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Synthesis Note: Progress Report on Implementation of the White Paper on Corporate Governance in Latin America

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Introduction

The White Paper on Corporate Governance in Latin America set out a broad agenda for reform of corporate governance rules and practices in the Region. Its content was agreed among participants over the course of four meetings of the Latin American Roundtable on Corporate Governance held between 2000 and 2003. By the time the White Paper was issued, Chile, Brazil and Argentina had already carried out major reforms of the legal framework for public listed companies. Colombia had taken important steps at the regulatory level to promote greater transparency and to encourage best practices. And in 2003, Mexico reformed its tender offer regime to ensure more equitable treatment of minority shareholders. Private sector actors, including business associations, stock exchanges and institutes of directors had already undertaken important complementary initiatives, including public awareness raising, standard-setting, training of corporate directors and development of mechanisms to help markets more effectively assess the quality of governance of securities issuers.

Yet, all involved in these efforts recognized that major challenges continued to lie ahead. Within a broader set of recommendations, the White Paper identified six priorities as most deserving of attention in most or all countries in the region:

- Taking voting rights seriously;
- Treating shareholders fairly during changes in corporate control and de-listings;
- Ensuring the integrity of financial reporting and improving the disclosure of related party transactions;
- Developing effective boards of directors;
- Improving the quality, effectiveness and predictability of the legal and regulatory framework; and
- Continuing regional co-operation.

This synthesis note was requested by the participants at the Fifth Meeting of the Latin American Roundtable held in Rio de Janeiro in October 2004. It examines how five countries involved in the Roundtable – Argentina, Brazil, Chile, Colombia, and Peru – have advanced against the priorities set out in the White Paper.[1] The information and analysis contained herein derives from the contents of five country progress reports, each of which was drafted and commented on by a team representing a range of constituencies in the respective country – including regulators, stock exchanges, investors, companies, international organisations, corporate governance institutes and experts.

The conscious decision was made to ask the country teams to focus only on key developments in the first five of the priority areas noted above, rather than attempting to review in detail how each country is progressing against each of the 57 recommendations contained in the White Paper. Each country report therefore highlights: progress achieved over the last three years; key developments; obstacles to progress; and priorities for further focus across the first five priorities mentioned above.[2] The rationale for taking this

[1] A draft progress report has also been prepared on Mexico, but was not received in time to be included in this analysis.

[2] The teams and commenters were asked to focus on the first five priorities and were not asked to address the issue of continuing regional co-operation because it is clear that this is continuing through the Latin American Roundtable, organized by the OECD in co-operation with the IFC and World Bank, and the activities of other regional and international institutions such as the Council of Securities Regulators of the Americas (COSRA), the Inter-American Development Bank (IADB), Andean Development Bank (CAF), Ibero-American Federation of Securities Exchanges (FIABV) etc., who all continue to participate actively in the Roundtable.

approach was two-fold: 1) it was judged more important to focus on the main messages than to disperse resources and attention across every detailed element of the corporate governance framework that may need attention; and 2) a more comprehensive report would be potentially duplicative, since corporate governance Reports on Observance of Standards and Codes (ROSCs) have already been prepared by the World Bank for nearly all the countries considered. These reports, available at http://www.worldbank.org/ifa/rosc_cg.html, involve a detailed review of the corporate governance frameworks and practices of countries against criteria set out in the *OECD Principles of Corporate Governance,* and may be considered complementary to these Roundtable reports. Over the last two years, ROSC reports for Chile, Colombia, Mexico and Peru have been published by the World Bank, while the most recent ROSC in Brazil has just been completed and is awaiting approval by the national authorities for publication. In the case of Argentina, the Center for Financial Stability has just completed an in-depth report on the status of that country's corporate governance. (See Policy Note No. 5 at http://www.cefargentina.org). Good information on the legal frameworks for corporate governance across the region is also available in the comparative publication put together by the International Bar Association called "Corporate Governance in 34 jurisdictions worldwide: 2005" (See www.gettingthedealthrough.com for reports on Argentina, Brazil, Chile, Colombia, Mexico and Venezuela.)

Accordingly, it is hoped that this synthesis note can serve as an aid to better focusing the future policy dialogue in the region, and to assist the Roundtable and its participating countries to prioritize their efforts to continue to promote implementation of White Paper recommendations. The country reports will contribute to these objectives by addressing the particularities of each country's corporate governance framework and institutions.

Organization of this synthesis note

Rather than merely summarize the combined contents of the country progress reports, the drafters believe this synthesis note would be of greater utility if it were organized around the cross-cutting issues and themes that emerged as particularly relevant for consideration by the Roundtable. The following eight items were identified:

1. Further legislative changes could achieve additional improvements. How likely is it that new laws will be passed? Is the considerable effort involved in promoting legal reforms better directed elsewhere?

2. The private sector can take an active role in standard-setting. Why has the degree of private sector involvement and the nature of institutions involved differed so significantly country by country?

3. What obstacles remain to developing more active shareholders?

4. Permitted share structures continue to differ country by country, with most countries explicitly rejecting a one-share one-vote regime. Should the continued permissibility of non-voting and multiple voting shares be a cause for concern and action?

5. Has progress in adopting international accounting standards gone far enough?

6. The region has experienced growing focus and activity related to appointment of independent directors and establishment of audit committees. But what matters most?

7. Increased consideration is being given to private rights of action, but these are not currently a reliable instrument of enforcement in most cases. What more is needed before private suits can play an important role in enforcement?

8. Corporate governance of non-listed companies is receiving growing attention. But what strategies yield best results?

1. Further legislative changes could achieve additional improvements. How likely is it that new laws will be passed? Is the considerable effort involved in promoting legal reform better directed elsewhere?

All five country reports indicate that important shortcomings remain in the current legal frameworks. In some cases, rectifying these would involve relatively technical adjustments or clarification of remaining lacunae in the overall legislative framework. The case of shareholder instructions to directors under Section 118 of Brazil's Corporate Law is an example. In other countries, more fundamental issues of corporate governance, such as the role and responsibilities of board members (Colombia) and the availability of effective enforcement mechanisms like derivative actions and class actions (Peru) would be the subject of proposed legal amendments, or perhaps part of more comprehensive company law reform. However, all the reporters express a lack of enthusiasm for the prospects of broad new corporate governance legislation in the current political environment.

Three of the five countries reporting (Argentina, Brazil and Chile) undertook major reforms of the legislative framework for listed companies between 2000 and 2001 (Chile's OPA Law and amendments to the Corporations Law in 2000; Argentina's Decree 677/01 of 2001; Brazil's amendments to the Corporate Law and securities legislation in 2001). Important improvements to the legal regime for listed companies were included in Colombia's new Securities Market Law, approved earlier this year. After the battles over these new laws, it is not surprising that the executive and legislative branches of government may be exhibiting a certain amount of "legislative fatigue." Some of the energies of the promoters and beneficiaries of the reforms have been redirected from engagement in the political sphere towards exercising and testing the new rights, powers and enforcement procedures established by the reforms. But even in Colombia and Peru, which have not experienced major legislative efforts focused on corporate governance, there seems to be limited appetite for pushing for omnibus corporate governance legislation action now. Why is this?

In addition to the factors noted above in the post-reform countries, the following explanations for largely (though not exclusively) focusing efforts on non-legislative solutions come out of the country reports:

- Absent a corporate governance-related scandal (Chile) or an economic crisis (Argentina), other national priorities tend to receive greater attention, presenting company law reform with insurmountable hurdles;
- Low degrees of public awareness (Colombia and Peru);
- Opposition from powerful parts of the private sector;
- Lack of cohesion and consensus for reform among key beneficiaries (especially pension funds and institutional investors);
- Continued scope for rule-making by regulators and supervisory authorities, which indicates that the legal regime is not a tight bottleneck; and
- A sense that the private sector still has not taken full advantage of the rights and remedies that already exist, or all possible voluntary mechanisms.

The effect of the above is a feeling that, at this point in time, there is a high bar before legislative initiatives are worth taking. Unless: (1) the key beneficiaries of the reform are united and energized; (2) the regulator has exhausted all its powers to accomplish the same goals through rule-making; and (3) private contracting, market mechanisms and existing private legal remedies have been tried and found inadequate, the likelihood is slim that a legislative proposal will gain traction. The amendments to the Securities Market and Corporation Laws in Chile known as "MK2" would appear to meet this test. Proposals to adapt national

accounting regimes and practices to international standards are another exceptional area where legislation appears to be necessary to make desired progress. However, opportunities for piecemeal changes may also present themselves when a glaring hole in the legal framework becomes apparent because of a well-publicized case, or when legislative changes are being considered in areas related to corporate governance (financial sector reform or reorganization of the regulatory agencies). Inclusion of certain corporate governance improvements for listed companies in Colombia's new Securities Market Law would appear to fall into the latter category.

2. The private sector can take an active role in standard-setting. Why has the degree of private sector involvement and the nature of institutions involved differed so significantly country by country?

Setting minimum corporate governance standards applicable to all companies is part of the mandate of corporate and securities market legislation, and can be complemented by rules issued by regulators thereunder. Some securities regulators, such as Brazil's CVM, have gone beyond this and encourage voluntary adoption of better practices by issuing a code of benchmarks and requiring that all companies disclose the degree to which they comply and explain any important divergences. But government agents can, and should go only so far in setting voluntary standards. They are not in the best position to judge what the standards should be, nor to assign priorities among them.

It is private sector agents that know what the markets are looking for, and business people alone have direct, practical experience implementing better governance practices in the local environment. In both OECD and non-OECD countries, business associations, institutes of directors, stock exchanges, investor groupings, etc., all play an important (and sometimes leading) role in setting standards. Private sector institutions educate companies and the public about the importance of adopting best practices. Some have also devised innovative mechanisms through which companies can communicate the good quality of their governance to the market. Latin America has been no exception to the participation of private sector players in standard-setting. However, as reflected in the country reports, the intensity of private sector involvement in standard-setting has varied markedly across countries, and the identity of the private sector leaders involved has also varied significantly.

Brazil has probably witnessed the longest, broadest and most intensive private sector participation in standard-setting. The Brazilian Institute of Corporate Governance (IBGC) is this year celebrating its tenth anniversary. Last year, IBGC published the third edition of its Code of Best Practices. In the aftermath of the 2001 legal reforms, the country's sole equity exchange, BOVESPA, launched the Novo Mercado, which together with Special Corporate Governance Levels 1 and 2, establishes a "staircase" approach to governance standards, providing an objective and enforceable mechanism for communicating good governance to the markets. Important pension funds have been key contributors in developing the IBGC Code, promoting its application, and collaborating in lobbying efforts, although Brazilian pension funds have not to date organized separately or together with other large institutional investors to promote their industry's separate corporate governance agenda. The one notable absence in the otherwise comprehensive private sector involvement in standard setting has been business associations.

Colombia's private sector efforts, in contrast to Brazil's, gained traction initially thanks to the efforts of a business association – the confederation of chambers of commerce, CONFECAMARAS. CONFECAMARAS's Corporate Governance Program, supported by the U.S. Center for International Private Enterprise, has been a critical contributor to both building awareness of governance issues and developing standards. The stock exchange, Bolsa de Colombia, undertook a program to work directly with its companies on governance improvements, but has only recently begun to consider the possibility of using the instrument of its listing rules to encourage better practices by public companies. Peru and Argentina also present examples of an "intermediate" level of private sector participation in standard-setting. Peru's Principles of Good Corporate Governance for Peruvian Companies were drafted by a committee that included both public and private sector entities, among the latter the Bankers Association (ASBANC) and the Confederation of Private Entrepreneurial Institutions (CONFIEP). Argentina's Institute for the Governance of Organizations (IAGO) is the issuer of that country's reference code of best practices, with the

Center for Economic Stability (CEF) now also playing a role in raising public awareness of the importance of higher standards for economic revitalization. However, in neither Peru nor Argentina has the stock exchange toughened its listing rules, and in Argentina the main business associations have been notably absent from the dialogue. Finally, private sector involvement in standard setting has been conspicuously low key in Chile (though the launch of a new business-sponsored Center for Corporate Governance earlier this year is surely a positive development), despite (or perhaps because) of the impressive legislative efforts promoted by the securities regulator.

So what explains this diversity of private sector involvement in standard setting and what are the lessons? The drafters were not asked to directly address this question in the country reports. Given the universally recognized importance of private sector input in standard-setting, perhaps this is a question that the Roundtable should explicitly examine in the future. In the meantime, the following observations/speculations might be useful to examine:

- The structure of existing business, professional and other private sector associations may play an important role in private sector participation in standard-setting. If the existing associations include well-established companies with privileged access to capital markets, this probably will impede their playing a more active role in corporate governance reform. Where more dynamic, capital-starved companies are active members, business associations may be more likely to see corporate governance standard-setting as in the best interests of their members.

- Traditional patterns of public/private sector division of labour and political culture may be relevant. The business communities in some countries may simply expect the public sector to take the lead. In such circumstances, does this hamper the prospects for private sector innovation, and should government do more to encourage private sector initiative?

- It appears from the country progress reports that stock exchanges rarely feel themselves in a position to lead standard-setting efforts, but that when there is already a fair amount of private sector involvement they can be important participants in designing and executing solutions.

- Different countries may have different political cultures regarding the legitimacy of non-governmental organizations. In some countries, new organizations, such as investor associations, may lack legitimacy unless there is some implicit government sponsorship or backing from a more established, traditional association. Other countries may exhibit greater acceptance of new institutional players.

- The internal governance of pension funds and other institutional investors, and the market and regulatory environments that act upon them may have important ramifications for the incentives for and ability of such institutions to band together to promote common objectives, such as better governance practices among the companies in which they invest.

3. What obstacles remain to developing more active shareholders?

The drafters of the country progress reports tended to consider that shareholder rights function "reasonably well," and that further strengthening of the legal and regulatory framework to facilitate more active shareholder involvement was considered a less serious priority in the Latin American context than some of the other priorities identified in the White Paper. The 2003 Resolution in Peru requiring more active involvement of pension funds in promoting corporate governance in the companies in which they invest was cited in support of this assertion. In Brazil, where the minimum notification period for shareholder meetings is 15 days, the CVM implemented new powers to allow them to increase the notice period to 30 days when the CVM deems the agenda items particularly complex. CVM's enforcement activities have sought to build company and investor awareness of shareholder rights, so that they may use them more actively. CVM is also developing an orientation guide for companies and investors on this subject.

The Bolsa de Colombia also made efforts to facilitate and encourage shareholder participation through a program of surveys and seminars aimed at building awareness of corporate governance requirements vis a vis shareholders. Most of the 40 companies surveyed (a sample designed to be representative of the 335 companies listed on the exchange) indicated that they have addressed minority shareholder rights in their codes and in their by-laws, and that awareness of the importance of shareholder voting rights has increased. New legislation in Colombia also requires that shareholder agreements must be fully disclosed in order to have an effect.

Yet, a number of weaknesses or obstacles were also cited. For example, Colombia's notice period of 15 days for annual general meetings, and only 5 days for extraordinary meetings, is considered relatively short, particularly from a foreign investor perspective. Chile noted that the World Bank ROSC corporate governance review had recommended that the notice period given to shareholders for annual meetings should be increased from 20 to 30 days, and legislation currently under consideration in Chile would enact longer notice periods.

In Argentina, it was noted that institutional investors have not been as active as desirable, and that it may be necessary to go so far as to require that they attend meetings and vote, in order to spur real change. Other in Argentina suggested that disclosure requirements should be enacted for institutional investors to report on their attendance and voting as a way to try to create stronger market forces in support of active institutional investor involvement. In Chile, proposed legislation aims to facilitate shareholder involvement by allowing for voting by mail, requiring the presence of external auditors at shareholders meetings, and expanding the scope of transactions requiring 2/3 of votes for approval.

While institutional investors and other shareholders have recourse to private actions through the courts when their rights are violated, as discussed under issue 7 of this paper, these rights are rarely used in practice in view of the high costs, unpredictability and time-consuming nature of such processes. In short, despite suggestions that the framework for shareholder rights is relatively sound, most countries would like to see more active shareholders and are searching for ways to create effective incentives for this to happen.

4. Permitted share structures continue to differ country by country, with most countries explicitly rejecting a one-share one-vote regime. Should the continued permissibility of non-voting and multiple-voting shares be a cause for concern and action?

Four of the five countries covered by the progress reports permit significant variances from the one-share one-vote principal. The legal/regulatory regimes in Argentina, Brazil, Colombia and Peru all allow for the issuance of shares representing the same economic interest but whose voting powers diverge. Argentina permits multiple-voting right shares, which can enable large shareholders to exercise disproportionate control of the shareholders meeting. Brazilian companies listed before the 2001 legal reforms may issue up to 2/3 of their capital in the form of non-voting "preferred" shares, but newly-listed firms must maintain no more than a 1:1 ratio between voting and non-voting capital. Colombia imposes a similar 1:1 limitation. Non-voting "investment" shares represent over 40% of the trading volume on the Lima Stock Exchange.

The authors of the country progress reports appear largely comfortable that the existence of multi-voting and non-voting shares is not *per se* detrimental to individual shareholders or overall market integrity. However, the limitations imposed on the percentage of capital stock that may be represented by non-voting shares implicitly acknowledges the White Paper's warning that disproportionate voting rights increase the likelihood that controllers will treat minority investors in an inequitable fashion. There is clearly recognition in Brazil that the proliferation of non-voting shares in the 1980s ultimately impeded market development in subsequent decades. The tighter limitations introduced in 2001 were a compromise between companies whose capital structures relied importantly on "preferred" shares, and regulators and others anxious to start reducing the "overhang" of such non-voting shares in the market.

On the whole, the progress reports reflect a consensus that sufficient protection against abuse of minority shareholders is accorded by a combination of market mechanisms (such as price differentiation between voting and non-voting shares) and legal provisions that set a cap on the proportion of non-voting shares. However, as evidenced by the history of Brazil's past proliferation of non-voting shares and some more recent, if so far isolated, cases in Argentina, temporary market conditions may on occasion permit the emergence of capital structures that can become problematic down the road. Continued vigilance and perhaps periodic tinkering with the rules may be what is required to ensure that the legal limitations / market mechanisms combination remains effective.

5. Has progress in adopting international accounting standards gone far enough?

All of the country reports cited efforts to move to conform local accounting regimes to International Financial Reporting Standards (IFRS), with a particular focus on improving the transparency of beneficial ownership and transactions between related parties.

The progress reports for Argentina, Brazil, Chile and Peru all cited efforts to implement IFRS standards, but suggested that further efforts are needed. In Brazil, legislation to strengthen accounting standards has been pending before Congress since the year 2000. If passed, it would eliminate a number of barriers to international convergence, and would require creating and financing institutions, including a National Accounting Standards Board, that would be necessary to fully implement the standards. In the case of Chile, the World Bank ROSC on accounting and auditing conducted in 2004 stated that the Chilean standards have been converging with IFRS, but that significant differences remain. Chile is working to adopt mandatory accounting standards in line with the ROSC recommendations. The MK2 bill under consideration by Congress would strengthen legal mechanisms for reporting on related party transactions, including provisions requiring company "insiders" to inform in advance of their intent to buy or sell securities in their company, and clarifying other requirements.

The Colombia progress report cited the efforts of a committee composed of several public sector entities that drafted a proposed bill to require adoption of IFRS, and that was subsequently issued for public comment in the second half of 2004. The draft provoked negative reaction from some quarters, stalling the proposal and requiring reconsideration of how best to go forward. Nevertheless, the 2005 Securities Market Law took an important step towards improving capacities for assessing the integrity of financial reporting by requiring the establishment of audit committees to be headed by an independent director. The Colombian securities regulator, Supervalores, and the general corporation superintendency, Supersociedades, have actively co-operated to identify and declare the existence of corporate groups and facilitate more effective control and disclosure of related party transactions, but the report suggests that rules in this area should be strengthened.

Given the complex ownership and control structures that are common in the region, identifying beneficial owners and reporting on related party transactions clearly is a major challenge requiring further attention. Countries are seeking to strengthen their capacities on an ongoing basis, either through co-operative efforts with other agencies, or through strengthened regulations.

6. The region has experienced growing focus and activity related to appointment of independent directors and establishment of audit committees. But what matters most?

While there is broad consensus in the Roundtable that independent directors have an important role to play in helping to ensure effective corporate governance, there continues to be considerable debate around just how much this issue should be emphasised. At the crux of this issue is the fact that nearly all listed companies in Latin America have concentrated ownership and control structures with individuals or groups of shareholders acting in concert holding the majority of voting shares. In such an environment, boards will always have majorities elected by the controllers. The Brazil report suggested that perhaps the real emphasis should be on increasing board members' qualifications and professionalism, rather than judging their independence solely on the grounds of whose votes elected them. Yet it continues to be recognized that independent directors have an important role to play, especially on audit committees and other committees concerned with sensitive issues such as questions of remuneration and related party transactions.

In Colombia, after following a voluntary approach in recent years that has yielded mixed results in terms of companies' use of independent directors, the new 2005 Securities Market Law imposes for the first time mandatory requirements for election of independent directors and the establishment of audit companies in all listed companies. The legislation defines criteria for independence and requires at least 25 percent of board members to be independent directors. The newly required audit committees must include at least three board members, including all of the directors that are deemed independent. Yet, there remains concern in Colombia about how to implement the 25 percent requirement, and how to ensure that there are sufficiently well trained people to serve these roles. A new training institute is being created with the aim of facilitating the transition to greater use of independent board members. But the Colombia progress report suggests that board members' roles and responsibilities would still benefit from being more clearly defined, and more could be done to increase the transparency of compensation schemes, establish mechanisms for board evaluations, and to ensure that information is provided to board members sufficiently in advance of board meetings for directors to properly carry out their duties.

In Argentina, where regulations required the establishment of Audit Committees with a majority of independent directors by May, 2004, there has been a clear increase in the number of independent board members overall. Yet Argentina's progress report suggests that there remains a perception among most board members that their loyalty should be to the shareholders that voted for them, rather than to all shareholders.

Over the last three years, some of the most significant developments have related to increased activity by institutional investors, particularly pension funds, to elect directors that are independent of the controlling shareholders and management, including for example in Brazil, Chile and Peru. On the other hand, as noted above, there may be a tendency to consider that these board members should "represent" the pension funds, to counter the influence of other board members elected by the controlling shareholders, rather than seeking to develop a board culture in which all board members consider that they should be representing the interests of all shareholders.

Peru has taken a voluntary approach to promoting independent directors, based on its non-binding Principles of Good Corporate Governance for Peruvian Companies, which recommend the creation of board committees and the inclusion of a "sufficient number" of independent directors. Under new disclosure requirements regarding corporate governance practices, of 50 companies that submitted a report, 26 companies declared to have independent directors on their boards, 8 declared that they do not, and 16 didn't comment. Recent amendments to pension fund regulations have required such institutions to take a more active role in promoting effective boards, including in electing independent directors. They have also become more active in introducing audit committees in their portfolio companies. The pension fund association has also developed a handbook for directors.

Chile too has taken a more voluntary approach to promoting independent directors, through actions of the pension funds and the newly established Center for Corporate Governance, which has begun conducting seminars and conferences for board members and others. Proposed legislation would increase the

minimum number of directors overall to 11 in order to increase the chances that minority shareholders can elect a director. However, this number would be higher than in most other Latin American countries (for example, the IBGC corporate governance code recommends that boards have 5 to 9 members), and there is some concern that such a requirement would increase company costs and potentially deter companies from going public.

In sum, countries have adopted a mix of mandatory and voluntary efforts to promote boards capable of exerting independent review and judgement in carrying out their responsibilities. Observers can be expected to compare the impact of the mandatory approaches adopted by Colombia and Argentina with the results from the more voluntary approaches followed in the other jurisdictions. All countries indicate that training of qualified board members will continue to be important in both contexts.

7. Increased consideration is being given to private rights of action, but these are not currently a reliable instrument of enforcement in most cases. What more is needed before private suits can play an important role in enforcement?

The Fifth Meeting of the Latin American Corporate Governance Roundtable included an illuminating panel on civil enforcement and private rights of action. The panelists were in agreement that the region evidences a relatively low level of private shareholder suits when compared to OECD countries (particularly those of the Anglo-American legal tradition). The slowness of the court system, procedural impediments and excessive levels of appeals, high court fees, lack of familiarity with corporate governance concepts on the part of judges, and difficulties in enforcing final judgments were all cited as disincentives for injured parties to petition for redress in the courts. Notwithstanding these impediments, shareholders have on occasion brought suits based on corporate governance claims in Latin American courts in recent years. Such cases indicate that under at least some circumstances plaintiffs believe that it is worth the effort to try to enforce their rights via the judicial power.

The country progress reports repeat most of the complaints about the judiciary raised at the Fifth Meeting's panel. At the same time, all the progress reports cited at least some advancements in the direction of making judicial enforcement of shareholder rights more effective and practical. Under Argentina's Decree 677/01, shareholders who bring suits against directors may now base their claims on the damages they suffered individually, rather than having to claim on behalf of all shareholders. This dramatically reduces court costs (which are calculated based on the overall amount of the claim). All the stock exchanges in Argentina now have arbitration panels empowered to hear complaints against listed companies brought before them by shareholders. The Brazil progress report highlights the important volume of administrative complaints handled by the CVM in recent years (averaging 80 cases determined per annum) and the CVM's repeated exercise of its power to extend the time for notice of shareholders meetings and require additional information to be provided shareholders. The CVM also now routinely assists the courts by providing advisory opinions. The Brazilian congress currently has before it a number of proposals to streamline judicial processes, but, until these are acted on "in practice, access to the courts is not a reliable enforcement tool."

The progress report for Chile cites in particular the Chilean Supreme Court's recent affirmation of the US$70 million fine imposed by its securities regulator, SVS, against the managers of Enersis in connection with the famous "Chispas" scandal. While lamenting the Chilean judiciary's limited ability to apply legal principals in ways that encourage confidence in the predictability of outcomes, the authors of the report look forward to the possibility that application of class actions to shareholder disputes may make such suits more practical in the future. Colombia's progress report notes the important role that the Supervalores has played in cases of del-listing valuation disputes by ensuring the independence of the appraisers. The quick response of Supervalores in such cases stands in sharp contrast to the long and complex procedures of the judiciary. Colombia's "acción de tutela" in particular provides defendants with unfair power to delay (and thereby deny) enforcement. Lack of class actions is also mentioned as an important shortcoming of the legal framework. Finally, Peru's progress report notes the repeated exercise of CONASEV's authority to oversee the conduct and legality of shareholders meetings of SAAs, and the regulator's powers to ensure fair valuation procedures and independent appraisers in the case of de-listings. The Peru report details procedural

obstacles under the existing derivative action legislation, and the CONASEV's initiative to make derivative actions more available to minority shareholders and to introduce class actions. Peru's report also points to the recent establishment of specialized commercial courts, which are expected to be fully implemented next year. The new courts may ultimately help speed up the adjudication of capital markets cases.

A few key messages with regard to private rights of action come through from the five progress reports:

- The regulator, as opposed to the courts, is often the most effective resort for shareholders who believe themselves to be victims of unfair treatment. However, the scope of cases where the regulators can afford real protection are limited (shareholder meeting legalities, informational adequacy, certain types of valuation issues) and the remedies they can effect are constrained by their jurisdiction and practicality.

- There is general recognition of the potentially important role that private arbitration of shareholder disputes can play, and its use has been increasing in some cases (Argentina, Peru), but experience overall is limited.

- Roundtable members continue to be critical of the quality of judges and their ability to understand and adjudicate corporate governance disputes. The professional education of judges on business matters generally and corporate governance issues in particular remains a high priority.

- Regulators can, and should play a role in assisting the judiciary to correctly adjudicate claims by providing advisory opinions when requested and on the regulator's own initiative (*sua sponte)*.

- Complex procedural requirements are more often the impediment to judicial enforcement than are lacunae in the substantive law.

- The availability of derivative suits and class actions can be expected to increase the likelihood of effective enforcement in the long run. However, the procedural requirements need to be practical for minority shareholders, and the ultimate feasibility of such actions remains hostage to the poor quality of most of the judiciary.

8. Corporate governance of non-listed companies is receiving growing attention. But what strategies yield best results?

One trend that appears to be emerging in many of the countries surveyed is a growing interest in promoting corporate governance in non-listed companies. The White Paper mentioned this issue only briefly, in a recommendation (paragraph 132) stating that chambers of commerce, other private sector groupings, banks and lenders, and, where appropriate, public authorities, should encourage the development of a culture of good governance and transparency among non-listed firms. Yet, several of the country reports suggest that growing attention should be given to these companies, not least because of their potential, as they improve their corporate governance and become interested in attracting outside capital, to begin listing on the stock exchange.

The Novo Mercado in Brazil has specifically launched a new "Access" market aimed at providing a transitionary period for small and medium-sized companies to begin listing and to progressively adopt better corporate governance standards. CONFECAMARAS in Colombia, the Center for Corporate Governance in Chile and Argentina's IAGO have all been active in voluntary efforts to raise awareness of the benefits of better governance for non-listed companies.

Public enforcement agencies also have expressed some interest in this issue, noting that minority shareholders who invest in non-listed companies also require protection of their rights, and that regulators may require information from non-listed companies in order to be able to enforce restrictions against related party transactions between listed and non-listed companies.

Yet, efforts by public authorities to impose additional governance-related requirements on such companies has generated controversy, notably in the case of Colombia, where a proposal to implement International Financial Reporting Standards for not only listed companies, but also for small and medium-sized enterprises (SMEs), met with resistance. The proposal has been delayed and it remains uncertain whether and in what form it may be taken up again by the Colombian Congress.

The OECD launched a new, global activity on corporate governance of non-listed companies with a meeting in Istanbul in April, 2005 that involved participants from all of the Regional Corporate Governance Roundtables. Interest and participation has been particularly strong from Latin America. While participants agreed that non-listed companies do not need a separate set of corporate governance principles or guidelines, they also suggested that internal and external mechanisms for improving corporate governance in non-listed companies could benefit from a focused approach to their specific challenges. The IFC's corporate governance methodology for family-owned or founder-owned unlisted companies was also recognised as a useful tool in this regard. Corporate governance of non-listed companies may be an issue for the Roundtable to consider more closely in the future, benefiting from ongoing OECD policy dialogue and research into policy options and their implications.