru. While Brazil has a startling 70% of cases appealed and only 6% of these appeals processed, Chile and Peru present an almost reverse picture. Both countries have low number of appeals at 9% and 33% respectively; and an impressive 55% and 48% of these appeals have been processed already. A variety of reasons could explain these differences and should be an interesting subject for further discussion at the Roundtable and possible research.

*Brazil, Chile and Peru show significant increase in number of sanctions from 2004; high number of appeals and slow appeals process in Brazil, almost reverse picture in Chile and Peru*

**Table 3: Fines and Sanctions**

	Argentina	Brazil	Chile	Colombia	Panama	Peru
<b>Administrative Procedures</b>						
<b>No of sanctions 2006-2009</b>	20 <sup>7</sup>	542 <sup>8</sup>	320 <sup>9</sup>	130 <sup>10</sup> (SFC)	7 <sup>11</sup>	334 <sup>12</sup>
<b>No of Sanctions 2001 to 2003</b>	27	319	85	82 Supervalores	NA	128
<b>No. of appeals to regulator's decision (time span)</b>	10 (06-09)	318 (06-09)	29 (07-09)	85 (SFC) <sup>13</sup> (06-09)	5 (06-08)	111 (06-09)
<b>Appeals dismissed or upheld, percentage of fines appealed and percentage of appeals processed</b>						
<b>Status of appeals</b>	10 pending	9 upheld, 10 dismissed, 299 pending	1 upheld, 15 dismissed, 13 pending	16 upheld, 3 dismissed, 66 pending	2 dismissed, 3 pending	54 dismissed, 57 pending
<b>% of fines appealed</b>	46%	70%	9%	35%	71%	33%
<b>% of appeals processed</b>	0%	6%	55%	22%	40%	48%
<b>Total Amount of Fines</b>						
<b>2008</b>	US\$70,685	US\$185.7 million	US\$2.34 million	US\$277,617 (06-08)	Collection pending	No info
<b>2007</b>	US\$315,056	US\$29.66 million <sup>14</sup>	US\$943,286		US\$15,000	No info
<b>Average in practice</b>						
<b>2008</b>	US\$51,823 (06 -09)	US\$1.46 million	US\$17,730	US\$1,400 (2009 inst.)	US\$1,000-\$20,000	No info
<b>2007</b>		US\$ 264,905	US\$6,936	US\$11,400 (2009 ind.)	NA	No info
<b>Highest actual</b>	US\$ 260,335	US\$38.5 million	US\$1.49 million	No info	No info	No info
<b>Market Cap, bn US\$<sup>15</sup></b>	42.5	1,173.1	203.2	149.1	7.1	66.7

<sup>7</sup> When including reprimands, this number rises to 33

<sup>8</sup> When including reprimands, this number rises to 665

<sup>9</sup> 2007 to June 2009

<sup>10</sup> The SFC reported 222 institutional and 22 personal sanctions, but qualified only 120 of the institutional sanctions as being relevant violations of the OECD's principles, and 12 of the 22 personal sanctions as reprimands.

<sup>11</sup> 2006 to 2008

<sup>12</sup> The numbers from Peru include reprimands, as well as fines and suspensions.

<sup>13</sup> The number of appeals is in relation to the total of 242 sanctions imposed by the SFC (also taking into account non-corporate governance related violations).

<sup>14</sup> Exchange rate as of October 1, 2009 (1 US\$ = 1.78 BRL)

<sup>15</sup> As of September 2009. Source: FIAB – Informe Mensual – Septiembre 2009

### *Summary of sanctions by country*

**Argentina's** CNV issued a total of 20 sanctions, 18 fines, 1 suspension and 1 disqualification, excluding reprimands, between 2006 and June 2009. This compares to 27 sanctions between 2001 and 2003. The highest fine during the course of the survey was imposed in 2009, and amounted to approximately US\$260,000. The average stood at around US\$51,800. Ten appeals are pending at the judicial level, of which two are cases of where the CNV has appealed the court's dismissal of the case. All appeals filed are still pending.

*Argentina: Lower number of sanctions than in previous survey*

**Brazil** issued a total of 542 sanctions as the result of an administrative procedure in the form of fines and suspensions between 2006 and July 2009. This represents a significant increase from 319 fines and suspensions between 2001 and 2003. The 542 sanctions consist of 448 fines and 94 suspensions or disqualifications from activities. Of the total of 542 fines and suspensions, 25% were issued for disclosure violations, underlining the CVM's focus on this area. An interesting feature of the Brazilian enforcement system is the *Termos de Compromiso*, or settlements. It allows the CVM to cease an administrative proceeding if the accused party commits to correcting the irregularity identified. Each settlement can involve more than one violation and more than one party/signatory. The signers of a settlement are not formally considered offenders, but have to pay a penalty to the CVM or affected party.

*Brazil: More sanctions issued than in previous survey, and growing significance of the Termos de Compromiso, high percentage of appeals, very slow appeal process*

The *Termos de Compromiso* have seen a significant increase over the time period covered in the survey. While there were only 19 *Termos* with 96 signatories in 2006, the number increased to 64 *Termos* with 159 signatories in 2007, and was again 64 in 2008, but with fewer signatories. The *Termos* come with a significant price tag. In 2008, the lowest *Termo* signed was just under US\$10,000, the average at US\$53,026 and the highest at a just over US\$3 million. In comparison, the lowest fine in 2008 was just under US\$6,000. However, the average fine in 2008 stood at around US\$1.5 million and the highest imposed at US\$38.5 million. In terms of appeals, Brazilian numbers indicate that the majority of people fined by the CVM appeal the decision (72% in 2006, 75% in 2007, and 87% in 2008), but the significant number of *Termos* signed might partially explain this high number, since offenders who consider their chances low in an appeals process might be more inclined to sign a settlement. Regarding the results of the appeal process, the main finding is the slowness of the process. Of the 318 appeals filed between 2006 and 2009, only 19 have been considered as of July 2009.

In **Chile**, 320 sanctions were imposed by the SVS between 2007 and June 2009, of which 18 were issued for the misuse of privileged information, and the remaining 302 for other, non-specified issues. This represents a drastic increase from the 85 sanctions between 2001 and 2003. Fines in Chile can reach up to 15,000 UF, which is approx. US\$575,000. Alternatively; the SVS can set fines of up to 30% of the value of the offense. The highest fine applied by the SVS between 2007 and 2009 was for the use of privileged information and stood at 38,970 UF (US\$1.49 million), which together with the return of the economic benefits amounted to US\$1.93 million. In recent years, the average fine has been relatively low at US\$6,936 in 2007 and US\$17,730 in 2008. It had been significantly higher in the previous survey, but these numbers were largely driven by the fines originating from the Chispas case, which totaled over US\$55 million. Between 2007 and 2009, only 29 cases were appealed, both on the grounds of the legality of the ruling as well as the amount of the fine. 16

*Chile: Growing number of sanctions and very low number of appeals*

of these have already been decided, with the SVS being rather successful, winning 15 of the 16 cases. The remaining 13 cases are still pending.

In **Colombia**, the SFC imposed 120 sanctions excluding reprimands on institutions, and 10 on persons between 2006 and July 2009. The Superintendencia de Valores which merged with the Superintendencia Bancaria to form the SFC in 2006 had issued 82 sanctions between 2001 and 2003. The minimum fine in Colombia is 10 monthly salaries or US\$2,402, while the highest allowed is US\$412,000 for institutions and US\$82,000 for persons. The average institutional fine for 2009 was US\$1,700, while the average fine imposed on persons was US\$11,400. Over the last three years, out of the 242 total sanctions imposed by the SFC (also taking into account non-corporate governance related violations), 85 have been appealed, of which 66 are still pending. Of the 19 concluded cases, 16 were ruled in favor of the SFC.

*Colombia: The SFC is issuing more sanctions than its predecessor Supervalores*

The number of sanctions is markedly lower in **Panama**, unsurprisingly given the size of the market. The Panamanian securities regulator, the Comision Nacional de Valores (CNV) imposed a total of 7 sanctions between 2006 and 2008, mainly for operating without a license and inaccurate financial statements. The CNV has a potential range of fines from US\$250 to US\$1 million at its disposal; in practice the highest fine the CNV issued between 2006 and 2009 was US\$10,000. However, the CNV has issued much higher fines in the past, such as in the matter of CNV vs. ADELAC COMPANY in 2001, where the highest fine imposed was US\$300,000. The first level of appeal for sanctions in Panama is before the Commissioners, where 5 of the 7 cases were reviewed. At the court level, no CNV decision has been overturned, while 3 of the 5 decisions are still pending.

*Panama: Low number of sanctions corresponding to the small market size*

CONASEV in **Peru** imposed over 334 sanctions between 2006 and July 2009, a significant increase from the 128 sanctions imposed between 2001 and 2003. No details on the type and amounts being fined was provided, and the numbers for Peru therefore include reprimands as well as fines and suspensions. 111, or about a third of these sanctions, were appealed. CONASEV has been highly successful in the appeal process though. 54 of the appeals were dismissed, not a single one upheld, and the remaining 57 are pending. Only two cases from 2006 and 2007 are pending, attesting to the speed of the Peruvian appeals process.

*Peru: Significant increase in number of sanctions, and fairly speedy appeals process*

### **Selected other supervisory bodies involved in enforcement**

While the focus of this survey is on securities regulators, other supervisory bodies play varying roles in corporate governance-related enforcement in the region. Naturally the banking and insurance supervisors are involved in the enforcement of CG in each country. They were not separately surveyed though where they are not part of the supervisory body such as in Chile for insurance and Colombia for banking and insurance. However, two institutions in Chile and Colombia playing a distinct role have provided separate data to this survey.

The **Chilean Superintendencia de Pensiones** (SP) oversees the corporate governance practices of the Chilean Administradora de Fondos de Pensiones (AFPs), institutional investors who play a vital role in the Chilean financial system due to the privatized Chilean pension system. Principal offences include violating rules dealing

with conflicts of interest, and failure to disclose personal transactions as well as false nomination procedures for the director in an AFP or public company, and non-compliance with investment policies and policies to solve conflicts of interests. Between 2006 and 2009, the SP issued 11 fines, ranging from approximately US\$7,600 (UF 200) to US\$11,400 (UF 300). The fines were imposed on issues of unauthorized investment policies, and lack of disclosure of personal transactions.

*Chile's  
Superintendencia de  
Pensiones oversees  
corporate  
governance  
practices of AFPs*

The **Colombian Superintendencia de Sociedades** (Supersociedades) monitors entities not covered by the other 10 specialized superintendencies such as the SFC. As such it has the authority to supervise the creation and operation of non-financial corporations. Supersociedades is also vested with quasi-judicial powers and can decide on litigation arising out of shareholders conflicts<sup>16</sup>. Principal offences include delayed release of financial statements; conflicts of interest; failure of invitation to and conduct of meetings; and lack of company registry information. The Delegatura para Inspeccion, Vigilancia y Control of Supersociedades has enforcement powers regarding CG which include the ability to: nullify board or shareholder decisions taken against corporation by-laws; resolve shareholder conflicts in cases of share valuation and withdrawal from the company; impose fines on directors as well as removing them. In 2008, the only year where Supersociedades provided information, it issued an impressive 2,912 fines totaling US\$5.5 million. The highest fine being imposed totaled about US\$55,700 with the average around US\$500.

*Colombia's  
Superintendencia de  
Sociedades is vested  
with quasi-judicial  
powers and can  
decide on litigation  
arising out of  
shareholders  
conflicts*

### **Self-Regulatory Organizations and Enforcement**

There are significant differences in the role SROs play in enforcement across the region. Unchanged from 2004, SROs play no significant role in enforcement in Chile and Panama. Since 2009, the Bolsa de Valores de Lima no longer acts as an SRO in Peru. Self-regulation plays a role in Argentina, Brazil and Colombia, but, with the exception of Brazil, only in the regulation of financial intermediaries.

In **Argentina**, each stock exchange is an SRO, and they are responsible for enforcing violations of financial intermediaries while listed companies fall under the responsibility of the CNV. The CNV reported sanctions imposed by nine SROs,<sup>17</sup> who issued a combined 38 sanctions between 2006 and 2009.

The **BM&FBOVESPA** monitors and enforces the listing rules of Novo Mercado, Level 2 and Level 1. These listing requirements are agreed to on a contractual basis by the exchange and the company, its management and controlling shareholders. BM&FBOVESPA ensures these rules are upheld. Sanctions applied to the breach of these listing rules numbered 48 between 2007 and July 2009, which reflected a rising trend.<sup>18</sup> The vast majority were issued for delay of the publication of financial statements or annual corporate calendars. BM&BOVESPA cooperates with the CVM

*BM&FBOVESPA  
sanctions for  
violating listing  
rules are rising,  
majority on  
disclosure  
obligations*

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<sup>16</sup> See Reyes, Francisco, Corporate Governance in Latin America: A Functional Analysis (August 1, 2007). Available at SSRN: <http://ssrn.com/abstract=1005208>

<sup>17</sup> SROs: Mercado de Valores de Buenos Aires S.A.; Mercado de Valores de Cordoba S.A.; Mercado de Valores de Mendoza S.A.; Mercado de Valores de Rosario S.A.; Mercado de Valores del Litoral S.A.; Mercado Abierto Electronico S.A.; Mercado a Termino de Buenos Aires S.A.; Mercado a Termino de Rosario S.A.; Argentina Clearing S.A.

<sup>18</sup> 10 fines were issued in 2007, 24 in 2008, and 14 in 2009 up to July.

particularly on the enforcement of disclosure obligations via its daily monitoring of listed companies.

The most significant development in the area of self-regulation occurred in Colombia. The **Autorregulador del Mercado de Valores** (AMV) took over SRO functions from the Bolsa de Valores de Colombia in July 2006. It acts as a national, private self-regulatory organization for financial intermediaries, people associated with financial intermediaries, issuers of securities who are also financial intermediaries, and voluntary members (those who although not intermediaries opt to obey to the AMV's authority). The AMV has self-regulatory powers to issue standards, supervise, and sanction financial intermediaries. The AMV issued 25 sanctions in 2008, ranging from reprimands and fines to suspension and expulsion. In 2007 and the second half of 2006, it issued a combined 48 sanctions, with a much higher share of fines and reprimands.

*Colombia's AMV took over SRO functions from stock exchange. Focus solely on financial intermediaries*

### III. Priorities for improvement & obstacles for enforcement

#### Areas of Strength and Priorities for Improvement

By and large, there was agreement on the key strengths and priorities for improvement among the countries surveyed, with some notable exceptions, which suggest possibilities for potential cooperation. It is worth noting that most of the priorities identified by the participating regulators were similar to those raised by third-party observers such as IMF, OECD and World Bank, and internationally operating business and law firms.<sup>19</sup> This is an encouraging sign underlining the usefulness of both third-party reports and thorough self-assessments to serve as the basis for future country-specific and regional policy initiatives.

*Self-identified reform priorities concur largely with those of third-party observers*

**Minority shareholder rights** were rated as the main area in need for improvement by most participants. Brazil's CVM explained this by highlighting the growing number of mergers and acquisitions which make the protection of minority shareholder rights all the more important. The Chilean SVS considers it of utmost importance for the growth of the market due to the concentrated nature of ownership in Chilean companies.

*Minority shareholder rights and related party transactions were identified as the main priorities for improvement*

**Related party transactions** were seen, together with minority shareholder rights, as the area where improvement was most necessary. Reasons cited were ownership concentration and the importance of avoiding these practices to maintain the integrity of capital markets. Brazil's CVM considers its enforcement of restrictions on related party transactions a strength.

Interestingly, **insider trading** and **the use of privileged information** was seen both as an area of strength as well as a priority for improvement by the participating supervisors. The Chilean SVS identified the detection of insider trading with privileged information as its main strength due to changes in the Securities and Corporate Law and the exclusive dedication of staff, development of methodologies and instruments of investigation to detect infringements. In contrast, Argentina and Brazil identified these issues as the main priorities for improvement. Argentina emphasized the difficulty to prove such offenses. Brazil pointed out that detection and sanctioning of insider trading was one of the main components of its 2008 enforcement program, but that enforcement still needs to improve in this area. One of the problems the CVM faces stems from bank secrecy requirements, making it difficult to access information and bank data on potential abusers of law. Peru's CONASEV raised the same issue.

*Insider trading and the use of privileged information are areas of strengths and priorities for improvement*

The enforcement of **disclosure requirements** was seen as the main strength in Argentina, Brazil, Panama and Peru, but was ranked as the area of least strength by Chile and Colombia. In recent years Brazil's CVM has dedicated resources to improve enforcement of disclosure of information to the market.

Interestingly, the Colombian SFC considers the **enforcement of fiduciary duties** of the principal company organs both as its main strength and the main priority for

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<sup>19</sup> For a comprehensive overview of each country's corporate governance framework based on publicly available sources, including main recommendations of published assessments, visit [www.estandardsforum.org](http://www.estandardsforum.org).

improvement. It explains this priority from the perspective that corporate governance enforcement cannot have the mere compliance with a code as its objective, but must rather aim to transform corporate culture to incorporate sound corporate governance as an integral part of risk management and value creation.

Two examples of new challenges arising from enacting best practices were described by regulators. The Chilean Superintendencia de Pensiones raised the issue of recent legal reforms that have introduced the requirement of at least two independent directors on the boards of AFPs. The challenge lies now in the **implementation and evaluation of the usefulness of this new policy**. In addition, a Director Registry where candidates for the board of pension funds need to register and state their independence and qualifications needs to develop evaluation and control mechanisms. The same applies to the new regulation on Investment and Conflicts of Interest.

*Challenge to develop evaluation and control mechanisms for new independent director requirements*

As previously noted, CONASEV enforces a **compliance statement with the Peruvian corporate governance code** as part of the general information disclosure requirement for listed companies. CONASEV reports that companies listed on the Registro Publico del Mercado de Valores (RPMV) initially considered themselves in high compliance with the 26 principles, but had released limited information to support these statements. Consequently, since 2006, CONASEV has implemented an evaluation program and has requested more information going forward to support companies' compliance statements.

*Importance of verifying compliance statements with corporate governance codes*

### **Obstacles to enforcement**

Most regulators considered the **judicial process** to be the main obstacle for successful enforcement. Brazil pointed out that the appeal process is conducted in the Council of Appeals of the National Financial System where an appeal may take several years to be processed rendering the CVM's sanctions ineffective. The Brazilian authorities have tried to address this issue by establishing the SPS, as described earlier. The Chilean SVS considers lengthy judicial procedures a particular obstacle in cases of violations of shareholders/investors in order for them to demand civil compensation for damages occurred. The Colombian SFC emphasized the importance of developing alternative mechanisms such as arbitration panels, specialized administrative agencies with quasi-judicial powers and self-regulators such as the AMV.

*Slow judicial process a key obstacle, beginning to be addressed by specialized administrative agencies*

Despite aforementioned increases in staffing, **inadequate staffing** of the regulator was listed as the main obstacle by Argentina, Brazil and Panama. Brazil underlined the continuous need for training.

**Operational/Legal Independence** was raised as an issue by Argentina's CNV, the Chilean SVS, Colombia's Supersociedades and Panama's CNV. Argentina's and Panama's CNV pointed out that they at least partially depend on the national budget for its funding, thus being potentially susceptible to political influence. The Chilean SVS referred to a proposal to transform it into a Securities and Insurance Commission, granting it with greater legal and political autonomy to be able to react to market dynamics and apply major sanctions for breaches of law.

*Operational and legal independence continues to be an issue for most regulators*

## Annex: Comparative Data from country surveys

### 1. Enforcement Framework

#### a. Primary Enforcement Body

	Argentina	Brazil	Chile	Colombia	Panama	Peru
Primary Enforcement Body:	National Securities Commission (CNV)	Securities and Exchange Commission (CVM)	Superintendence of Securities and Insurance (SVS)	Colombian Financial Superintendency (SFC)	National Securities Commission (CNV)	National Securities Commission (CONASEV)
Primary Responsibilities	Enforces and monitors compliance with capital market regulations.	Enforces the Corporation Act and other CVM rules and deliberations.	Implements Securities and Corporate Law. In addition to listed companies, supervises insurance companies and fund administrators.	In addition to listed companies, supervises stock exchanges, financial intermediaries, and other financial institutions	Enforces corporate governance regulations on listed or registered companies	Issues, monitors and enforces legislation.
How is it organized?	CNV is an autonomous public sector organization, within the Subsecretaria de Servicios Financieros.	An autonomous entity	Independent institution, interaction with government via Ministry of Finance	SFC is a public sector organization.	An autonomous government entity	Self-financed public sector organization.
Number of employees (2009 & 2004)	190 142	500 363	262 246	732 NA	53 44	142 144
<b>Budget: (in million US\$)</b>						
2004	2.64	25.80	9.08	5.40	NA	7.86
2007	6.64	77.2 <sup>20</sup>	14.27	61.38	1.6	8
2008	8.63 <sup>21</sup>	90.6 <sup>22</sup>	16.68	58.25	1.9	8.6
2009	7.32		19.46	62.59 <sup>23</sup>	2	11.8
Budget in local currency (2004/2008, million)	7.87 26.97	75.41 169.82	5,542.43 9,113.58	14,139.90 NA	NA 1.90	27.13 25.05

<sup>20</sup> Numbers made available by the regulator based on August 28, 2009 exchange rate.

<sup>21</sup> Exchange rate = 3.13 units per USD (historical rate as of October 1, 2008)

<sup>22</sup> Numbers made available by the regulator based on August 28, 2009 exchange rate.

<sup>23</sup> Excluding estimates on liabilities and provisions

% increase from 2004 to 2008 <sup>24</sup>	138.59%	84.63%	35.96%	NA	NA	-17.23%
Funding stable and independent?	Partially allocated by the overall public sector budget, partially derived from fee income.	CVM is a financially autonomous body.	Part of National Budget, approved by Congress.	SFC has administrative and financial independence.	40% depends on national budget.	Yes (according to each year's income for services offered).
Discretion to allocate budget?	The CNV's budget it's allocated by the national budget.	NA	Full discretion within range of budget	The government austerity policies establish the allocation of budget.	Full discretion, subject to the approval of the Ministry of Economy and Finance and the Budget Department of the National Assembly (Congress).	Part of the overall Public Sector Budget Law
Independence in authority?	Yes	Yes	Yes	Yes	Yes	Yes
Length of term for chair?	7 years for the 5 member board	5 years for 5 member board including chairman	No fixed term.	No fixed term.	5 years	3 years
Enforcement Department	CNV's enforcement department	Superintendencia de Procesos Sancionadores (SPS)	Market Compliance Department of the SVS	Direccion de Gobierno Corporativo  Direccion de Supervision Emisores	National Enforcement Department	Direccion de Emisores, Direccion de Investigacion y Desarrollo, Direccion de Patrimonios Autonomos, Direccion de Mercados Secundarios, and Tribunal Administrativo
Enforcement staff	14	22 inspectors & 8 federal prosecutors	10	15 (CG directorate) 13 (Issuers directorate)	5	3 (only at the Tribunal Administrativo)
Significant legal changes in past five years	In 2007 the CNV issued a "comply or explain" reporting mechanism (Código de Buenas Prácticas de Gobierno	In 2008, the Superintendencia de Procesos Sancionadores was established to investigate irregularities and conduct inquiries.		The establishment of the SFC following the 2005 merger of Superintendencia de Valores and the Superintendencia Bancaria.	None.	- Legislative Decree No. 1061 of 2008 amended the Securities Market Law to modernize the capital market and improve transparency

<sup>24</sup> Budgetary increase was calculated by adjusting budgets in local currency for inflation. (Source IMF: Inflation, average consumer prices.) Data for inflation are averages for the year, not end-of-period data. The index is based on year 2000 =100. Historical exchange rate for 2004 budget was October 1, 2004; historical exchange rate for 2008 budget was October 1, 2008.

	Societario)			- Adoption of a code of corporate governance for listed entities in 2007.		and disclosure practices. -improved disclosure practices following a 2005 amendment to the CG report.
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### b. Other Enforcement Bodies

	Argentina	Brazil	Chile	Colombia	Panama	Peru
Other enforcement bodies (i)			Superintendence of Pensions	Supersociedades	Superintendencia de Bancos de Panama (SBP)	Superintendencia de Banca, Seguros y Administradoras Privadas de Fondos de Pensiones (SBS)
Primary responsibilities			Oversees CG of Pension Fund Administrators (AFPs).	It legally exerts supervision on corporations not supervised by the other specialized "superintendencias" (10 in total) of which the most significant are the SFC and the SSP (Superintendencia de Servicios Publicos).	Apply CG regulation (Agreement 4-2001) to all banks located in Panama, listed or non-listed.	It regulates and supervises the financial and insurance sector as well as pension funds administrators
Nr and amount of Sanctions imposed			11 between 2006 and 2009	2,912 fines totaling US\$5.5 million in 2008		
Other Enforcement Bodies (ii)			Superintendence of Banks and Financial Institutions.		Insurance and Re-insurance Superintendence	
Primary Responsibilities			CG enforcement related to financial institutions.		Enforce a newly adopted (September 2009) CG regulation on listed or non-listed institutions registered before this entity.	

Separation of responsibilities clear and defined?	Other organizations devoted to regulate companies, for instance those which provide utilities, may set up their own Corporate Governance Code.	Per the provisions of the Securities Act the exchanges must act as supplementary bodies of the CVM.	Yes, by legislation.	Yes.	Yes.	Separation of responsibilities between CONASEV and SBS clearly defined in the Constitution and law and MoUs
Describe the system of cooperation		The BOVESPA cooperates with the CVM through its daily monitoring of listed companies, particularly with respect to their disclosure obligations.	Board of Superintendents for coordination and enacting joint regulation  Board of Capital Markets for capital market issues.	Inter-institutional Committees coordinate matters between the SFC and Supersociedades  MOU between SFC and the Autorregulador del Mercado de Valores (AMV) to share supervision of financial intermediaries.	Cooperate via formal and written request. An MOU for cooperation between the CNV and the Banking Superintendence.	

### c. Judicial Process

	<b>Argentina</b> <sup>25</sup>	<b>Brazil</b>	<b>Chile</b>	<b>Colombia</b>	<b>Panama</b>	<b>Peru</b>
Judges trained on financial and capital markets?	Only a few	Some judges have undergone training courses on capital markets offered by the CVM in Rio de Janeiro and Porto Alegre.	No	No	Only a few	No
Special courts for capital markets?	No. The general commercial courts, Tribunales Comerciales, are dealing with capital market matters	Only in the state of Rio de Janeiro	No	No	No. However, three Public Prosecutors specialized in financial crime investigations work directly with the court.	No
How long do appeal processes last?	From three months up to one year	Typically, cases are settled between the parties prior to any conclusive judgment.	Illegality actions: less than 6 months  Appeals of fines between 6 to 10 years	On average 732 days		On average 3 years

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<sup>25</sup> Information for Argentina in this section has been provided by the Instituto Argentino para el Gobierno Corporativo

## 2. Sanctions and Administrative Procedures

	Argentina	Brazil	Chile	Colombia	Panama	Peru
<b>No. of fines excluding reprimands</b>						
2009	5	56	52	120 institutional 10 personal		106 <sup>26</sup>
2008	7	103	136		2	104
2007	2	105	132		3	26
2006	4	184	NA		2	98
<b>Total Amount of fines (in US\$)</b>						
2009	489,690					
2008	70,685	185 million	2.34 million	168,300 (for the 120 institutional sanctions)	0	No info
2007	315,056	29 million	0.94 million		15,000	No info
2006	57,388	65.5 million <sup>27</sup>		109,317 (for the 10 personal sanctions)	80,000	No info
<b>Individual Sanctions</b>						
Highest in practice	US\$260,335	US\$38.5 million	US\$1.49 million	US\$82,000 highest allowed	No info	No info
Average in Practice 08	US\$51,823	US\$1.46 million	US\$17,730	US\$11,400 (individual sanctions, 2009)	NA	No info
<b>No. of sanctions appealed</b>						
2009	2	19	29 appeals (2007 to 2009)	85 <sup>28</sup> (2006 to 2009)		41
2008	2	84			1	40
2007		81			2	13
2006	4	134			2	17
<b>Appeals dismissed or upheld</b>						
2008	All appeals are pending	1 upheld 83 pending	Out the 29 - 15 in favor of SVS, one against, 13 pending	Pending: 66 In favor of SFC: 16 Dismissed: 1 Partially in favor of violator: 1 Fully in favor of violator: 1	1 pending	Dismissed: 17 Pending: 23
2007		4 upheld, 77 pending			2 pending	Dismissed: 12 Pending: 1
2006		4 upheld, 10 dismissed, 120 pending			2 dismissed	Dismissed: 16 Pending: 1

<sup>26</sup> The numbers from Peru include reprimands, as well as fines and suspensions.

<sup>27</sup> Exchange rate as of October 1, 2009 (1 US\$ = 1.78 BRL)

<sup>28</sup> The number of appeals is in relation to the total of 242 sanctions imposed by the SFC (also taking into account non-corporate governance related violations).

### 3. Private Enforcement

	<b>Argentina</b>	<b>Brazil</b>	<b>Chile</b>	<b>Colombia</b>	<b>Panama</b>	<b>Peru</b>
Private arbitration available?	Yes. Companies as well as shareholders may freely resort to arbitration. Each Argentine province can set up its arbitration rules in the provincial procedural code.	Yes. The Market Arbitration Panel is a forum set up by the BOVESPA to settle corporate and stock market disputes.  There are several private arbitration centers which can be used as an alternative to the Panel.	Yes, if an arbitration clause has been established.	Yes.	Yes.	Yes.
Shareholder conflicts solved by private arbitration?	Yes	Yes	Yes	Yes	NA	Yes

#### 4. Self-Regulatory Organizations

	Argentina	Brazil	Chile	Colombia	Panama	Peru
<b>Self-Regulatory Organizations (SROs)</b>						
Role of SROs	Each security market (or stock exchange) is a SRO, supervised by the CNV <sup>29</sup>	The BM&F BOVESPA monitors compliance with listing rules.	NA	The AMV has self-regulatory powers to issue standards, supervise, and sanction financial intermediaries, any other issuer associated with financial intermediary functions, and voluntary members.	Role of SROs vary.	The Institucion de Compensacion y Liquidacion de Valores (CAVALI S.A.) which promotes CG practices. Since 2009, Bolsa de Valores de Lima no longer acts as an SRO
<b>Type of Sanctions</b>						
	Warning, fine, suspension, and prohibition.	Fines	NA	Expulsion, suspension, fine, and reprimands.		
<b>No. of Sanctions</b>						
2008	9	24	NA	25	None regarding CG.	NA
2007	8	10	NA	48 sanctions imposed between 2006 and 2007. The Bolsa de Valores de Colombia (BVC) applied 43 sanctions in 2006, until July 8 when the AMV took over the SRO function.	None regarding CG.	NA
2006	12	NA	NA		None regarding CG.	NA

<sup>29</sup> SROs: Mercado de Valores de Buenos Aires S.A.; Mercado de Valores de Cordoba S.A.; Mercado de Valores de Mendoza S.A.; Mercado de Valores de Rosario S.A.; Mercado de Valores del Litoral S.A.; Mercado Abierto Electronico S.A.; Mercado a Termino de Buenos Aires S.A.; Mercado a Termino de Rosario S.A.; Argentina Clearing S.A.