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Synthesis Report: Voluntary Corporate Governance Codes in Latin America

This synthesis report was developed for the Roundtable by **Felipe Alonso** and **Daniel Blume** of the OECD Corporate Affairs Division, based mainly upon surveys prepared for the Roundtable by consultants for Argentina (IAGO), Brazil (Leonardo Viegas of IBGC), Colombia (Andrés Bernal), Mexico (Felipe Alonso with support of Roberto Danel), Peru (CONASEVofficials), Spain (Felipe Alonso with support of Juan Munguira, CNMV) and the Andean Code (IAAG Consultants). The co-authors wish to thank the contributors to these reports, which will be made available separately at the Roundtable and on the OECD Web site at <http://www.oecd.org/daf/corporate-affairs/roundtables>. We also thank Phillip Armstrong of the Global Corporate Governance Forum and Davit Karapetyan and Mike Lubrano of the IFC for their valuable suggestions.

Roundtable participants will be invited to discuss the report's findings and recommendations as well as to submit written comments to Felipe.Alonso@oecd.org or Daniel.Blume@oecd.org prior to its finalization.

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Introduction

Why is the Roundtable considering the issue of corporate governance code development?

1. There has been a remarkable level of activity during the past year to develop and improve voluntary corporate governance codes within a significant number of Latin American countries. **Mexico** (December 2006), **Colombia** (April 2007) and **Argentina** (October 2007) all recently announced the issuance of improved national corporate governance codes, while **Peru** is currently working to update its code. In addition, **Costa Rica** (June 2007), and **Chile** (October 2007) just issued their first voluntary national code. In **Brazil**, the Brazilian Institute of Corporate Governance (IBGC) has already issued three versions of its national code and has indicated an intention to update its code again next year. The **Andean Development Corporation (CAF)** has also been working to actively promote corporate governance in Andean countries through its regional code (2005, hereinafter the Andean Code) as well as its implementation processes. Finally, **Panama** also developed a code in 2003. Thus, the time appears ripe for the Latin American Roundtable to review recent experience.

2. The Roundtable has concluded through previous discussions that, while some desirable improvements could be achieved through further legal reform, major legal reforms have already occurred in **Argentina, Brazil** and **Chile** (2000-2001) and more recently in **Colombia** (2005) and **Mexico** (2006). Within this context, most Roundtable participants have indicated that achieving further legal improvements would be politically difficult, so that most countries have focused on improving enforcement and private sector implementation as a main priority. It is against this background that the Roundtable has focused particularly on facilitating the use of transparency and market forces to promote corporate governance change.

3. Therefore, the Roundtable focused on two main issues for its 2007 meeting: 1) the development and use of voluntary corporate governance codes as a means to promote corporate governance change and inform the market; and 2) enhancing the role of institutional investors in promoting corporate governance improvements. The two issues are complementary in that corporate governance codes can provide clear benchmarks to help inform investors and facilitate the effective functioning of the market, while active investors who take into account company adoption of corporate governance codes can reinforce the positive impact of such codes.

Purpose and structure of this synthesis report

4. It is against this background that this synthesis report aims to provide a basis for the Roundtable's consideration of corporate governance codes at the 2007 Roundtable meeting. While a separate synthesis note addresses the role of institutional investors, the issues and questions of relevance to investor consideration of codes are also addressed in this report. The report draws upon country reports prepared for the Roundtable by representatives of **Argentina, Brazil, Colombia, Mexico, Peru, Spain¹** and **CAF**, also taking into account additional experience from **Chile, Costa Rica** and **Panama**. These country reports, which describe the processes followed and main issues encountered, will also be distributed to Roundtable participants. This report aims to provide an overview of how different Latin American countries have developed their national corporate governance codes, driving forces, difficulties encountered and lessons that may be learned to support further development of codes in the region.

1. While Spain is not a Latin American country, it was decided to include Spain in the comparison due to its recent and relevant experience to update its code and the active presence of Spanish companies in the region.

A brief comparative table of main features of these codes and main subjects treated is provided in Annexes 1 and 2.

5. An important caveat for this exercise is that it does not represent an attempt to provide a detailed review or evaluation of the content of different corporate governance codes, and how consistent these codes may be with the objectives set out in the *OECD Principles of Corporate Governance* or the *Latin American White Paper on Corporate Governance*. While the main subjects addressed in each code are briefly listed in the country reports and attached annex, a comparative analysis of what they include and related gaps could be misleading, since some codes purposely leave out subjects already sufficiently addressed by legal, regulatory and listing requirements or market forces. A full analysis of these interactions across all subject areas that voluntary codes address would have required a far more extensive country-by-country (and code-by-code) review. Rather, it was preferred to focus this initiative on the lessons that can be learned more generally to ensure effective processes for developing and making use of voluntary corporate governance codes.

6. Thus, the report is organised around the following main issues:

1) Elaboration of Voluntary Codes

2) Relation with the Legal Framework: How should recommendations in voluntary codes interrelate with the country's legal and regulatory framework?

3) Compliance and Reporting on Corporate Governance: Differing Approaches

The report concludes by highlighting main findings and questions to be considered as a basis for discussion at the 2007 Roundtable meeting taking place in Medellín, Colombia.

1) Elaboration of Voluntary Codes: Differing objectives, target audiences and active players

7. The *OECD Principles of Corporate Governance* (*OECD Principles*) recognise the variable role of voluntary codes within a country's corporate governance framework: "...*The desirable mix between legislation, regulation, self-regulation, voluntary standards... will therefore vary from country to country. As new experiences accrue and business circumstances change, the content and structure of this framework might need to be adjusted.*"²

8. Not surprisingly, Latin American experience reflects this variability. Different countries have established different **main objectives** and elaboration processes for developing their codes, emerging from their particular legal and institutional frameworks. Some countries, notably **Argentina, Brazil** and more recently **Mexico** and **Chile**, have focused mainly on using their voluntary national corporate governance codes for educational purposes, providing a convenient **benchmarking** tool for company management, boards and other relevant players in the market to assess the level and potential for improving corporate governance practices in companies.

9. Others, including **Colombia, Costa Rica, Panama, Peru, Spain** and the very recent regulator-led code in **Argentina**, while maintaining an educational value, have focused especially on using their codes as a means for enhancing disclosure and market understanding of company corporate governance practices

2. Annotations to Principle I of the OECD Principles of Corporate Governance (2004).

through a “comply or explain” reporting mechanism, which is aimed at complementing the legal framework. The **CAF’s Andean Code**, while intended for educational purposes to support company adoption of corporate governance and country development of national corporate governance codes, also strongly supports “comply or explain” mechanisms to help ensure that the codes are taken into account.

10. Behind these objectives is a debate over the appropriate balance between regulatory and voluntary approaches to corporate governance. In **Brazil**, the educational and entirely voluntary nature of the IBGC code reflects the fact that it plays a complementary role to the legal and regulatory framework combined with the self-regulatory approach of the Novo Mercado, which enables companies to commit voluntarily to higher corporate governance standards. Because listed companies already have a means of publicly disclosing their commitments to higher corporate governance standards by listing on one of the three corporate governance listing segments of Bovespa, there may be less demand in the market for a separate reporting/disclosure mechanism concerning voluntary measures. Rather, the IBGC, the author of the code, can focus on promoting good practices, particularly on issues not covered by the Novo Mercado, and also on reaching a wider audience than just companies adhering to Bovespa’s corporate governance listing standards, including non-listed family-owned companies. The IBGC code is also intended to serve as an important benchmark or reference for the market and regulatory authorities, but it is left to the market to determine how it may best make use of the code, rather than requiring disclosure against its detailed provisions.³

11. While most other Latin American countries are moving towards a comply or explain mechanism referencing their voluntary codes, **Mexico** is another exceptional case in which the regulator decided to drop an earlier comply or explain mechanism, because Mexico’s recent Securities Law amendment that went into effect last year established significantly stricter corporate governance standards across a number of areas. As a result, the private sector leaders in the development of the revised 2006 corporate governance code have chosen to target the voluntary code to a broader audience including non-listed companies.

12. In the case of **Argentina**, an “educational” code was issued in 2004 by the Instituto Argentino para el Gobierno de las Organizaciones (IAGO), a non-profit private sector institution (hereinafter IAGO’s Code). Likewise, the Comisión Nacional de Valores (CNV), the securities market regulator, has just recently issued a “comply or explain code” in order to complement the legal framework (hereinafter, CNV’s Code). However, due to the recent appearance of the latter, this report will mostly refer to IAGO’s Code unless indicated otherwise.

13. Other countries that have adopted improved reporting on corporate governance as a main objective for their codes have taken varying approaches to this, which are discussed in greater detail in the later section of this report on “Compliance and Reporting.”

3. It should be noted that the Brazilian Securities Commission (CVM) also issued a “comply or explain” code in 2002 setting out a more limited list of good corporate governance practices against which companies should file annual reports. This synthesis report does not address the CVM code in any detail, however, because the Brazilian country report indicates that the market is far more focused on the more binding commitments made through the Bovespa corporate governance listing segments, and suggests that, while the code is still listed on the CVM web site, “there is no indication that it has been or will be enforced in the near future.”

Target audiences differ based on a code's overall objectives

14. Codes developed primarily as an instrument for corporate governance disclosure tend to focus on listed companies and financial institutions as the main target audience. These are the primary target for most codes because corporate governance practices in the broadest sense are most salient to companies that have many outside investors, and the public interest in good governance tends to be strongest when there is a wider group of shareholders and stakeholders concerned, providing greater regulatory justification for requiring disclosure. “Educational” or “benchmarking” codes often have a broader audience in mind, using the code as a reference for courses for non-listed, often family-owned companies as well. The IBGC code, for example, contains specific provisions on succession planning for family-owned companies. The Andean Code is the most elaborate in targeting a wider group of companies, providing differentiated standards or benchmarks for four different kinds of companies: large listed; listed; large non-listed companies that are not family-owned; and other closely-held and family-owned non-listed companies.

Main actors in the development of corporate governance codes

15. Corporate governance codes in Latin America were developed by a variety of public and private sector parties, ranging from regulator-led initiatives in **Panama, Peru, Spain** and the recent CNV's Code in **Argentina**, to private-sector-led initiatives (with strong participation of the regulator) in **Colombia** and **Mexico**, to corporate governance institutes with mainly private sector membership leading code development in **Argentina** (IAGO's Code), **Brazil** and **Chile**. In **Costa Rica**, the code was exclusively developed by the private sector and the Stock Exchange.

16. It is not possible from this experience to point to one model of leadership as working best, as leadership has tended to emerge depending on the country context, purpose of the code (educational versus disclosure-oriented) and the relative strengths, capacities and political acceptance of business associations versus institutes versus regulators in assuming the leading role. Notwithstanding who has had the leading role, there's a clear consensus that all concerned parties should be consulted and involved in the process.

17. The *Toolkit for Developing Corporate Governance Codes of Best Practice* issued by the Global Corporate Governance Forum in 2005 (hereinafter, the Toolkit), a document that provides a practical set of guidelines for those interested in developing, monitoring, and updating a corporate governance code, points out that: “No single type of organization is best suited to initiating or developing a corporate governance code... What is essential is that all interested parties be involved in the process and represented on the crafting committee. It is important that the lead organization consults with various institutions and organizations and considers their possible contribution to the code crafting process. The careful selection of participating parties not only ensures that all important issues are taken into account in the content of the code but also helps secure support from these parties when it comes to implementing the code.”⁴ The elaboration of the current code in **Colombia** (2006) is a good example of a multi-sector led initiative, since both the private sector and the regulator were actively involved.

18. Except for the **Andean Code**, which was elaborated by a Spanish consultancy firm “IAAG Consulting & Corporate Finance” (IAAG), these “crafting committees” usually involve stakeholders such as stock exchanges, regulators, international organisations, business and professionals associations, institutional investors, lawyers, auditors, consultants and academics. In the case of the **Andean Code**, its authors have advocated such an inclusive process in the development of national codes; for example, the

4. *Toolkit for Developing Corporate Governance Codes of Best Practice*; Volume 2; Module 1; Global Corporate Governance Forum; pp. 2 (www.gcgf.org)

Andean Code has served as a reference for Colombia's and Peru's recent efforts to update their codes. In the case of **Spain**, besides the public and private sector parties, the drafting committee included advisors from the European Commission.

19. In **Brazil** and **Argentina**, the codes were elaborated by corporate governance non-profit institutions, the IBGC and IAGO, respectively. They have suggested that while their institutes are mainly comprised of private sector members, their non-profit status as separate entities can enable them to play a more neutral role vis-à-vis other private sector lobbying groups and regulatory agencies that potentially can lead to a better balance of competing interests. This was also the case in **Chile**, where the code was elaborated by the Centro para el Gobierno de la Empresa, a non-profit institution integrated by private sector entities and the Pontificia Universidad Católica de Chile in order to promote corporate governance.

20. In **Colombia** (2002/2006), the private sector played an active leadership role along with the regulator, since voluntary codes are "self-regulatory" frameworks and it was suggested that it would be better accepted if elaborated by those who implement it. In **Mexico** (1999/2006), the code initiative was initially suggested by the regulator but ultimately led by the Consejo Coordinador Empresarial (CCE), a national business association. In both cases, the private sector was positioned as the main actor since a regulator-led code would have generated greater reluctance from companies concerned that this could be an indication of possible future regulation.

21. Nevertheless, sometimes the regulator has led the drafting process due to the complementary role of the "comply or explain" mechanism in relation to the regulatory framework, as well as due to transparency and investor protection concerns. This is the case of **Spain**, **Peru** and **Panama**, as well as the recent "comply or explain" CNV's code in **Argentina**.

The driving forces for code development and revisions

22. Voluntary code development in Latin America has progressed in different stages. Many countries have seen a need to update their codes or revise their approaches to promoting use of the codes as a result of changing circumstances, including changes in relevant laws and regulatory requirements, interest in higher standards, and development of more detailed guidance.

23. The first wave of codes came following the issuance of the *OECD Principles* in 1999, with **Brazil** and **Mexico** issuing their first voluntary corporate governance codes the same year. As global attention to corporate governance continued to increase, and the Latin American Roundtable on Corporate Governance, launched in the year 2000, worked to develop a White Paper on Corporate Governance in Latin America (*White Paper*, 2003), various countries including **Colombia** (2002), **Peru** (2002), **Panama** (2003), **Argentina** (2004), **Brazil** (updated versions of its code in 2001 and 2004) and **CAF** (2005) came out with codes. For this first wave of code development, the main objective was to build awareness and educate companies and the market about good practices. While development of the Brazilian code began before the issuance of the *OECD Principles* and drew upon an international comparison of other voluntary codes, all other codes cite the *OECD Principles* as a main reference in setting the framework for issues addressed. For those adopted after 2003, the *White Paper* was an additional reference. Interestingly, while the *OECD Principles* are aimed foremost at the overall policy framework, the most successful codes in Latin America have tended to go into much greater detail concerning company practices.

24. A second wave of code development has begun with **Colombia** and **Mexico** issuing new versions of their codes that have taken into account recent corporate governance legal reforms, while **Peru** has also undertaken a recent code review process. Most recently, new codes were issued in **Argentina**, **Chile** and

Costa Rica. Most of these recent efforts have tended to move beyond basic awareness-raising and education on good practices to also incorporate regulatory-mandated “comply or explain” mechanisms to facilitate reporting on corporate governance compliance, and to create additional incentives for companies and the market to be aware of and make use of the good practices identified in their codes. Proponents of these new codes have in some cases acknowledged weaknesses in their original attempts and have attempted to incorporate lessons learned to ensure that their codes are suitably adapted to the purpose of “comply or explain” mechanisms. A later section of this report will go into greater detail concerning the challenges and lessons learned in relation to these initiatives.

2) Codes and the Legal Framework: How should recommendations in the voluntary codes interrelate with the country’s legal and regulatory framework?

25. As the *OECD Principles* emphasise, the success of a voluntary code that complements the legal framework widely depends on the clarity of its status: “...*Corporate governance objectives are also formulated in voluntary codes and standards that do not have the status of law or regulation. While such codes play an important role in improving corporate governance arrangements, they might leave shareholders and other stakeholders with uncertainty concerning their status and implementation. When codes and principles are used as a national standard or as an explicit substitute for legal or regulatory provisions, market credibility requires that their status in terms of coverage, implementation, compliance and sanctions is clearly specified.*”⁵ The latter brings up questions regarding the overlapping of voluntary codes and the legal and regulatory framework.

26. The way in which different codes interrelate to the legal and regulatory framework is influenced by the code’s overall objective. “Educational” or benchmark-setting codes, which can also be referred to as “generic codes” (such as in **Argentina, Brazil, Chile and Mexico**), cover a broad range of best practice-related issues, which sometimes overlap with legal provisions that already require such practices. In **Chile**, the greatest difficulty the adoption of a Code had to face was the strong legal culture in the country, which resulted in the general belief that rules to be fulfilled have to be in a law. This is why one of the declared objectives of the Code is to be a first attempt to move from this culture to one benefiting also from self-regulation. However, since the corporate governance framework is frequently evolving, it was suggested, at least in the Brazilian case, that whenever the legal standards broadly reach or even surpass those provided by a generic or standard-setting code, the latter should be revised, its standards raised or its focus re-oriented in order to be in tune with such evolution. Voluntary governance recommendation should go beyond the minimum legal and regulatory requirements, provide guidance on issues that are not possible to regulate, or be more oriented toward companies not covered by the law, as is the current code of **Mexico**.

27. The code in **Brazil** has gone through three review processes in order to respond to the evolution of the legal and contractual frameworks,⁶ whether by raising its standards or changing its focus. The Brazilian code report is particularly interesting in this regard: “*Legal provisions, contractual requirements such as Bovespa’s, and self-regulation codes such as IBGC’s are all designed for companies but have different objectives...This resulting framework of legal, contractual and voluntary rules has some overlaps and redundancies but complement each other, each one with different scope, focus and approach – as well as different “teeth”. They cannot replace each other. If they get too close to each other, the voluntary codes should promote higher standards and/or correct their focus...Generally speaking, corporate governance provisions in the IBGC code set the highest standards among all self-regulation codes in*

5. Annotations to Principle I-B of the OECD Principles of Corporate Governance (2004)

6. For the case of Novo Mercado, whose standards are adopted by companies through the listing rules of the Brazilian Stock Exchange

Brazil. Over time, IBGC's standards have been referred to by other codes... or get absorbed by contractual and legal requirements. This may be a warning sign that the 'IBGC bar' should be raised, or that the focus should move to other organizations such as, for example, the vast number of non-listed, family controlled companies." A comprehensive table regarding the status of the legal, contractual and voluntary schemes regarding corporate governance in Brazil is attached to the Brazilian code report.

28. A second type of code observed is one used to complement the legal framework through a mandatory **"comply or explain"** mechanism, which is the case for the codes of Argentina's new code and those of **Colombia, Panama and Spain**. These codes stipulate that listed companies must disclose their compliance with the codes' recommendation or explain why and how they deviate from these recommendations. Its purpose is to incentivize companies to go beyond compliance with the minimum requirements set forth in laws and regulations. In this sense, the Toolkit states: *"Codes tend to focus on identifying and articulating 'good' or 'best' practice. Laws tend to focus on identifying minimum threshold behaviors and practices. In other words, codes set out norms to which companies should aspire, while laws set minimum standards to be met."*⁷

29. Nevertheless, overlaps between regulator-elaborated codes and the legal requirements sometimes exist, as in the case of **Peru**, where the Comisión Nacional Supervisor de Empresas y Valores (Conasev) sought to complement the legal framework with voluntary best practice provisions, and to set a national corporate governance benchmark/reference against which listed companies could report their corporate governance practices.

30. An interesting exception is **Costa Rica**, where the "comply or explain" system is not regulatory-mandated but rather listed companies can voluntarily choose to adopt or not said system. If a company chooses to adopt the reporting system, it must submit an annual report regarding its level of adherence with the code's recommendations, whose veracity will be reviewed by an external auditor. The latter is similar to the Novo Mercado approach in Brazil (where companies voluntarily choose to list in the special corporate governance listing segments).

31. Based on international experience and their own nature, voluntary codes used to complement the legal and regulatory framework through a disclosure system (such as "comply or explain") should minimise overlap with said framework to avoid confusion in the market and companies as well as unnecessary repetition.

32. As mentioned before, since their recommendations don't overlap with the legal and regulatory frameworks, the codes of **Colombia and Spain** are clear initiatives directed toward complementing elements from these frameworks with voluntary best practices. The **Spanish** report elaborates on this point: *"...[The Code's Recommendations are] voluntary, rather than mixing them in with legal duties or binding rules. This is a point to remember when analyzing the Recommendations of the Unified Code, especially when comparing them with the good governance codes of other countries. Thus, readers less familiar with Spanish company law should be aware that what they may see as obvious omissions are in fact already written into current legislation. In this respect, Appendix 1 of the Code lists the most important Spanish legal texts governing the issues addressed by the Unified Code."* Indeed, through "Appendix 1" and references to the related legal provisions throughout its text, the Spanish code clearly sets out the relation between the voluntary and legal schemes. The recently issued code in **Chile** is also interesting in this respect. Although it's an "educational" or "generic" code and its contents sometimes overlap with the legal framework, the code's recommendations are related through footnotes to the

7. Ibidem pp. 32.

corresponding legal provisions of the corporate or securities market laws. The latter brings clarity to the code's users since they can identify which provisions and to what extent they're already legally bound to comply with and those that they may adopt voluntarily.

3) Compliance and Reporting on Corporate Governance: Differing Approaches

33. The *White Paper* recommends that listed companies report at least annually on their internal corporate governance structures, making an implicit reference to the “comply or explain” mechanism that a number of countries have adopted: “86. Companies should report on the content of their existing policies, any changes made since the last disclosure, why such changes were made, the procedures for ensuring compliance, and an assessment of the company's compliance. Regulators and exchanges should require such disclosure, and where recognised standards exist, provide that the company describe the justification for any divergence from the practices recommended in such standards.”

34. The reporting requirements and practices vary from country to country. **Argentina** (CNV's Code), **Costa Rica**, **Panama** and **Spain** provide that companies should either comply with the recommendations or explain why they deviate. In contrast, the current code of **Colombia** and the former code in **Mexico** (1999), prescribe a “voluntary explanation” model in which a company may merely answer “no” if it does not implement a specific measure. In these latter cases, the active involvement of the private sector in the codes' elaboration process led to the consensus of a more voluntary approach, so companies can choose to disclose or not where it complies with or deviates from the code's recommendations. **Peru** has a more mixed system of reporting that incorporates both mandatory, self-evaluation scores and background information related to compliance with its code mixed with voluntary explanations, described in greater detail below.

35. A key issue that each country has had to address is the balance between the regulatory and public interest in promoting vibrant capital markets that recognise and value corporate governance improvements, and companies that seek to minimise their compliance costs by keeping reporting requirements simple and flexible. Indeed, if a listed company is not actively trading shares it will not have the same incentive to invest in reporting on its corporate governance practices as one that is preparing for an IPO. If reporting requirements become too burdensome, the company may prefer to de-list. On the other hand, if a regulator, in the interest of reducing reporting requirements, establishes a disclosure mechanism that only provides for “yes/no” answers or subjective, self-evaluation numerical scores, it may not provide enough detailed and credible information for an investor to be able to make good use of it.

36. The requirement to report on compliance with the code's recommendations is commonly mandated by law and/or regulation - **Argentina** (Resolution 516/07 of CNV), **Colombia** (Circular 028/2007 of Superfinanciera), **Panama** (Acuerdo 12-2003 of Conaval), **Peru** (Resolución General 140-2005 of Conasev) and **Spain** (Article 116 of the Securities Market Law and Resolution of May 22, 2006 of CNMV). The reporting is usually required annually by having companies answer a questionnaire based on the code recommendations. An officer of the company is normally accountable for the accuracy of the report's contents. Costa Rica's more voluntary approach already described in paragraph 30 above is an exception to this, allowing companies to choose whether to report or not.

Growing pains: challenges of reporting against voluntary codes

37. Developing effective disclosure against codes has been a challenge, one that has led most Latin American countries to review and revise their approach in recent years. The country report prepared by **Peru**, for example, acknowledges that Conasev's requirement that company annual reports beginning

in 2004 include assessments on a 0-4 scale of their compliance with various aspects of the voluntary corporate governance code led to subjective results, often with insufficient background information for the regulator or the market to determine their credibility. Conasev, which undertook to develop the code in 2002 through a multi-stakeholder committee of public and private sector actors, decided to add additional background questions to the survey in 2005 which could provide corroborating, objective information by which the market could better judge the compliance “grades” that the companies submitted. Nevertheless, Conasev reports that there continue to be inconsistencies between the subjective self-evaluatory grades issued by the companies and the more detailed answers to the questionnaire. Conasev is currently leading a process to improve the code in order to add new elements not addressed in the original version, and to clarify and limit aspects that overlap with legal requirements. Noting the difficulty of improving the self-evaluation approach, Conasev suggests that it should approve a new version of the disclosure system that is consistent with the new, updated code, once reviewed and approved by the multi-stakeholder committee.

38. **Colombia’s** original voluntary code, developed in 2002, was driven largely by “Resolution 275,” issued in May 2001 by the regulator and stipulating that issuers seeking to receive investments from the pension funds shall adopt a corporate governance code. As Resolution 275 did not establish a corporate governance benchmark to base such a company code upon, nor a definition of what is considered best practice, some companies seeking to comply with Resolution 275 merely provided a long description of the company’s by-laws or a duplication of corporate law. The code developed under the leadership of the Colombian Federation of Chambers of Commerce (Confecamaras) sought to fill this gap. While the 2002 code helped establish a clear national benchmark against which pension funds could judge company corporate governance, Resolution 275’s requirements for disclosure of corporate governance practices were general in nature and limited in applicability to those companies seeking pension fund investment.

39. The more recent initiative to update the **Colombian** code, issued earlier this year and accompanied by a reporting requirement applicable to all listed companies, is much more specific in requiring reporting on compliance against all aspects of the code. This applicability to all listed companies will ensure that a larger number of companies must take the code into account, and therefore has the potential to further increase attention to and adoption of good corporate governance standards in **Colombia**. However, its usefulness to the market as a reporting tool remains to be tested, given the voluntary nature of the explanation portion of the requirement.

40. In **Mexico**, the first code (1999) adopted the “comply or explain” mechanism and was conceived as a voluntary scheme to complement the legal framework. Reporting on compliance was based on a questionnaire of the Comisión Nacional Bancaria y de Valores (CNBV), with information on overall compliance trends reported annually by CNBV. However, the issuance of a new Securities Market Law in 2006, which significantly raised corporate governance standards for listed companies, triggered the revision of the code. The new code, elaborated by the CCE and issued in 2006, no longer provides for the “comply or explain” mechanism mandated by regulation, since some provisions of the new Law for listed companies are stricter than the code’s recommendations. In the end, the new **Mexican** code is aimed at reaching beyond the companies targeted by the new Law, covering all kinds of companies or associations - commercial, civil and non-profit, listed and not listed - thus having a “universal” or “generic” application.

41. In **Argentina**, the recently issued Resolution 516/2007 of CNV implements a “comply or explain” reporting mechanism under which listed companies will have to report -along with their annual report- their level of compliance with the voluntary code included in the Resolution. Listed companies must report if they’re complying with the code’s recommendations and, if so, how they’re actually doing it. They must also report if they’re not complying with such recommendations, either totally or partially, to

explain the cause and if they're expecting to implement them in the future. With the latter, the CNV adopted a rigorous "comply or explain" mechanism that favours full disclosure.

The value of disclosed information: the role of different players in the market

42. It has been widely observed that markets give better value and provide access to cheaper capital for companies that meet higher corporate governance standards. However, for the market to give such value, market players such as institutional investors, banks and rating agencies need reliable information and "objective standards." Besides the financial and business-related information disclosed by the companies, the quality of the country's legal and regulatory framework as well as its enforcement are among these "objective standards."

43. Likewise, besides the legal framework and its enforcement, some "objective standards" within the voluntary scheme also exist. One clear example in the region is the Novo Mercado (NM) corporate governance listing segment in **Brazil**. Even though the NM is a voluntary scheme, its contractual framework, established through its listing rules, makes it legally-binding and enforceable. As evidenced by data, investors have given higher value to companies in NM because they have a concrete standard against which they can value such companies. Even though a corporate governance special listing-segment such as NM may not be feasible in every market -- either due to legal constraints or market characteristics - lessons can be learned from the contractual "teeth" of such a framework, which makes the disclosed information more reliable. Normally, in different markets, some of these "teeth" for corporate governance frameworks include: mandatory compliance, possibility of sanctions for non-compliance, mandatory auditor/authority review of the compliance report, etc.

44. As mentioned before, one interesting case is the code from **Costa Rica**, an exclusively private-sector led initiative similar to the *voluntary-but-enforceable* approach of Novo Mercado, since the voluntariness of adopting or not the "comply or explain" reporting system and the fact that the adherence report will be audited may indicate that companies adopting it are really committed to implement best practices and the market may have credible indicator to compensate those efforts. The latter is reinforced by the idea that when a "comply or explain" reporting system is mandated to all companies in the market, and there is no audit or enforcement procedure to assure the veracity of the reporting, the credibility of such reporting as well as the value the market gives them may decrease. Indeed, Costa Rica's experience should be closely followed by the region in order to observe the companies' reaction to a voluntary "comply or explain" scheme, and the market-value reaction to adherence reports audited by a professional external auditor.⁸

45. While voluntary codes do not provide the same kind of "teeth" that contractual commitments or legal and regulatory requirements do, it is nevertheless possible to create incentives around voluntary mechanisms that provide useful information to the market.

46. First, **regulatory authorities** can play an important role in ensuring that reporting mechanisms, such as the code-based questionnaires, can be more valuable to the market by providing more than "yes/no" answers or subjective grades, but actually requiring explanations of how the recommendations are implemented (as **Peru's** background questions do). These reporting mechanisms should ask concrete

8. The markets regulator is responding to this initiative by preparing to amend the existing, mandatory, corporate governance regulations (which apply to all regulated entities, including financial entities and listed companies), to grant a complete exemption to non financial listed entities that sign up to the code and make the annual, verified, declarations as formal market announcements. Under the proposal, failure to make a declaration would mean a company falls back into the mandatory regime and a false declaration would be treated as market manipulation.

questions when applicable (e.g., *number and classification of board directors, current stock distribution, existence of tag-along rights, etc.*) and should also enable companies to explain how they are implementing other best practices (e.g., *how does the internal control system work; why doesn't the company have a remuneration committee within the Board, describe the directors' nomination process, etc.*). In addition, the regulator should also be able to ask for clarifying information regarding the adoption of the voluntary code when a response provides insufficient or misleading information.

47. Second, **companies** should be the ones to understand that adoption and disclosure of improved corporate governance practices will add to the value of their business, but only if they provide sufficient and credible information that the market can take into account.

48. Third, **rating agencies, securities analysts and financial press** should play an active role in considering and reporting on such disclosure, comparing how companies measure up against national benchmarks. However, this will only occur if investors are willing to pay for such information and take it into account in their investment decisions. The Roundtable has decided to focus particularly on the investor role in this process because it is so crucial to the overall system and the potential for voluntary market mechanisms to work effectively.

49. Finally, if a voluntary code -- due to its disclosure mechanisms or ambiguous status within the corporate governance framework -- does not allow for clear disclosure of corporate governance practices that is beneficial for companies in terms of value and performance, and to the market in terms of investor protection and usefulness of the disclosed information, then the code could just generate confusion in the market and become an unnecessary burden for the companies. In the latter case, it may be better not to have a voluntary code at all and focus on improvements via more enforceable initiatives, i.e., the regulatory and legal framework.

Institutional investors and voluntary codes

50. In some countries, institutional investors (IIs) are already playing a role in promoting best practices through corporate governance codes. **Colombia's** case is of particular interest, because of Resolution 275's mandate that listed companies seeking investments from pension funds shall adopt a corporate governance code. To the extent that Colombian PFs make use of the Colombian voluntary corporate governance code as a relevant benchmark for such company codes, the Resolution provides a potentially significant tool to enable PFs to positively influence corporate governance practices. Likewise, institutional investors will be required to take into account and provide a detailed report on the corporate governance structure of each company, and to disclose the importance of this review within the investment decision-making process. However, this requirement does not imply that a poor evaluation of the company's corporate governance system will limit the investment in all cases.

51. In some other countries, including **Brazil** and **Chile**, certain pension funds have developed their own corporate governance codes. For example, in Chile, where no national corporate governance code was developed until very recently, Cuprum, a pension fund, developed a voluntary code that distributes among its investee companies in order to persuade them to adopt its recommendations. They also follow up and monitor this process through the directors they appoint to the Boards of some investee companies. In this sense, a pension fund code can help the market by providing higher-than-legally-required benchmarks, and provide clarity on investor expectations and demand for good corporate governance practices. However, a broader concern is to avoid creating multiple and conflicting standards that may lead to confusion for companies and the market. For this reason, it is considered good practice for such codes

to reference and specify how they relate to voluntary national codes and other legal, regulatory and listing requirements.

Main conclusions, findings and issues for discussion

- Corporate governance codes are an important source of country best practices as evidenced by the existence of such codes in almost all major Latin American markets. Moreover, many countries have gone through one or more iterations, indicating the increased degree of importance attached to corporate governance in general and improvements in overall governance practices in the region.
- The process of developing corporate governance codes and who participates is just as important as the end result and its enforcement. Relevant stakeholders such as the regulator, stock exchange, institutional investors and business associations among others should be consulted for the elaboration of a voluntary code. Inclusive public debate and discussions are key to the success and implementation of the resulting code. The purpose of the code helps to determine which party may take a more active role; when elaborating codes is aimed at complementing the legal framework, the regulator should ensure that the status in terms of coverage, implementation, compliance and sanctions is clearly specified in order to send clear signals to the market concerning their use.
- “Educational” or “Benchmarking” codes can be applied to all kinds of companies, so that different stakeholders have a reference regarding best practices. Whenever the legal standards broadly reach or surpass those of these codes in a general way, the codes should be revised, their standards raised or their focus re-oriented.
- The implementation of corporate governance codes is most effective when it is possible to rely on the market to react on compliance/non-compliance. At the same time, given that capital markets in the region are still developing, the regulator may play an important role in the codes’ implementation. This is the case in a growing number of countries that have adopted mandatory “comply or explain” mechanisms.
- A “comply or explain” code will have greatest value if companies disclose enough relevant, accurate and reliable information in order for it to become an efficient and credible tool for investors and other stakeholders in the market. Mandatory reporting mechanisms provide companies with sufficient flexibility in choosing which recommendations to implement and yet, in optimal form, require them to explain where and why they deviate from other recommendations. The regulator should take measures to ensure that companies fully comply with this obligation.
- The topics covered in each country code and the degree of enforceability depends not only on the level of development of a country’s capital markets and corporate governance practices, but also on the legal and regulatory environment and enforcement practices. For this reason, it is important that voluntary codes be complementary to the legal framework and yet provide a higher standard to go beyond the minimum enforceable regulation.
- Given the costs involved in regularly reporting such information, the incentive to develop complete, accurate and reliable reports on company corporate governance practices will depend on the responsiveness of the market to such information. For the market to be responsive, a proper market infrastructure is essential (e.g. informed investors, market and securities research and financial press) so that analysis is available on company compliance with codes, and investors take

into account such analysis. Only with such complete market infrastructure can companies reap the full benefits of implementing best governance practices to create long-term value for shareholders, the market and the country.

- Institutional investors (II's) -- including pension funds -- could play a greater role in promoting corporate governance by elaborating or referencing voluntary codes suggesting best practices for companies or other investment vehicles aiming to receive a "substantial" part of their investments. II's could condition their investments in listed companies on their adoption of the recommendations of a "comply or explain" mechanism already existing in the market.
- Due to the phenomenon of cross-listing in different countries, some Roundtable participants expressed an interest in promoting a minimum level of standards for the region, which could be achieved through the elaboration of a regional code. Likewise, there is an interest in identifying what are the minimum legal and voluntary standards that different markets of the region already have in common.
- Some Roundtable participants expressed that the Latin American region has a strong legalist tradition in which most of the substantial changes of the actual company practices come through legislation rather than voluntary schemes. However, international participants pointed out that the development of voluntary codes in more developed markets has been an answer of the private sector to the threat of possible legislation. In this sense, countries should seek to achieve the correct balance between incentives for the codes' adoption and enforceable mechanisms to give them credibility.

ANNEX 1: COMPARATIVE OVERVIEW: LATIN AMERICAN FRAMEWORKS FOR VOLUNTARY CORPORATE GOVERNANCE CODES

CODE	Date issuance and revisions	Elaborator	Comply or explain (CoE)	Overlapping with the legal framework (LF)
ANDEAN CODE	2005	+IAAG Consultoría and Corporate Finance by initiative of the Corporación Andina de Fomento (CAF)	Calls for the adoption of the CoE model	Framework for national codes. Some aspects overlap with and already included in LF of Bolivia, Colombia, Ecuador, Peru and Venezuela
ARGENTINA	+2004 (IAGO) +2007 (CNV)	+Instituto Argentino para el Gobierno de las Organizaciones (IAGO) + Comisión Nacional de Valores (CNV)	CNV's Code adopts a regulatory mandated CoE model (General Resolution 516-2007 of CNV)	+Some aspects overlap with and already included in national LF (IAGO's Code) +No overlap of the code's recommendations with the national legal framework (CNV's Code)
BRAZIL	1999, 2001, 2004 (revision expected for 2008)	+ Instituto Brasileiro de Governança Corporativa (IBGC)	Totally voluntary-educational code. Separate CVM code provides the basis for comply or explain reporting.	Some aspects overlap with and already included in national legal and voluntary (<i>i.e. Novo Mercado</i>) frameworks
COLOMBIA	2002, 2007	+Superfinanciera (regulator), +Confecamaras (Business Chambers'Confederation) among others	Adopts a regulatory mandated CoE model (Circular 028/2007 of Superfinanciera) whereas the "explain" part is voluntary	No overlap of the code's recommendations with the national legal framework
CHILE	2007	+Centro para el Gobierno de la Empresa	Totally voluntary-educational code.	Some aspects overlap with and already included in national LF
COSTA RICA	2007	+Bolsa Nacional de Valores +Camara Costarricense de Emisores de Titulos Valores (Issuer's Chamber)	(Adopts a voluntary-entry CoE model , where the adherence report is audited by an external auditor.	No overlap of the code's recommendations with the national legal framework
MEXICO	1999, 2006	+Consejo Coordinador Empresarial (Business Coordinating Council)	Totally voluntary-educational code (CoE model adopted for listed companies through a questionnaire mandated by the Stock Exchange internal rules) tbc	Some aspects overlap with and already included in national LF
PANAMA	2003	+Comisión Nacional de Valores (CONAVAL)	Adopts a regulatory mandated CoE model (Acuerdo 12-2003 of CONAVAL)	No overlap of the code's recommendations with the national legal framework
PERU	2002	+Comision Nacional Supervisora de Empresas y Valores (CONASEV)	Adopts a regulatory mandated CoE model (Resolución General 140-2005 of CONASEV) whereas the "explain" part is voluntary	Some aspects overlap with and already included in national LF
SPAIN	2006	+Comisión Nacional del Mercado de Valores (CNMV)	Adopts a regulatory mandated CoE model (Article 116 of the Securities Market Law and Resolution of May 22, 2006 of CNMV)	No overlap of the code's recommendations with the national legal framework

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**ANNEX 2:
COMPARISON OF MAIN CHAPTERS AND SUB-HEADINGS ADDRESSED IN VOLUNTARY
CORPORATE GOVERNANCE CODES**

**SHAREHOLDER'S RIGHTS AND EQUITABLE TREATMENT - KEY OWNERSHIP FUNCTIONS
DISPUTE RESOLUTION MECHANISMS**

ANDEAN CODE	+Shareholders rights and equitable treatment; Equal treatment on voting rights; Right of no dissolution of the companies' capital; Promoting participation and disclosure for shareholders; Electronic mechanisms for disclosure and dissemination of information through corporate website; Right of convey or transfer shares; Change of control. +General Assembly of Shareholders; Function and competence; Internal Rules for the General Assembly of Shareholders; Different classes of meetings and notices. +Arbitration and alternative dispute resolution mechanisms in the by-laws
ARGENTINA (IAGO)	+The shareholders; Equitable treatment; Reporting information; Shareholders' Meeting. +Dispute management and settlement; Mechanisms.
ARGENTINA (CNV)	+Relations with Shareholders; Information to shareholders; Attention to doubts and inquiries by shareholders; Participation of minority shareholders in GSA; Control market; Dividends policy.
BRAZIL	+Ownership; Owners; The "One Share = One Vote" Concept; Owners' Agreements; Owners' Records; The General Assembly; Acquiring Control; Leaving the Company; The use of Insider Information; Arbitration; The Family Council; Free Float.
CHILE	+Shareholder's rights and duties: Ownership rights exercise; Equitable treatment of shareholders
COLOMBIA	+Shareholder Rights; Notice of the Meeting; Development of the Meeting; Authorization of Related Transactions; Shareholders Rights and Fair Treatment. +Shareholder's Claims
COSTA RICA	+Investor's Relations (IR) Voluntary Framework; IR's Official; Special dates' calendar; Company's profits and key issues tri-monthly results; Open meeting with shareholders; Meeting with analysts and other market participants; Include IR in company's website.
MEXICO	+Shareholders' Meetings; Information and agenda; information and communication between shareholders and board of directors.
PANAMA	+Shareholders; Access to information concerning corporate governance rules, criteria for selecting external auditors, remuneration of the Board; compensations paid to key executives and remuneration schemes involving stock; Exercise to voting rights in shareholder's meetings; Annual determination of the compensation to the Board
PERU	+Shareholder's Rights: The company's governance framework shall protect shareholder's rights. +Equitable Treatment of Shareholders: The company's governance framework shall assure equitable treatment of shareholders, including minority and foreign. All shareholders shall have the possibility of redress in case of violation of their rights.
SPAIN	+Bylaws and general shareholders' meeting; Bylaw restrictions; Listed companies from the same group; Competences of the General Shareholders' Meeting; Prior circulation of board proposals to the General Shareholders' Meeting; Separate votes on General Meeting items; Split votes.

RESPONSIBILITIES AND COMMITTEES OF THE BOARD MANAGEMENT

ANDEAN CODE	+The Board of Directors; The need of a Board; Main functions of oversight and definition of strategy; Prohibition of delegation; Internal Rules and Chart of the well functioning of the Board; Board dimension; Different categories of Directors; Nomination; Cease of Directors; Rules on director's duties; Director's compensation; Board Structure; Top executive; Internal rules on board functioning, notice, and organization; Special Committees; Oversight and control on related party transactions.
ARGENTINA (IAGO)	+The Board of Directors; Overall Responsibility; Constitution; Independence; Knowledge , skills and values; Loyalty and care; Functioning; Specific responsibilities; Evaluation and training; Remuneration. +Chairperson of the Board; Overall responsibility; Specific responsibilities. +Board Committees; Audit Committee; Remuneration Committee; Nominations and Corporate Governance Committee; Finance Committee.
ARGENTINA (CNV)	+The Board in General: Responsible for company's strategy; Management control: Internal control and information, risk management: Audit committee; Number of directors; Integration of the board; Participation in other boards; Evaluation of the board; Training and development of directors. +Director's Independence: Independent directors; Designation of executive directors; Proportion of independent directors; Independent directors meetings. +Committees: Presidency of the committee by an independent director; Rotation of external auditors and trustees; Double role of auditor and trustee; Compensation systems; Corporate governance and appointments committee; Non-discrimination policy for the board's integration.
BRAZIL	+The Board of Directors; The Board of Directors; The Advisory Board; The Mission of the Board Of Directors; Responsibilities; The Internal Regulations of the Board of Directors; The Chairperson; The Chairperson and the CEO; Committees; The Audit Committee; Other Professionals; Number of Members; Independent, External and Internal; Directors; Independent Directors; Executive Session; Non-members Invited to the Board Meetings; Board and Director Evaluation; Director Qualifications; Composition of the Board; Term of Office; Age; Change of Main Occupation of Directors; Compensation; The Budget of the Board and the use of External Advice; Independent Board Leadership (Lead Director); The Corporate Spokesperson; Relationship with the CEO and Officers; Evaluation of Officers; Succession Planning; Introducing New Directors; The Secretary to the Board of Directors; Meeting Dates and Agendas; Meeting Documentation and Preparation; Minutes of the Meetings; Relationship with Independent Auditors; Internal Audit; Relationship with the Fiscal Council; Deputy Directors; Continuing Education for Directors; Risk Management; Confidentiality; Disclosure of Corporate Responsibility. +Management; Responsibilities - The Chief Executive Officer (CEO); Officer Nominations; Stakeholder Relations; Disclosure; The Annual Report; Internal Controls; Code of Conduct; Evaluation of the CEO and Officers; Compensation; Access to Facilities, Information, and Files.
CHILE	+Responsibilities and Functioning of the Board: The duty of care; The duty of loyalty; Board's functioning.
COLOMBIA	+Board of Directors; Size and Formation of the Board; Duties and Rights of Board Members; Responsibilities of the Board of Directors.
COSTA RICA	+ Board of Directors and responsibilities of its members; Integration and Operation. + Audit Committee +Compensation Committee +Internal controls and the Board of Directors
MEXICO	+Board of Directors; Functions; Integration; Structure; Operation; Director's duties. +Evaluation and Compensation Function; Generic functions; Operative issues. +Finance and Planning Function; Generic functions; Operative issues
PANAMA	+Board of directors and shareholders; duties of the board; incompatibilities of the members of the board; board integration and independence criteria; shareholders +Support committees; auditing committee (functions/internal rules); compliance and risk administration committee (functions/internal rules); committee for evaluation and appointment proposals of independent directors and key executives (functions/internal rules); rules of ethics
PERU	+Board's Responsibilities: The company's governance framework shall include its strategic guidelines, an efficient control of management by the Board of Directors and the responsibilities of the latter in front of the company and its shareholders.
SPAIN	+Board of Directors; The corporate interest; Competences of the board; Size; Functional structure; Other directors; Proportion between proprietary and independent directors; Sufficient number of independent directors; Explaining the nature of directors; Gender diversity; The Chairman; The Secretary; Board meetings; Regular evaluation; Information to directors; Dedication. +On directors; Selection, appointment and renewal; Disclosure of director particulars; Rotation of independent directors; Removal and resignation; Remuneration; The advisory vote of the General Shareholders' Meeting; Disclosure of individual remuneration. +On committees; Executive Committee; Supervision and Control committees; Audit Committee; Nomination and Remuneration committees.

**DISCLOSURE AND TRANSPARENCY
AUDITING AND OTHER SUBJECTS**

ANDEAN CODE	+Disclosure of financial information and internal control; Disclosure to financial markets; Shareholders agreement Disclosure +Corporate governance annual report; Evaluation and overview of the observance of the internal rules on corporate governance; Information included in the Corporate Governance Report.
ARGENTINA (IAGO)	+Information transparency, fluency and integrity; Reliability of information; Financial disclosure; Non-financial disclosure; Corporate governance annual report; The Website. +Auditors; Internal auditor; External auditor. +Conflicts of interest; Mechanisms; Forbidden practices; Disclosure; Policies. +Interest groups and social responsibility; Mechanisms; Interest groups; Social responsibility
ARGENTINA (CNV)	+Community Relations: Internet communications; Site's requirements.
BRAZIL	+Independent Auditing; Independent Auditing; The Opinion of the Independent Auditors; Selection, Fees, Maintenance, and Replacement of Independent Auditors; Observations and Recommendations from the Independent Auditors; Length of Mandate and Independence; Non-Audit Services; Professional Standards of Independence. +The Fiscal Council; The Fiscal Council; Composition; Work Agenda; Relationship with the Owner; Relationship with the Audit Committee; Relationship with the Independent Auditors; Relationship with the Internal Auditors; Fiscal Council Compensation; Fiscal Council Opinions. +Conduct and Conflicts of Interest; Code of Conduct; Conflicts of Interest.
CHILE	+Transparency and Information Flows
COLOMBIA	+Disclosure of Financial and Non Financial Information; Request of Information; Market Disclosure; External Auditor (<i>Revisor Fiscal</i>).
COSTA RICA	+ Shares buying and selling from Board members, key executives and consultants. +Investor's relations +corporate governance annual report
MEXICO	+Audit Function; Generic functions; Auditors selection; Financial information; Internal control; Related parties; legal provisions fulfillment revision.
PERU	+Communication and informative transparency; The company's governance framework shall assure that information regarding all material aspects of the company, such as financial results and reports, ownership and corporate governance, is regularly and accurately presented. +Function of stakeholders in the companies' governance; The company's governance framework must recognize stakeholder's rights provided by law and incentive active cooperation among them and the company in order to foster work and wealth generation, as well as financially solid companies. +Non-listed companies; All principles and practices described in the code are applicable to non-listed companies.