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Colombian SOEs: A Review
Against the OECD
Guidelines on Corporate
Governance of State-owned
Enterprises

Héctor Lehuedé

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ABSTRACT / RÉSUMÉ

COLOMBIAN SOES: A REVIEW AGAINST THE OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES

By Héctor Lehuedé¹

This report evaluates the corporate governance practices of Colombian SOEs against the OECD Guidelines on Corporate Governance of State-Owned Enterprises (SOEs). The assessment was prepared based on information provided by the Colombian authorities, an analysis of the available literature and interviews with authorities, consultants, academics, and company as well as stakeholder representatives. Following a brief introduction, Part A of the report provides information about the context in which Colombian SOEs operate, including the main aspects of the regulatory framework and its key actors. Part B refers successively to the different chapters of the Guidelines, evaluating Colombian norms and practices in their light. The final section sets out the report's conclusions and recommendations. Complementary information can be found in the five annexes. The review was prepared at the request of the Colombian authorities and approved by the OECD Working Party on State Ownership and Privatisation Practices.

JEL classification: G03, G30, G34, K22, L32

Keywords: corporate governance, state-owned enterprises, Colombia, OECD Guidelines.

ENTREPRISES PUBLIQUES COLOMBIENNES : UN EXAMEN AU REGARD DES LIGNES DIRECTRICES DE L'OCDE SUR LE GOUVERNEMENT D'ENTREPRISE DES ENTREPRISES PUBLIQUES

Par Héctor Lehuedé

Ce rapport évalue les pratiques de gouvernance des entreprises publiques colombiennes au regard des Lignes Directrices de l'OCDE sur le Gouvernement d'Entreprise des Entreprises Publiques. L'évaluation a été préparée sur la base des informations fournies par les autorités colombiennes, d'une analyse de la littérature disponible et d'entretiens avec les autorités, des consultants, des universitaires et des représentants des entreprises et des parties prenantes. Après une brève introduction, la Partie A du rapport fournit des informations sur le contexte dans lequel les entreprises publiques colombiennes fonctionnent, et notamment sur les aspects essentiels du cadre réglementaire et sur ses principaux acteurs. La Partie B fait référence successivement aux différents chapitres des Lignes Directrices, à l'aune des quelles les normes et pratiques colombiennes sont évaluées. La dernière section présente les conclusions et recommandations du rapport. Les cinq annexes contiennent des informations complémentaires. Le rapport a été préparé à la demande des autorités colombiennes et approuvé par le Groupe de Travail sur l'Actionnariat Public et la Privatisation de l'OCDE.

Codes JEL : G03, G30, G34, K22, L32

Mots clés : gouvernance d'entreprise, entreprises publiques, Colombie, Lignes Directrices de l'OCDE.

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ACRONYMS AND ABBREVIATIONS

ADR / GDR	American Depositary Receipt / Global Depositary Receipt
AGM	Annual General Meeting
ANH	National Hydrocarbons Agency
BVC	Colombian Stock Exchange
CEO	Chief Executive Officer
CGN	General Accounting Office
CGR	Comptroller General's Office
CONPES	National Council for Economic and Social Policy
DNP	National Planning Department
EBTDA	Earnings Before Taxes, Depreciation and Amortization
EICE	Industrial and Commercial State Company
EPM	Empresas Públicas de Medellín
ESE	Social State Company
ESP	Public Service Company
GAAP	Generally Accepted Accounting Principles
GDP	Gross domestic product
GSED	Defence Business Social Group
IAS	International Accounting Standards
IFRS	International Financial Reporting Standards
IGBC	General Index of the BVC
ILO	International Labour Organization
IOSCO	International Organisation of Securities Commissions
IPO	Initial Public Offering
ISA	International Standards on Auditing
KPI	Key Performance Indicator
MCIT	Ministry of Trade, Industry and Tourism
MD	Ministry of Defence
MHCP	Ministry of Finance and Public Credit
MILA	Latin American Integrated Market
MME	Ministry of Mines and Energy
ROE	Return on Equity
SEM	Mixed-Ownership Company
SME	Small and Medium Size Enterprise
SOE	State-Owned Enterprise
SRO	Self-Regulatory Organisation
USD	United States of America dollars

INTRODUCTION

As stated in the OECD's Principles of Corporate Governance (the Principles), corporate governance is part of the larger economic context in which firms operate and which includes, among others, macroeconomic policies and the degree of competition in product and factor markets. It involves a set of relationships between a company's management, its board, its shareholders and other stakeholders and also provides the structure through which the objectives of the company are set and the means of attaining those objectives and monitoring performance are determined. For the members of the OECD, the presence of an effective corporate governance system, within an individual company and across an economy as a whole, helps to provide a degree of confidence that is necessary for the proper functioning of a market economy. As a result, the cost of capital is lowered and firms are encouraged to use resources more efficiently, thereby underpinning growth.

In a number of OECD countries, State-Owned Enterprises (SOEs) represent a substantial part of GDP, employment and market capitalisation. These companies tend to have a very significant position in utilities and infrastructure industries whose performance is vital to the population and other parts of the business sector, making their corporate governance of the greatest importance. In 2005, the OECD adopted the Guidelines on Corporate Governance of State-Owned Enterprises (the Guidelines) as an application of the Principles to the sector of state-owned enterprises. The two instruments are fully compatible and the Guidelines should be viewed as a complement to the Principles explicitly oriented to issues that are specific to the corporate governance of SOEs. They consequently take the perspective of the state as owner, focusing on policies that would ensure good corporate governance, without intending to contradict or discourage countries from undertaking privatisation policies or programmes rather than retaining state ownership. OECD experience has shown that good corporate governance of SOEs is an important prerequisite for economically effective privatisation when the state decides to reduce its participation in the market.

The purpose of this report is to evaluate, at the request of the Colombian authorities, the corporate governance practices of Colombian SOEs against these Guidelines to which the governments of all OECD members have adhered. The evaluation takes the Guidelines as its starting point and also takes into account certain aspects of the Principles. The definitions and classifications set out in Annex 1 are used in order to make it comparable with the results of other OECD reports relating to SOEs. The report was prepared by Héctor Lehuedé from the Secretariat of the Corporate Affairs Division based on information provided by the Colombian authorities, an analysis of the available literature and Secretariat missions to Colombia that included interviews with authorities, consultants, academics, and SOE as well as stakeholder representatives. It was approved and declassified by the OECD Working Party on State Ownership and Privatisation Practices (the Working Party).

Following this introduction, Part A of the report provides information about the context in which Colombian SOEs operate, including the main aspects of the regulatory framework and its key actors. Part B refers successively to the different chapters of the Guidelines, evaluating Colombian norms and practices in their light. The final section sets out the report's conclusions and recommendations. Complementary information can be found in the five annexes.

PART A. COLOMBIAN CORPORATE GOVERNANCE LANDSCAPE

1. The Colombian economy and capital market

Colombia is Latin America's fourth largest economy and its short-term growth prospects are strong by OECD standards. Sound macroeconomic policies and the benefits of a commodity boom, together with improved security conditions, have given the economy an important boost. The OECD Economic Survey 2013 concluded that, in order to ensure sustainable and inclusive growth over the medium term, the Colombian authorities must address three key challenges: adjusting to the commodity boom, boosting productivity and reducing income inequality (OECD, 2013a).

Table 1. Colombian economy facts (2012 or latest available data)

Category/Indicator	Measurement unites	LAC		OECD countries				Colombian ranking		
		Colombia	average	Min	Mean	Median	Max	World	OECD	LAC
Country size										
Surface area	1,000 km2	1,142	601	3	1,603	188	9,985	26	5	5
Population	1,000	46,927	17,493	319	36,623	10,823	311,592	28	10	3
Labour force	1,000	22,136	9,353	188	17,748	5,280	157,493	30	11	3
GDP										
At current FX-rate	Billion USD	332	172	14	1,356	499	15,094	32	21	4
At PPP, current	Billion USD	474	225	11	1,281	366	15,094	26	15	4
External trade	Billion USD	124	74	15	790	449	4,770	51	31	6
GDP per capita										
At current FX-rate	USD	7,067	8,601	10,064	40,387	40,598	115,039	88	35	18
At PPP, current	USD	10,103	11,196	15,340	34,973	34,736	88,787	85	35	17
Human development index		0.71	0.73	0.70	0.87	0.89	0.94	87	34	22

Source: OECD Economic Survey 2013, citing World Development Indicators (World Bank), UNDP-UN.²

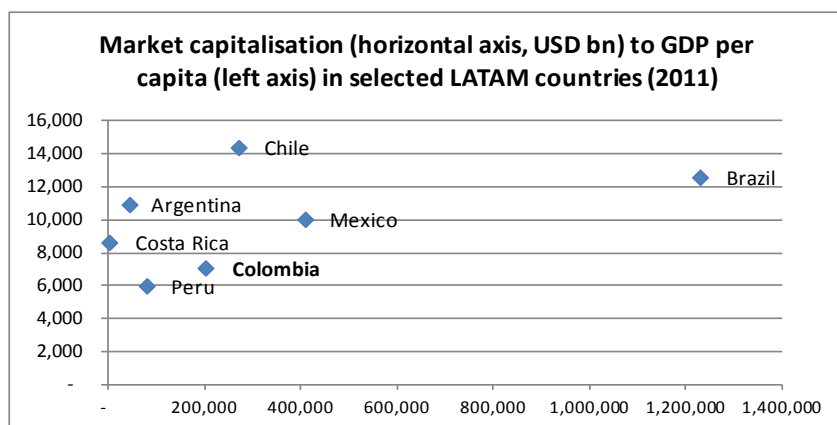
Colombia's capital market has experienced important development since 2007 when the state oil company, *Empresa de Petróleos de Colombia* (Ecopetrol), carried out its IPO but, at between 50% and 60% of GDP, remains medium-sized by Latin American standards. This is a result of factors that include the strong development of the country's financial sector,³ with an important banking sector that exports services to many Central American countries, as well as

² Notes to the table: i) External trade is the sum of exports and imports, USD. ii) The Human Development Index is an index measured on a scale from 0 = lowest to 1 = highest possible value. iii) LAC (Latin America and Caribbean) as per the World Bank, except for seven countries for which there was no recent data (Aruba, Cayman Islands, Curacao, St. Martin, Turks and Caicos, Virgin Islands).

³ "Over the past decade, assets of the supervised financial system have risen from about 60 per cent of GDP in 2000 to about 90 per cent of GDP in 2011. Credit institutions (mostly banks) account for about half of financial system assets, with the balance held by nonbanks (largely private pension funds, trust companies and insurance companies). Large domestic complex conglomerates dominate the financial landscape, with ten holding about 80 per cent of total financial sector assets. In the banking sector, the top 3 banks (...) hold about 60 per cent of banking system assets, and banks extend 90 per cent of their commercial loans to 7 per cent of debtors" (IMF 2013, p. 8).

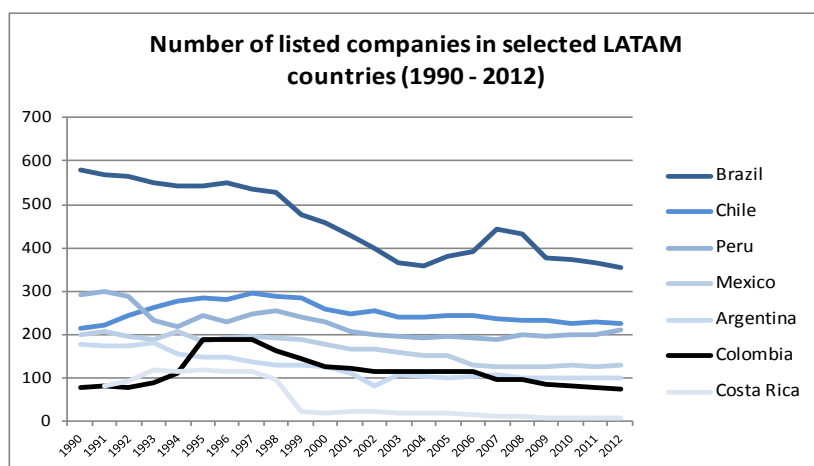
the still only moderate growth of the country's private pension funds⁴ and the recent boom in fixed-income securities in a context of historically low interest rates.⁵ In 2012, stock market capitalisation in Colombia reached USD 262 000 million (Figure 1), with compound annual growth of 39% during the past ten years. The market comprises a total of 88 listed companies, three of them SOEs owned at the central government level (Figure 2). Daily share trading averaged USD 163 million in 2012, with the total traded during the year reaching USD 40 billion of which overseas investors accounted for 14% (BVC, 2013).

Figure 1. Colombian market capitalisation



Source: World Bank Indicators, 2013

Figure 2. Number of listed companies



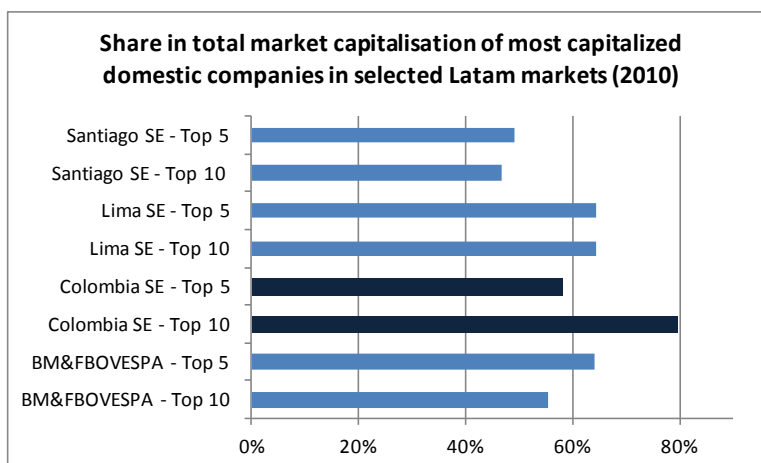
Source: World Bank Indicators, 2013

⁴ Colombia's defined-contribution private pension system, created 16 years ago, currently has assets under management for USD 88 billion. In contrast to other countries, it competes with a parallel pay-as-you-go system and its growth has also been constrained by the economy's high level of informality. The 2013 OECD Economic Survey of Colombia highlighted the impact that a high minimum wage (80% of the median wage) and high social security contributions have on the labour market. Out of a workforce of 21 million, only 6.5 million pay pension contributions. The survey also draws attention to a lack of public policies providing adequate incentives for formalisation (OECD, 2013a).

⁵ "Colombia's capital markets reflect mainly activity in government debt and equity markets (...). Non-government fixed income remains undeveloped (4 per cent of GDP) and dominated by financial sector issues" (IMF 2013, p. 8).

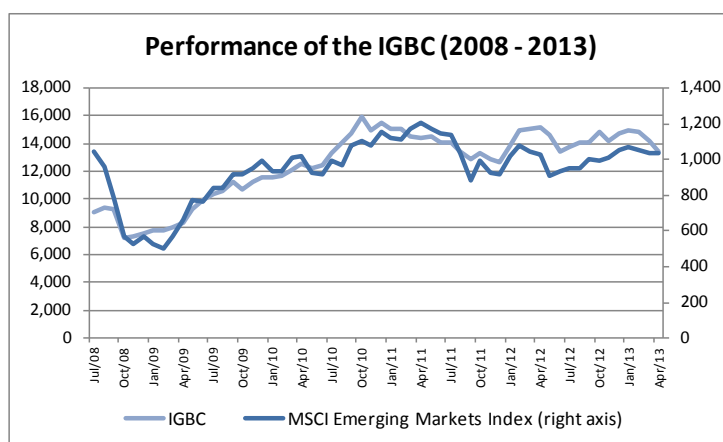
The ten principal companies (Figure 3) account for approximately 80% of total market capitalisation (WFE, 2013) at the Colombian Stock Exchange (BVC)⁶ and are concentrated in the oil and gas industry (Ecopetrol) and the financial sector. The level of liquidity is low, with an average market free float of 15% in 2012 (BVC, 2013).

Figure 3. Market concentration of listed companies



Source: World Federation of Exchanges, 2013

Figure 4. Performance of the IGBC Index 2008 - 2013



Source: Thomson One

Colombia's principal share price indices are the IGBC, the general index that reflects the price of shares traded on the BVC (Figure 4); the COLCAP which reflects the price of the 20 most liquid shares and in which each issuer's weight is determined by its adjusted market capitalisation; and the COL20 which also reflects the price of these 20 shares but weighted by their liquidity. The main trading systems are the Colombian Electronic Market (MEC), administered and regulated by the BVC, on which securities other than government debt are

⁶ Until their merger in July 2001, Colombia had three different stock markets (Bogotá, Medellín and Occidente), with differences in the price of the same asset that created opportunities for arbitrage, fragmented the market and weakened its incipient liquidity. Their merger created the present Stock Exchange of Colombia (BVC) which, over the years, has grown in depth, transparency and dynamism.

traded; the Electronic Negotiation System (SEN), used principally for government debt; and the OTC market.

Market concentration is also seen at the level of intermediaries since the three largest stockbrokerages, account for around 50% of the BVC's income (BVC, 2013). The Central Securities Depository (DCV) is responsible for mitigating risks related to the physical handling of transfers, registration and other operations, receiving securities and financial instruments whether or not they are registered on the National Securities and Issuers Register. The Securities Market Self-Regulation Corporation (AMV), a non-profit private institution, was created in 2006. Its governance is designed to guarantee industry representativeness and provide it with the necessary independence for the exercise of its self-regulation functions. It adopted the OECD Principles as its guidelines. In addition, under Decree 4 759 of 2005, members of stock markets and independent stockbrokerages as well as investment fund managers must have a Client Defender who responds to complaints within a maximum period of five working days.

The BVC has joined together with the Lima and Santiago stock exchanges to create the Integrated Latin American Market (MILA), seeking through the unification of their platforms to increase the range of options and liquidity they offer to issuers and investors. They aim to serve as an alternative to the region's two larger markets (Brazil and Mexico) (Table 2).

Table 2. Integrated Latin American Market (MILA)

	Market cap (USD Bn)	Issuers	Traded volume (equity, USD Bn)	Intermediaries
Peru BVL	103	217	1	25
Colombia BVC	250	75	5	28
Chile BCS	337	222	9	32
MILA	690	514	15	85
Mexico BMV	533	132	28	34
Brazil BOVESPA	1,236	352	142	90

Source: BVC, 2013 (information as of February 2013).

2. Development of the Colombian corporate governance framework

Numerous reforms, introduced between 1995 and 2002, established a modern framework for securities issuers in Colombia and aligned companies' governance structures with international corporate governance practices. Law 222 of 1995 contains norms in line with the OECD Principles, particularly as regards shareholders' rights, disclosure and creditors' rights as well as the operation of a company's board and the responsibilities of its management. This law also introduced new types of legal action, such as the so-called social responsibility action which can be used against a company's managers if they fail to fulfil their functions. In 1998, Law 446 went on to introduce improved mechanisms for the protection of minority shareholders, enabling any group of shareholders that represents less than a 10% stake to request the intervention of the regulator if they consider the company is taking measures detrimental to their interests.

Corporate governance and its improvement became an issue in Colombia in 2001 with the introduction of a number of public policies to foster better business practices. They were accompanied by an educational campaign launched by the Colombian Confederation of Chambers of Commerce (*Confecámaras*) and the issue by the Securities Superintendency⁷ of

⁷ Now Financial Superintendency (see section A.3.2.2.)

Resolution 275, on the voluntary adoption of codes of corporate governance by issuers of securities with private pension fund administrators (AFPs)⁸ among their investors (Gutiérrez and Pombo, 2009). In addition, the merger of the country's stock markets, which also took place in 2001, created an actor which has played an important role in the promotion of corporate governance in Colombia.⁹

However, according to local experts, the most important reform as regards to corporate governance is Law 964, the Securities Market Law, introduced in 2005 (see A.3.1.3.). More recently, External Circular 028 issued in 2007 by the Financial Superintendency (which replaced the Securities Superintendency after its merger with the Banking Superintendency) obliged the entities under its supervision to adopt the national Corporate Governance Code (the *Código País*), drawn up by the regulator together with the BVC and different business associations (see section A.3.2.1.).

The main reforms introduced in recent years include articles 24 and following of Law 1 429 of 2010, which regulate private liquidation procedures and the responsibilities of administrators and liquidators, and article 17 of Law 1 474 of 2011 that added disloyal management as a criminally sanctioned conduct in the Criminal Code. In 2012, Law 1 258 created a new type of company, the simplified stock company, introducing greater flexibility as regards corporate governance requirements for investment companies that do not publicly offer securities. Finally, Law 1 564, also introduced in 2012, established in article 24 of the General Procedural Code jurisdictional powers that allow the Company Superintendency to review the validity of votes at shareholders' meetings in the case of a shareholder's abusive use of the right to vote (see section A.3.2.3.).

These efforts are reflected in Colombia's good results in the World Bank's Doing Business rankings (Figure 5). In general, its capital market is perceived as very favourable to investment and the World Bank considers its legal and regulatory regime as among the best as regards protecting investors, an aspect on which it took 6th place in the global ranking for 2013, with a significant improvement between 2005 and 2012 (Figure 6).¹⁰ Colombia also performs well on resolving insolvency where it ranks 21st while its worst performance is enforcing contracts (154th).¹¹

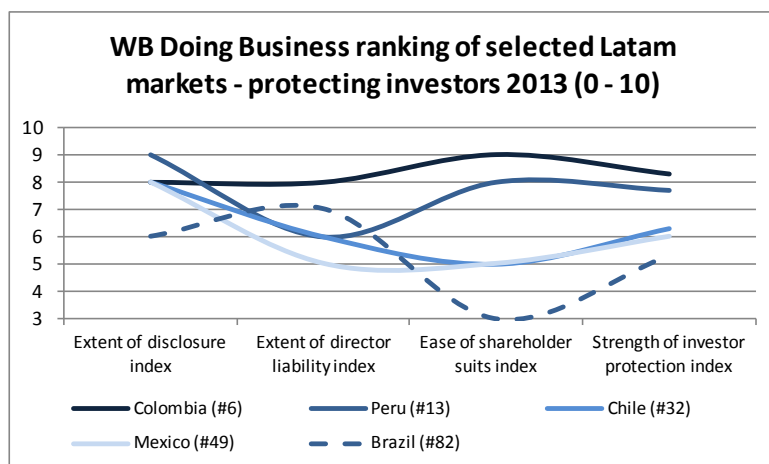
⁸ Colombia has a defined-contribution pension system under which pension savings are managed by AFPs which can invest part of their assets under management in the Colombian capital market. There is also a parallel pay-as-you-go system administered by Colpensiones.

⁹ The BVC has promoted improvements in corporate governance practices in collaboration with the IADB and the CAF and other multilateral organisations. In 2002, it implemented a pilot plan under which it worked with consultants to improve the corporate governance of ten listed and non-listed companies. It subsequently carried out countrywide surveys that were the predecessor of those now carried out by Código País. In addition, the BVC created the Colombia Capital programme which has launched numerous initiatives to improve practices and communication between issuers and investors.

¹⁰ The strength of investor protection index is the average of the extent of disclosure index, the extent of director liability index and the ease of shareholder suits index. It ranges from 0 to 10, with higher values indicating greater investor protection.

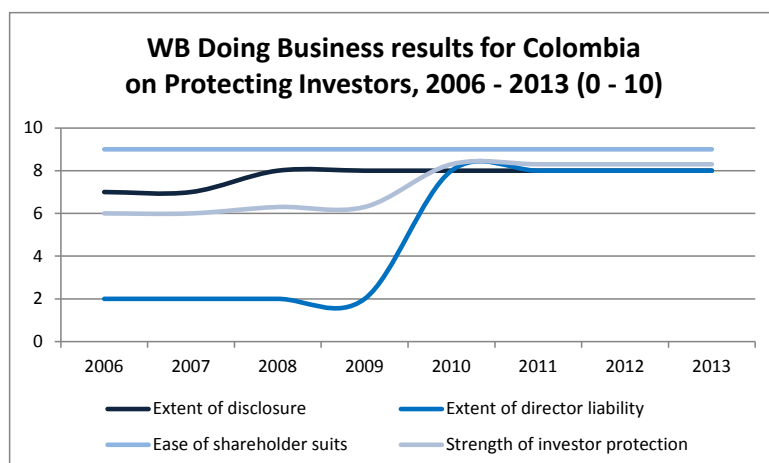
¹¹ The 2013 OECD Economic Survey urged the Colombian authorities to continue improving the country's business environment, in particular by reforming product market regulations that act as barriers to entrepreneurship and by strengthening the rule of law to ensure better contract enforcement and reduce corruption (OECD, 2013a).

Figure 5. Investor protection assessment by World Bank



Source: World Bank Doing Business 2013 Database

Figure 6. Colombia's results in WB's Doing Business



Source: World Bank Doing Business 2013 Database

The marked improvement in evaluation of directors' liability by the World Bank ranking is due partly to the important development of arbitration as seen particularly in the arbitration systems of the Bogotá Chamber of Commerce. In Colombia, arbitration rulings must be public and have served to interpret the law and create jurisprudence.

Colombian companies have a highly concentrated ownership structure. Among the largest listed companies, the controlling shareholders retain more than two thirds of total shares. Beyond those cases, a study of non-financial listed companies without a single controlling shareholder (between 1996 and 2004), found that in almost all companies the four largest shareholders controlled over 51% of direct votes (Gutiérrez and Pombo, 2009).

Banco de Bogotá and Bancolombia (formerly *Banco de Colombia*) were the first Colombian companies to list on the stock market and did so in 1929, the same year in which the Bogotá Stock Exchange was founded. Bancolombia is controlled by *Grupo Empresarial Antioqueño*, the country's largest conglomerate and a dominant player in the food, cement, banking and insurance industries. In 2009, the group's consolidated sales represented between 6% and 8% of Colombia's GDP.

Another important player in the private sector is the Bavaria brewery, founded in 1899 and listed in 1933. Under the control of the Santo Domingo family from the Barranquilla region, it grew into a diversified conglomerate that included *Caracol Televisión*, the TV channel, and *Avianca*, the airline, among other important companies. As the Bavaria group, it became the country's second most important conglomerate. In 2005, the brewery was spun off and acquired by South Africa's SABMiller, with the Santo Domingo family as the second largest shareholder in the resulting holding company (Box 1).

Box 17. Merger of SABMiller and Cervecería Bavaria

The most important challenge faced recently by Colombia as regards corporate governance arose from the merger of SABMiller and Bavaria. Under the merger agreement reached on 18 July 2005, SABMiller obtained a 71.8% stake in Bavaria, implying important challenges as regards protection of minority shareholders. Colombia's corporate governance institutions duly responded, resulting in three public tender offers: a first voluntary offer by SABMiller, a second compulsory offer at a price established by the regulator and a third delisting offer. Together, these three mechanisms ensured that the prices paid to both majority and minority shareholders were fair and on relatively similar terms. This is Colombia's only recent public corporate governance challenge at the securities market level and indicates that the country has achieved important progress in this field where it now has more strengths than weaknesses.

Source: Bernal, 2009.

Corruption constitutes a significant challenge for the development of corporate governance in Colombia. In 2012, it ranked 94th out of 174 countries in Transparency International's Corruption Perceptions Index (Transparency 2013b). According to the AmericasBarometer 2011 published by the Latin American Public Opinion Project (LAPOP 2011), the perception of corruption in Colombia reached 81%, its highest level since the study was first carried out in 2004. Similarly, the latest Survey of Colombian Companies' Anti-Bribery Practices, carried out in 2012, found that 94% of businesspeople believed that their peers offered bribes and 58% of companies lacked mechanisms for reporting cases of bribery. This is also reflected in the World Bank's Doing Business report which indicated that, in the view of businesspeople, corruption is the factor which most hampers companies' competitiveness.

According to Transparency International's latest report, Colombia has seen political progress, particularly as regards the rule of law.¹² These advances have also opened the way to progress in combating corruption. However, Transparency International considers that neither these developments nor government measures such as the 2011 anti-corruption statute (Box 2) and the creation of the Presidency's anti-corruption office¹³ have made an effective contribution to reducing corruption or overcoming the principal challenges it poses: i) collusion between the public and private sectors; ii) clientelism and the capture of public policies by organised crime; iii) a lack of state control and weak provision of services in remote areas of the country; and iv) the ineffectiveness of criminal justice (Transparency International 2013a).

¹² While the peace talks with the Revolutionary Armed Forces of Colombia (FARC)¹² provide promising signs of greater political stability, in the most recent ranking published by the World Economic Forum, Colombia ranks 124th out of 132 economies in terms of "business costs of crime and violence" and 132th (last) on "business costs of terrorism".

¹³ In the 2013 Economic Survey of Colombia, the OECD criticised some of these measures on the grounds that their design implies dependence on the political cycle and suggested giving them greater independence and autonomy.

Box 18. Main provisions of the Anti-corruption statute (Law 1 474 of 2011)

Administrative measures: i) barring individuals and legal entities responsible for committing a crime against the public administration or public assets from future contracts with the state; ii) barring former public officials from acting before public bodies on behalf of private interests for a period of two years after ceasing in their previous posts; and iii) barring former senior public officials from becoming state contractors in the sector in which they served for a period of two years after ceasing in their previous posts.

Penal measures: i) exclusion of the option of alternative sentences; ii) extension of the statute of limitations in the case of crimes related to corruption; and iii) extension of the penal responsibility of legal entities.

Disciplinary measures: i) reform of the terms of disciplinary investigations; ii) strengthening of the disciplinary powers of the Supreme Council of the Judiciary; and iii) proposed preferential control of processes in which there is a delay by the Disciplinary Jurisdictional Court.

Other key terms: i) definition of new crimes for corruption in the private sector and stiffer penalties; ii) power of the President to directly appoint officials in charge of offices for the control of central government bodies; and iii) increase in the grounds for cancelling the registry of a public accountant, including failure to report to the authorities acts of corruption of which he/she has become aware in the exercise of his/her professional activities.

Source: http://www.legis.com.co/BancoConocimiento/L/ley_1474_estatuto_anticorrupcion/ley_1474_estatuto_anticorrupcion.asp

On 24 January 2011, the government of Colombia formally applied for full membership of the OECD Working Group on Bribery in International Business Transactions and to adhere to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In November 2011, the OECD Executive Directorate accepted Colombia's application (it became the Working Group's 40th member).

3. Regulatory environment in Colombia

3.1. Main laws

3.1.1. Colombian Constitution (1991)

Under Colombia's Constitution, companies are regarded as the basis of the country's development and have a social function. This entails obligations and implies that the state must prevent the obstruction or restriction of economic freedom and control any abuse by individuals or companies of a dominant domestic market position. The Constitution delegates to the law the task of defining the scope of economic freedom when so required by the social interest, the environment and the country's cultural heritage.

Article 150 of the Constitution assigns to the National Congress the task of creating or authorising the creation of SOEs. Congress may, however, also delegate extraordinary powers to the government to create or modify SOEs and change the institution to which they are linked through decrees with force of law.¹⁴ Article 336 stipulates that the government must sell or liquidate state monopolies and transfer their activities to third parties when they do not achieve the efficiency required by law.

¹⁴ These special faculties are often granted when a new President takes office, as it was in the case of President Santos.

Article 60 adds that, when the state sells its stake in a company, it must take measures to diversify ownership and offer shares to workers and solidarity organisations on preferential terms. This norm establishes the framework for the privatisation regime discussed in section A.6.

Article 305 establishes that, at the regional level, the governor is empowered to freely appoint and remove the managers or directors of public institutions and companies owned by the department. The department's representatives on their boards and their managers and directors are considered agents of the governor. Similarly, under article 315, mayors are empowered to appoint and remove the managers or directors of local public institutions and companies in accordance with the corresponding provisions.

Finally, article 106 establishes that the inhabitants of an area served by a utility company can elect representatives to its board (normally through the local governor or mayor), prior compliance with the requirements established by the law and in the cases which it defines.

3.1.2. Commercial Code (Decree 410 of 1971)

The general framework for Colombia's company and commercial contract law is provided by the Commercial Code. Chapter VI of the Code regulates the structure of stock companies (Box 3).

Box 19. Main elements of stock company law under the Commercial Code

Constitution: By public deed which must be registered with the Chamber of Commerce corresponding to the company's domicile; reforms of a company's by-laws must also be by public deed and registered with the corresponding Chamber of Commerce.

Shareholders: A minimum of five with no upper limit; no shareholder may hold more than 95.99% of the company's equity.

Equity: A company's equity is divided into shares of equal value and comprises: (i) authorised capital; (ii) subscribed capital and (iii) paid-in capital. At the time of a company's constitution, its shareholders must subscribe at least 50% of its authorised capital and pay in at least a third of the subscribed capital. Within the limits of the authorised capital, increases in subscribed capital are through the issue of new shares, duly authorised by a shareholders' meeting. A reform of the company's by-laws is required only in the case of an increase in authorised capital which must be by public deed.

Responsibility: Shareholders are responsible only up to the amount of capital they have contributed. A company's administration is jointly and unlimitedly responsible for damages caused by intent or negligence to the company, its partners or third parties.

Company organisation: i) Shareholders' meeting and board of directors appointed by the shareholders' meeting with at least three members (directors and alternate directors) and ii) manager appointed by the board of directors with the powers established in the company's by-laws. The manager is also normally the company's legal representative. Administration corresponds to the board of directors and the manager.

Transfer of shares: The transfer of shares must be recorded in the Share Register through a written order from the seller. This order may take the form of endorsement. In the case of preferential rights, these are guaranteed by the company's by-laws.

Source: articles 373 and following of the Commercial Code.

3.1.3. Securities Market Law (Law 964 of 2005)

Colombian experts view this law, introduced in 2005, as the single most important reform of securities market regulation and protection of minority shareholders of listed companies (Gutiérrez and Pombo, 2009). It is described that its design follows the Sarbanes-Oxley Act (2002) and the reforms of company law implemented by South Korea (1998-2003) on independent directors, audit committees and systems of information and financial control. It is also highlighted that:

“(...) two central points of this reform are contained in the chapter on the obligations and functioning of securities issuers and are related to their boards of directors (article 44) and audit committees (article 45). In the case of boards of directors, its most important provisions establish that 25% of directors must be independent and define the criteria for considering that a director is independent (...) The law also introduces greater flexibility in the system of election of directors, which was previously based exclusively on the electoral quotient system, and explicitly establishes the separation of the legal representative of a company from the president of its board of directors. The law also stipulates that audit committees must comprise at least three members of whom a majority must be independent. The president of this committee must be an independent director.” (Gutiérrez and Pombo, 2009, pp. 246 - 247)

3.2. Main administrative regulations

3.2.1. Corporate Governance Code (Código País)

Colombia's corporate governance code, known as the *Código País*, comprises 41 best practices drawn up by issuers in the non-financial and financial sectors on the basis of work carried out by different participants in the country's capital market. It was adopted by the Financial Superintendency in 2007 in order to standardise the corporate governance practices that companies had developed independently through their own internal codes. It is built around recommendations on: i) shareholders' meetings; ii) boards of directors, iii) disclosure of financial and non-financial information; and iv) dispute resolution.

Adoption of the code is voluntary and based on the principle of self-regulation, but the Financial Superintendency requires that all issuers submit an annual report on their implementation of the measures it recommends.¹⁵ Via External Circular 55 of 2007 the Financial Superintendency also demanded that AFPs should factor compliance with the *Código País* into their investment decisions.¹⁶ From 2007 to 2011 the *Código País* took a “comply or explain” approach under which it was sufficient to disclose non-compliance without, unless the issuer wished, explaining the reasons. This was amended by External Circular 7 of 2011 and applies now under usual “comply or explain” practices.

3.2.2. Rulings from the Financial Superintendency (Superfinanciera)

The Financial Superintendency, known as *Superfinanciera*, is a technical body with legal personality and administrative and financial autonomy. It plays a key role in Colombia's capital

¹⁵ See <http://www.superfinanciera.gov.co/Codigopais/presentacion.htm>.

¹⁶ AFPs are also subject to corporate governance rules contained in Decree 857 of 2011 and External Circulars 051 of 2011 and 01 of 2012 of the Financial Superintendency.

market since it supervises and controls persons and companies undertaking financial, stock market and insurance activities or any other activity related to management of resources obtained from the general public. In Colombia, these activities can only be undertaken by entities authorised by the Superintendency.

The Financial Superintendency is the product of the merger in 2005 of the Banking and Securities Superintendencies, bringing together under a single regulator the supervision of all financial and insurance institutions and participants in the securities market. The aim of the merger was to guarantee a stable, efficient and competitive financial system that provides protection for the consumer; to improve regulation of conglomerates; and to avoid regulatory arbitrage.¹⁷

The Financial Superintendency is divided into two main areas: a risk area and an institutional area. Oversimplifying a much more sophisticated categorization, within the risk area and there is a division responsible for conglomerates and matters relating to corporate governance whose scope includes all capital and financial market agents except real sector issuers, which are the responsibility of the institutional area, where matters of corporate governance are addressed by the securities issuers division.

The Financial Superintendency's functions include the control of the suitability of the persons appointed as CEOs or directors of entities under its supervision, ensuring formal compliance with the grounds for recusal but without addressing the issue of the candidates' skills (no "fit and proper" testing). This is regulated by External Circular 29 of 2006.

Via External Circular 28 of 2007, the Superintendency adopted the Código País, the Colombian Corporate Governance Code, which it drawn up together with the Colombian Stock Exchange and a number of business associations, and also made reporting on its compliance compulsory for all entities subject to its supervision (see Table 6 for a sample of results).

3.2.3. Rulings from the Company Superintendency (*Supersociedades*)

The Company Superintendency, known as *Supersociedades*, is a technical body attached to the Ministry of Trade, Industry and Tourism (MCIT), with legal personality, administrative autonomy and its own assets. Since 1981, the *Supersociedades* has supervised those companies not subject to control by what is now the Financial Superintendency.¹⁸ In 1995, the *Supersociedades* was empowered to act as conciliator in conflicts between companies and their owners (or between the owners), enabling it to create an Arbitration and Conciliation Centre. It was, in addition, given exclusive jurisdictional powers as regards agreements for the restructuring of insolvent companies.

Article 24 of Law 1 564 of 2012, which established the text of the General Procedural Code, recently gave the *Supersociedades* jurisdictional powers to review the validity of votes at

¹⁷ The study which was carried out prior to this reform found that the existence of difference supervisors had encouraged regulatory arbitrage on accounting and business development matters as well as in the provision of information to consumers. One example of this was the case of collective portfolios which, when structured and managed by fiduciary companies, were supervised by the Banking Superintendency but by the Securities Superintendency when structured and administered by stockbrokerages or investment management companies.

¹⁸ As from 1992, overlap of powers between the Company Superintendency and the Financial Superintendency was resolved in the latter's favour, giving the Company Superintendency residual responsibility for companies not subject to the supervision of other regulators.

shareholders' meetings in the case of a shareholder's abusive use of the right to vote. In particular, this norm refers to:

“the total annulment of a decision adopted in abuse of the right on the grounds of illicit purpose and compensation for damages in the case of majority, minority and parity abuse when the shareholders do not exercise their right to vote in the interests of the company and for the purpose of causing damage to the company or other shareholders or of obtaining unjustified advantage for themselves or a third party as well as when the vote may result in damage to the company or the other shareholders”.¹⁹

4. Organisation of the Colombian SOE sector

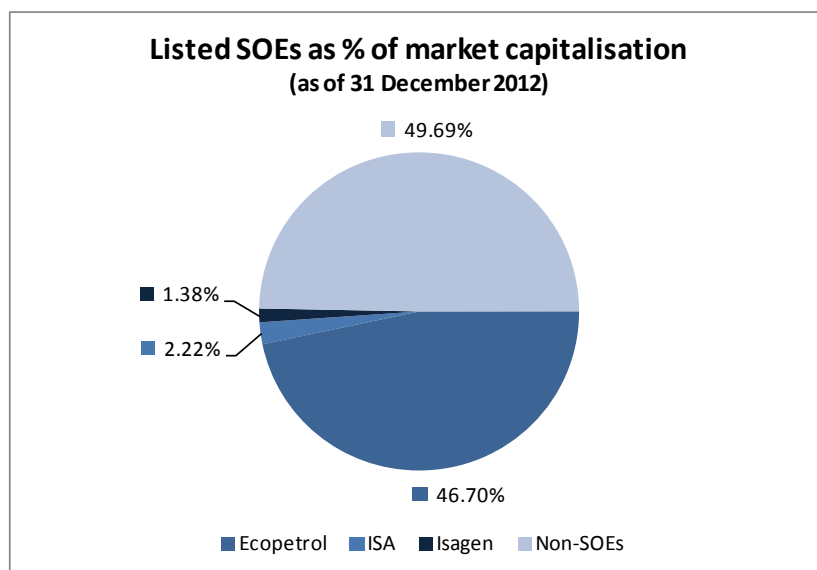
According to the Ministry of Finance and Public Credit (MHCP), the state of Colombia develops activities of an industrial or commercial nature and of economic management through SOEs while also fulfilling its administrative functions through public institutions. The central government-owned SOE sector includes about 70 SOEs and partly state-owned companies, organised mostly as either statutory corporations or stock companies (see Annex 3 for an overview of the sector). The valuation of its assets at the end of 2012 accounted for around 30% of Colombia's GDP, a level not far from other OECD countries (Christensen, 2011).

Only three central government SOEs - Ecopetrol, *Interconexión Eléctrica S.A. E.S.P* (ISA) and Isagen - are listed on the Colombian stock market but are very important in terms of their relative weight, particularly Ecopetrol which alone represented 46.7% of total market capitalisation at the end of 2012 (Figure 7). In these three companies, the state has an average 80% stake.

Colombia also has numerous SOEs at the regional and municipal level which, since their control falls outside the scope of the central government, are not covered by this report. However, it is important to note that some are important players in their markets and have good corporate governance standards as, for example, in the case of *Empresas Públicas de Medellín* (EPM) (see Annex 2), while others, such as a number of utilities that serve the capital city, are important players at a regional level and some are even listed. However, according to experts interviewed for this report, there are also many sub-national SOEs in which corruption and mismanagement represent a serious problem.

¹⁹ It is not clear if these powers against abuse of law granted to the Company Superintendency would apply to voting at listed SOEs or others subject to the supervision of the Financial Superintendency.

Figure 7. Listed central government owned enterprises



Source: MHCP

The Colombian government is divided by administrative sectors in accordance with the different areas of state activity, with enterprises owned by the central government distributed depending on regulatory affinity. As a result, they are assigned to different ministries that include principally the MHCP, the Defence Ministry (MD), the Mines and Energy Ministry (MME), the MCIT, as well as others that include the Ministry of Agriculture, the Ministry of Transport and the Ministry of Health and Social Protection. In parallel, the government has issued norms of a general nature which apply to all companies, whether privately or state-owned, independently of the ministry responsible for them, such as the Utilities Law and the Organic Statute of the Financial System.

Law 489 of 1998, which established the general structure of the state, stipulates that SOEs have administrative and financial autonomy and their own assets. They can, therefore, be subject to private law and undertake for-profit industrial or commercial activities but, due to the contribution of state capital and the relation that the law establishes between these enterprises and the different bodies of the state, remain state activities.²⁰

In general, the relations of Colombian SOEs with the different ministries (or administrative departments) take the form of what under Colombian administrative law is defined as *vinculación* (linkage), which offers more autonomy from the central government to SOEs than that offered to other bodies subject to *adscripción* (ascription). The linkage is usually determined when an SOE is created, along with its legal form and starting capital, and, unless its charter states otherwise, the relationship may, depending on the decision of the legislature, be with any ministry or administrative department related to its activities. This decision may subsequently be revised, subject to compliance with same original formalities.

²⁰ According to the jurisprudence established by Colombia's Constitutional Court, the relationship of SOEs to executive government, combined with their nature as decentralised bodies, implies that i) they must be created or authorised by law; ii) they are subject to control of their finances, management and results by the Comptroller General's Office; iii) they are subject to political control exercised directly by Congress to which they must report on the state of their business; iv) their directors and management are subject to the recusals applicable to public officials; and v) they are subject to the norms of the organic budget law. Sentence C-910 of 2007.

This relationship of SOEs to ministries and administrative departments implies that, notwithstanding their autonomy as decentralised bodies, they are subject to control by the central government. This control is not of a hierarchical nature but takes the form of “tutelage” by the ministries or administrative departments for which the SOEs are an instrument of coordination for the implementation of their policies.²¹ Under this tutelage, the ministry or administrative department must ensure the legality of an SOE’s administrative actions and monitor its compliance with public policies. It also usually implies that officials from the ministry or administrative department sit on its board of directors.

It is fairly common for Colombian SOEs to be linked to one ministry but having its shares owned by another. This is the case of a number of SOEs administered by the MHCP, despite being linked formally to other ministries. Barring some specific exceptions,²² there are no formal mechanisms for resolving the discrepancies that can, in these cases, arise as a result of the different points of view of ministries as regards decisions that correspond to the state as owner. Greater coordination between ministries or the creation of a co-ordinating body or central ownership entity, with total or partial responsibility for the SOE sector, could make an important contribution to avoidance of these problems (see section B.2.4.).

4.1. Colombian Presidency

Like many other Latin American countries, Colombia has a presidential political system under which the President of the Republic has great power over the state. In the case of SOEs, this is reflected in the role played by ministries as representatives of the executive as well as in the role played directly by the President.

Under the statutes and charters of some SOEs, it is the President who nominates their CEOs and some members of the board, in accordance with the terms of their statutes which may stipulate minimum requirements or characteristics for the corresponding posts. In addition, the President’s powers include the appointment of the presidents, directors or managers of national public institutions and of all other officials who do not have to be selected competitively.

Under Colombian law, all state entities, including enterprises in which the state holds a stake of 90% or more, must have offices responsible for their internal control. Under Law 87 of

²¹ The concept of tutelage is defined in Law 489 of 1998 which, among its provisions, states that: (i) at the national level, “ministers and directors of administrative departments guide and co-ordinate compliance with the functions assigned to (...) companies of mixed ownership that are ascribed or linked to them or form part of the corresponding Administrative Sector (article 41); (ii) “the charter of all companies of mixed ownership will indicate the conditions of the state’s participation which include authorisation of its creation, the company’s character as of a national, departmental, district or municipal nature and its relations with different bodies for the purposes of the control the state must exercise over it” (article 98); and (iii) “representation of the shares that public bodies or the Nation hold in a Mixed-Ownership Company corresponds to the Minister or Director of the Administrative Department to whose institution the Company is linked” and “when the shareholder is a public institution or industrial or commercial state company, its representation will correspond to the respective legal representative but may be delegated to the officials indicated in its internal statutes” (article 99). See also articles 104 to 106 of Law 489 for the scope of administrative tutelage.

²² Article 99 of Law 489 of 1998 establishes that, if two or more public bodies must participate in the shareholders’ meeting of an SOE in the financial sector, the right to vote on behalf of the state’s shares will correspond to the body to which the SOE is linked: “Representation of the shares that public institutions or the Nation hold in a Mixed-Ownership Company corresponds to the Minister or Director of the Administrative Department to whose institution the Company is linked”. Under this norm, it is, for example, the MCIT that votes in representation of the state at shareholders’ meetings of the *Fondo Nacional de Garantías S.A. (FNG)*, a body linked to the MCIT but whose shares are mostly held by the MHCP.

1993 and the Anti-Corruption Statute (see Box 2), it is the President of the Republic who appoints the head of the internal control office of the executive branch's national state bodies.²³ The Directorate of the National Internal Control System, which reports to the President of the Republic, establishes a system of organisation and set of plans that include verification and evaluation methods, principles, norms, procedures and mechanisms which all bodies subject to internal control must adopt.

In utilities, a sector that is important in the activities of Colombian SOEs, it is the President of the Republic who has the authority to complement the law and establish general policies on administration and efficiency as well as for the control, inspection and supervision of these companies. Under Law 819 of 2003, the Colombian Congress determined that the state's interests must be represented on the boards of utility companies by MHCP officials. Under related norms, issued subsequently by the President of the Republic, the boards of all these companies must include at least one MHCP official.

The President of the Republic also plays a significant role in setting the remuneration of the state's representatives on the boards of some SOEs. Law 4 of 1992 states that public employees may not receive more than one remuneration that has its origin in the National Treasury but makes an exception in the case of the fees received by public employees as directors of SOEs. In this case, the President of the Republic has delegated the task of setting the remuneration of directors of SOEs in which the state holds a majority stake to the Minister of Finance. The President has, in addition, delegated the power to establish the salary regime of the public employees of bodies that include non-financial SOEs linked to the MHCP and the presidents of state financial entities.

4.2. Ministry of Finance and Public Credit (MHCP)

Under Colombia's Constitution, the state must foster business development, guard against the obstruction or restriction of economic freedom and prevent or control abuse of a dominant domestic market position by individuals or companies. The Ministry of Finance and Public Credit (MHCP) is the principal body responsible for the economy's general management and is, therefore, probably the single most important player as regards state ownership of companies.

The MHCP's responsibilities as regards SOEs include administration of the state's shares in companies linked to the Ministry or subject to its administration through intra-administration contracts. They also include participation in the preparation, modification and monitoring of the budgets of some SOEs where the state holds 90% or more of the shares. It is, therefore, responsible for monitoring the financial management and investments of decentralised national entities, guiding management of the companies linked to it and of the bodies ascribed or linked to it. It must also co-ordinate sales of SOE's assets and shares.

The MHCP has a five-member Investment Banking team, which manages the state's ownership stake in all SOEs related to the Ministry in conjunction with professionals of the MHCP's Asset Committee and the office of the General Secretary (in-house legal counsel).²⁴ Its

²³ Each four months, this head of internal control must publish a detailed report on the entity's website; see Chapter II of http://www.secretariasenado.gov.co/senado/basedoc/ley/2011/ley_1474_2011.html.

²⁴ "The Asset Committee of the MHCP was created by Resolution 2 214 of 2006 and comprises the Minister of Finance and Public Credit, who serves as its president, the Technical Vice-Minister, the General Vice-Minister, the Secretary General and the Director of Public Credit and the National Treasury. The Investment Bank Subdirector serves as secretary of the Committee whose functions are: to analyse and evaluate the performance of the State's shares in the companies referred to in article 1 of this Resolution, based on the

principal function is to manage the Ministry's portfolio of state shares and to co-ordinate sales of SOE assets and shares (Box 4).

The Investment Banking area and the Asset Committee explain that they carry out their work as shareholder representative autonomously, without consulting other ministries or officials responsible for regulating the markets in which the SOEs operate. However, by law or under the statutes of some SOEs, the Finance Ministry must form part of or appoint a delegate to the boards of a dozen SOEs related to the MHCP, many of which are in areas that are part of its direct responsibilities as regards public or economic policy.

Box 20. Functions of the Investment Banking Division of MHCP

The MHCP's Investment Banking Division was created in 2008 and its functions are defined in article 39 of Decree 4 712 issued in 2008. They include:

- i) To advise on, propose and monitor processes such as mergers, acquisitions, capitalisations, concessions and divestments and systems of private participation in assets that are directly or indirectly owned by the state and in infrastructure projects;
- ii) To monitor the financial situation of entities in which the state holds a stake through the MHCP;
- iii) To advise the MHCP on matters involving companies in which the state holds a stake and which imply processes that include divestments, ownership diversification, capital increases and decreases, liquidations, mergers and spin-offs; to monitor contingent liabilities related to divestment processes and systems of private participation in decisions about these processes; and to co-ordinate their evaluation and analysis with the Risk Sub directorate;
- iv) To advise the MHCP on decisions in board and shareholders' meetings of the companies in which the state holds a stake;
- v) To co-ordinate processes related to the management of state shares in SOEs linked to the MHCP and in other SOEs subject to intra-administration agreements established for this purpose; to advise on matters related to the sale of their assets and shares; and to present reports to the corresponding areas;
- vii) To participate in board and shareholders' meetings and committees of companies in which the state holds a stake and to monitor the decisions taken and report to the corresponding areas.

Source: MHCP

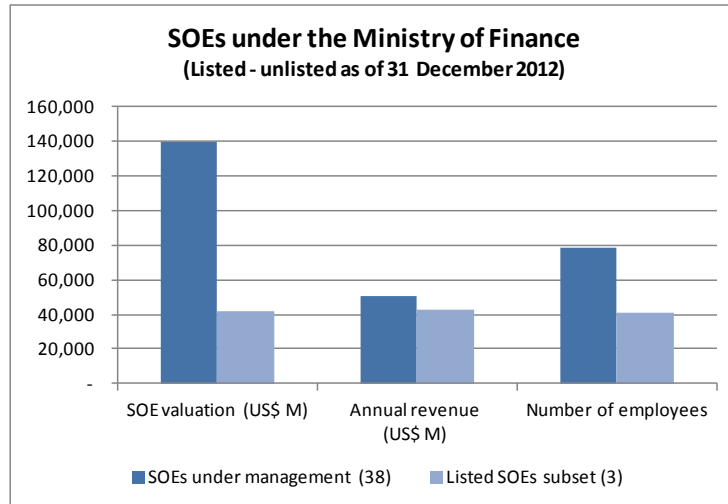
No public procedure exists for the MHCP's appointment of SOE directors. Even in the case of independent directors, their nomination and election depends on contacts and the professional or personal relations of its officials with possible candidates. Similarly, there is not a defined practice for taking into account (internal or external) evaluations of the board as a whole or its members individually when making appointments, except for particular cases like ISA, Isagen and Gecelca (MHCP).

The portfolio of SOEs under the responsibility of the MHCP comprises around 38 SOEs, with 24 state-controlled companies as well as numerous minority stakes and is the largest and most important in Colombia. It includes three listed companies owned by the central government

reports presented by the Private Participation Group or whoever fulfils its function, and to define the position of the MHCP on matters such as the sale of shares, mergers, capital increases and decreases, liquidations, the issue of shares and the distribution of dividends by the said companies" (MHCP, p. 14).

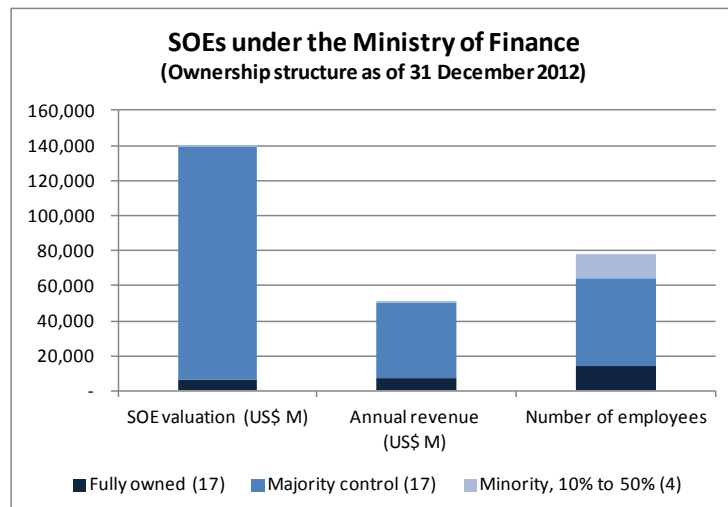
and, according to the Ministry, the principal companies in the portfolio have a value of some USD 150 billion and generate annual revenues of approximately USD 45 billion (MHCP). These companies account for some 80 000 direct and indirect jobs (Figure 8).

Figure 8. Overview of the MHCP SOE sector



Source: MHCP

Figure 9. Ownership of MHCP SOEs

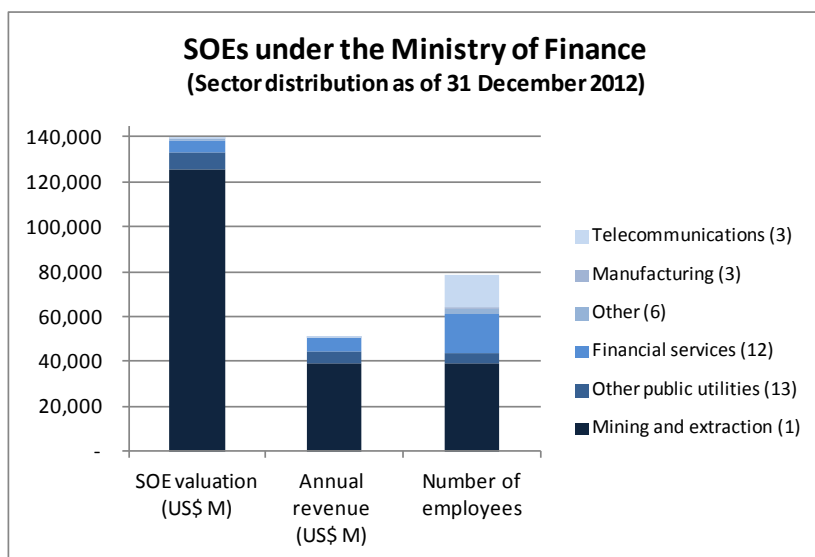


Source: MHCP

The vast majority of the MHCP's SOEs are controlled at the national level and, in only a few cases, by a sub-national entity. In general, its SOEs are wholly owned by the state or the state has an absolute majority and there are only a few cases in which it holds a non-controlling (blocking) stake (Figure 9).

Companies in the MHCP's portfolio correspond principally to the mining and extractive sectors (with Ecopetrol as clearly the key asset), financial services and utilities where the energy sector predominates (Figure 10). An overview about Colombia's SOEs can be found in Annex 3.

Figure 10. Sector distribution of MHCP SOEs



Source: MHCP

4.3. Ministry of Defence (MD)

With 18 companies, the Defence Ministry's portfolio of SOEs is the second largest in Colombia in terms of size. For its management, the Ministry created the Defence Business Social Group (GSED) in 2008, which reports to a vice-ministry and now comprises 34 people, divided into a business management team and a financial planning team. Its principal functions are to direct and guide the corporate policies of the Ministry's SOEs, with a management approach geared to achieving their objectives and a high level of competitiveness. The GSED co-ordinates the SOEs' interaction with the Ministry and the context in which they operate whilst, at the same time, controlling policy implementation and fostering the consolidation of their corporate processes.

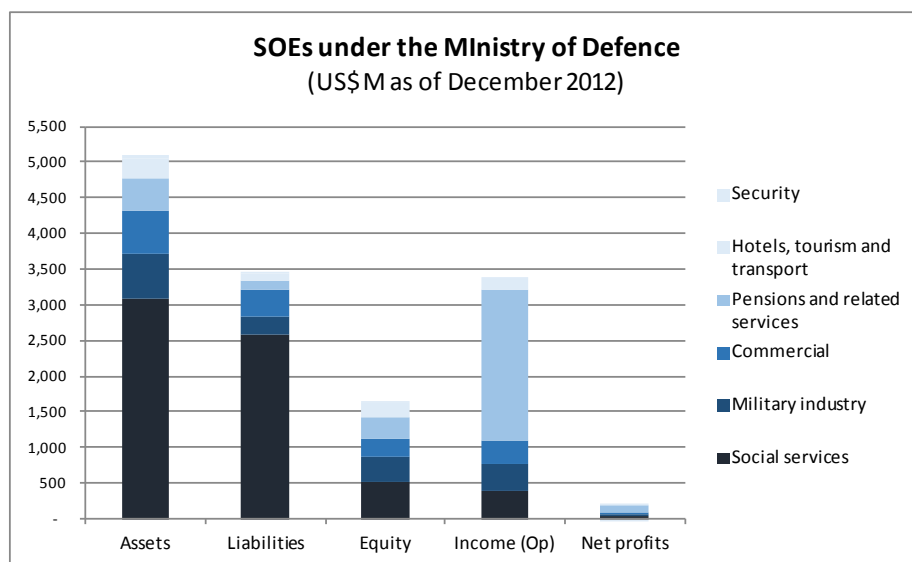
The projects on which the GSED initially focused included the development of a technological platform for reporting and monitoring company information such as key performance indicators (KPIs) and financial and administrative indicators which are updated regularly. In future, it plans to focus on reinforcing the capabilities and independence of the companies' boards of directors which have so far tended to take second place since the GSED has centralised many of their functions in the Ministry.

The SOEs administered by the GSED offer a wide range of goods and services not only to the armed forces and police but also to Colombian society in general and include educational, transport, recreational and housing services as well as the production of equipment and other goods for both military and civilian use.²⁵ Some of the enterprises are related to the defence sector or provide services exclusively to the armed forces and, in some cases, the fact that they do so on a non-commercial basis means were they not incorporated, they would not qualify as SOEs. Others, however, undertake activities that are clearly of a commercial nature, with the armed forces as just one of their clients, or activities that are not related to defence. Examples of

²⁵ In accordance with its mission and strategy, each SOE must "seek to contribute to the quality of life and professional performance of the members of the Armed Forces and National Police".

the latter include the Tequendama Hotel (a franchise of the Crowne Plaza chain), which is one of the most important assets in the portfolio of the fund used to finance military and police pensions, as well as Indumil, which holds a monopoly on the arms and explosives industry and a participation in Satena, the only airline to serve the most isolated parts of Colombia.

Figure 11. SOEs under the Ministry of Defence



Source: GSED

According to the GSED, the entities under its management have assets worth some USD 5.1 billion, generate annual revenues of around USD 3.4 billion (Figure 11) and account for some 11 418 direct and indirect jobs. Most of the companies are wholly owned by the state or the private stake is less than 1%.

Given their link to the Defence Ministry and the fact that their activities are related to the armed forces, most of these SOEs have a deeply embedded military culture that is apparent in, for example, the composition of their boards of directors, some of which comprise exclusively members of the armed forces, and the profile of their CEOs, almost all of whom are either active or retired high-ranking military officials. This is explained, in part, by salaries and directors' fees that are, in general, very low or, in some cases, non-existent. The manager of a GSED company with annual revenues of USD 200 million may, for example, receive a monthly salary of around USD 4 000 which would not be viable unless accompanied by a military salary or pension.

4.4. Ministry of Mines and Energy (MME)

The Ministry of Mines and Energy (MME) maintains ownership relations with a number of important SOEs, including the three that are listed, as well as many electricity generators. However, its role is confined mainly to the appointment of directors and definition of the sector's policy objectives, rather than that of shareholder. This task carried out by the MHCP which, under Law 819 of 2003, is responsible for representing the state's interests in the utility companies in which it holds a stake. The Minister of the MME and other Ministry officials participate *ex officio* or as a result of delegation in the boards of a number of companies in the sector. Matters relating to SOEs are handled by the Ministry's Business and Legal Affairs Office.

4.5. Ministry of Trade, Industry and Tourism (MCIT)

The Ministry of Trade, Industry and Tourism (MCIT) plays a limited role as shareholder in the four SOEs that fall within its area of responsibility, except for the appointment of directors and some sectorial guidelines. It is often the MHCP that represents the state at shareholders' meetings, although the Minister of the MCIT does participate *ex officio* in a number of boards. The MCIT's SOEs include Bancoldex, Colombia's development bank, as well as two fiduciary companies and a company that promotes Colombian craftwork. Matters relating to SOEs are handled by the office of the Ministry's Secretary General (the Ministry's internal legal counsel).

4.6. National Planning Department (DNP)

The National Planning Department (DNP) is an administrative department²⁶ that reports directly to the Presidency of the Republic and whose purpose is the implementation of national social, economic and environmental strategies through the design, guidance and evaluation of public policies, the management and allocation of public investment and the development of government plans, programmes and projects. Its link to the SOE sector is related to budget control and strategic planning mostly.

The DNP's functions include: i) proposing macroeconomic and financial objectives and strategies in co-ordination with the MHCP that are consistent with the government's policies and plans, in accordance with the projection of short, medium and long-term scenarios; ii) ensuring proper budget programming of the different sources of investment resources, based on the government's priorities and the country's development objectives; iii) serving as the Technical Secretariat of the National Council for Economic and Social Policy (CONPES); iv) preparing and submitting to CONPES documents setting out the government's policy priorities as well as other documents that correspond to its functions, divulging their content and monitoring and evaluating the lines of work defined; and v) guiding and co-ordinating the design and implementation of the plans, programmes and projects of the entities ascribed and linked to the DNP.

4.7. General Accounting Office (Contaduría General de la Nación)

The General Accounting Office (CGN) regulates the public sector's accounts and is headed by the General Accountant. It was created under article 1 of Law 298 as a special administrative unit attached to the MHCP, with its own legal personality and budget, technical and administrative autonomy.

Its functions include: i) to define accounting policies, principles and norms for all the country's public sector; ii) to establish general and specific technical norms and procedures to standardize, centralise and consolidate public sector accounting; iii) to manage the country's public accounts and, to this end, issue norms for the recognition, registry and disclosure of the information of central government bodies; iv) to prepare the country's general financial statements, submit them for auditing by the Comptroller General's Office and present them for review and analysis by the National Congress through the Legal Accounts Commission of the Chamber of Representatives within the timeframe established by the Constitution; and v) to carry out the studies and research considered necessary for the development of accounting expertise.

²⁶ Administrative departments are entities of a technical nature that are charged with directing or co-ordinating a service and supplying the government with adequate information for decision making. They have the same rank as ministries but do not have the power to propose legislation.

4.8. Comptroller General's Office (*Contraloría General de la República*)

The Comptroller General's Office (CGR) is the highest body for fiscal control of the state. It is autonomous and independent and, under the Constitution²⁷ and Law 42 of 1993, is responsible for supervising public finances, consolidating the general public sector budget (including individuals who manage or administer public funds), standardizing and centralising accounting and establishing the nomenclature of budget accounts and the form in which budget implementation is reported. The CGR is, in turn, subject to supervision by the General Audit Office, which is responsible for fiscal control of both the CGR and the Offices of Regional Comptrollers.

The CGR's principal functions include: i) supervising fiscal management and those individuals or bodies that manage state funds or goods; ii) evaluating the results of different state organisations and bodies, determining whether they acquire, manage and/or use public resources within the framework of the law and in accordance with the principles of economy, efficiency, effectiveness, equity and environmental sustainability; iii) examining the reasonableness of the financial statements of those entities subject to fiscal control and determining the extent to which they achieve their objectives and comply with their plans, programmes and projects; iv) establishing the fiscal responsibility of public servants and individuals who, by commission or omission and by intent or negligence, cause damage to public assets; and v) seeking redress of public assets.

It is important to note that, in contrast to many other countries, Colombia's CGR is charged under the Constitution with protecting public resources and assets and recovering goods. For this it audits the management of all state entities, including those enterprises in which the state has only a small ownership stake, and it is empowered to act in cases of violation of fiscal responsibility and has judicial police powers. Its investigations in this field seek to verify: i) intentional or negligent conduct attributable to individuals or legal entities responsible for the management of public assets; ii) damage to public assets; and iii) a causal connection between these two elements. As a way to ensure recovery of losses, the CGR is authorized to order precautionary measures, including seizure and confiscation against property and assets, whether they are inside or outside the national territory.

As further developed in section B.6.3., the way in which the CGR exercises its audit function has, on a number of occasions, been perceived by the market as at odds with the powers of SOE boards of directors and management, particularly as regards their capacity to define the enterprise's strategy and assume risks such as the possibility of losses. The zeal with which the CGR carries out its ex-post review of the business decisions of boards of directors and, in some cases, pursues pecuniary responsibility for losses has been identified by a number of experts as deterring professional and independent directors from accepting seats on the boards of SOEs.

The decision for the CGR to exercise its role ex-post and selectively was taken in 1991 to remedy the administrative delays that occurred under the previous system of ex-ante control. Under the present system, the CGR acts ex-post when it considers there is sufficient evidence to indicate possible shortcomings in an entity's or official's management of public resources. It is

²⁷ The Constitution states that the Comptroller General's Office "supervises the fiscal management of the government and individuals or entities that manage public funds or goods. This control will be exercised ex-post and selectively in accordance with the procedures, systems and principles established by law. In special cases, the Comptroller General's Office may, however, authorise private Colombian companies, selected competitively and on merit and hired with the prior knowledge of the Council of State, to exercise this supervision".

also important to note that the costs of review by the CGR are borne by the company in question.

4.9. Colombian budget control

SOEs in Colombia are under budgetary control of the National Public Budget Office when the state's participation in the company is 90% or higher. In some cases, the CONPES also has jurisdiction on budget issues of certain SOEs.

The functions of the General Directorate of the National Public Budget include that of proposing, in conjunction with the DNP, the allocation of the part of the profits of SOEs and other similar bodies that go to the National Treasury. This is done in collaboration with the MHCP's Investment Bank Divisions, which prepares a technical study of the enterprises' borrowing level as a basis for establishing a dividend distribution policy compatible with their financial viability.

The role of the CONPES is to decide the amounts of profits to be distributed or retained by certain SOEs in relation to the financial needs of the state for any given year.

5. Colombian listed SOEs

Only three SOEs controlled by the central government are listed (Ecopetrol, ISA and Isagen). As shown in Figure 7, they have a very high relative weight in both the state's portfolio of companies and Colombia's capital market. This is particularly the case of Ecopetrol which, as of end-2012, alone represented 46.7% of market capitalisation. On average, the state owns 80% of these three companies which account for annual fiscal revenues equivalent to 1.1% of GDP.

Colombian experts consider that the three companies are good examples of professional management and excellent corporate governance. This is also borne out by the different awards they have received for good corporate governance and is a view shared by public opinion in general.

An interesting and frequently cited aspect of the development of these companies' good practices is the role that certain individuals have played. Perhaps the best example is Javier Gutiérrez, currently CEO of Ecopetrol and, previously, of ISA. In these posts, he laid the foundations of these companies' corporate governance and business culture as well as managing their listing processes. His work at ISA was inherited by Isagen when it was created in order to divide up the electricity business. Different people interviewed for this report indicated that he was appointed as manager of Ecopetrol when it decided to list precisely to replicate the good results he had previously achieved at ISA.²⁸ According to these accounts, his vision and leadership go a long way to explain the positive perception that now exists of the corporate governance of these three listed SOEs.

5.1. Empresa de Petróleos de Colombia S.A. (Ecopetrol)

Ecopetrol is one of the world's 50 leading hydrocarbons companies and the fourth largest in Latin America. In terms of revenues, profits, EBITDA, assets and net worth, Ecopetrol is

²⁸ At this time, Ecopetrol was at the final stages of a reform started in 2003 that took it out of a complex situation as regards undue political influence and corruption. Its listing was seen as a means of consolidating a cultural shift towards higher standards of corporate governance. See Annex 4 for more information.

Colombia's largest company and the only one in its sector that is vertically integrated (Table 3). As of December 2012, it had a market value of USD 132.2 billion (Bloomberg). It employs 7 303 people directly and creates a further 32 060 indirect jobs.

Ecopetrol stretches across the exploration and production, transport and logistics, refining, petrochemicals and bio fuels segments and has operations in Brazil, Peru and the Gulf coast of the United States as well as Colombia.

Table 3. Ecopetrol's fact sheet

Key Operational Figures	2012	Financial Results (USD Bn)	2008	2009	2010	2011	2012
Production	754 MBOED	Revenue	14.1	12.8	19.4	30.4	33.1
1P reserves	1877 MMBOE	EBITDA	6.4	4.8	8.6	15.1	15.3
Refining capacity	330 MBD	Net income	5	2.4	4.3	8.4	8.3
Petrochemical production	500 M Tons/yr	Assets	24.4	24.7	34.3	46.1	56.9
Sales volume	880 MBOED	Liabilities	6.8	9.5	12.4	16.4	20

Source: Ecopetrol, 2013

Table 4. Ecopetrol's ownership structure, 2013

Shareholder	Ownership (%)
Colombian State	88.5
Main local institutional investors	4.2
Retail investors	3.7
Other institutionals	1.9
ADRs	1.1
Foreign investors	0.7

Source: Ecopetrol, 2013

Ecopetrol was listed in 2007 on the Colombian Stock Exchange (ECOPETROL) (see Annex 4) and has now close to half a million shareholders. It trades also in the form of ADRs on the New York Stock Exchange (EC) and on the Toronto market (ECP). The state of Colombia owns 88% of the company (Table 4).

5.2. Interconexión Eléctrica S.A. E.S.P. (ISA)

Created in 1967, ISA is Colombia's largest power transmission company. It was originally 100% state-owned and was formed for the purpose of interconnecting Colombia's different regional transmission grids. However, in order to finance its growth strategy, the company looked to the capital market and opted to diversify its ownership as a means of enhancing its competitiveness. Its listing took place between 2000 and 2002 and attracted thousands of new investors. As of December 2012, the company had a market value of USD 3.4 billion, assets for USD 14.6 billion and revenues of USD 2.4 billion. It directly employs 663 people.

The state retains a 51% stake in ISA, EMP owns another 10% whilst 31% is divided amongst some 48 790 shareholders and floats freely on the Colombian Stock Exchange (INTERELECTRI), where its shares have been among the most liquid and heavily traded, with one of the highest market capitalisations (Table 5). In 2004, ISA registered its Level I ADR (IESFY) with the U.S. Securities and Exchange Commission (SEC). The price-to-earnings ratio of its shares, which well exceeds the market average, reflects a positive evaluation by investors (Figure 12).

Table 5. ISA's ownership structure (December 31, 2011)

Investors	Shares	%
State Investors	569,472,561	51%
Colombian state	569,472,561	51%
Free Float	348,226,256	31%
Institutional investors	212,714,992	19%
Individuals	85,530,421	8%
Companies	21,017,997	2%
Foreign investors	27,607,946	2%
ADRs	1,354,900	0%
Other SOEs	189,979,077	17%
Empresas Públicas de Medellín -EPM-	112,605,547	11%
Ecopetrol S.A.	58,925,480	5%
Empresa de Energía de Bogotá -EEB-	18,448,050	2%
Capital	1,107,677,894	
Treasury shares	17,820,122	
Total	1,125,498,016	

Source: ISA, 2012

ISA is the parent company of Grupo Empresarial ISA, a conglomerate of 30 subsidiaries that develop transmission line and telecommunications infrastructure, road concessions and projects for the intelligent management of systems in real time. As well as Colombia, it has line infrastructure in Argentina, Brazil, Bolivia, Chile, Ecuador, Panama, Peru and Central America.

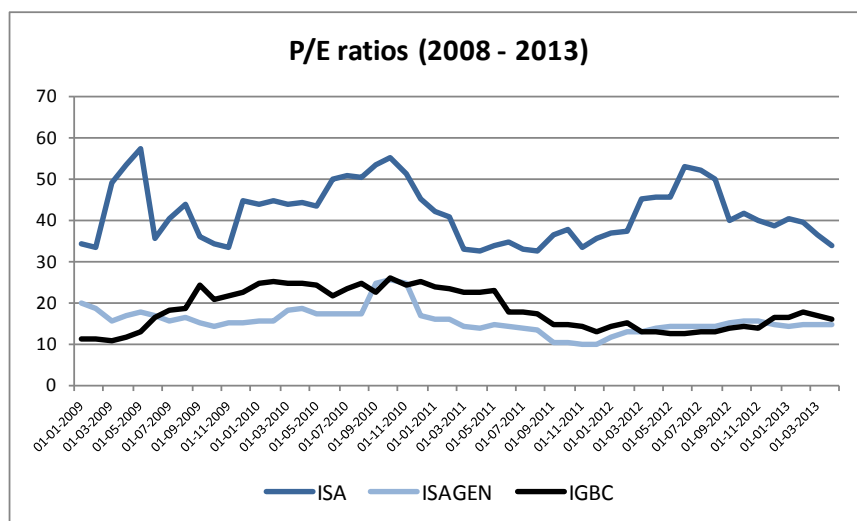
According to the company, its participation in the capital market led it to understand that investors seek companies that are profitable, act transparently, disclose information, respect minority shareholders' rights and have good corporate governance practices. In response, ISA formally established a Code of Good Governance in 2001.²⁹ Its compliance with this Code is verified by its own and government auditors and is monitored and evaluated in reports that are posted on its website.

ISA has been a member of the Companies Circle of the Latin American Corporate Governance Roundtable³⁰ (co-organised by the OECD) since 2006. A description of the company's corporate governance policies can be found in Annex 5 of this report.

²⁹ The Code was presented by the CEO and adopted by the board of directors and, subsequently, incorporated into the company's statutes. It is enshrined in the company's mission and vision and commitments to stakeholders as well as in important internal documents that include the Code of Ethics, Business Management System, Procurement Statute, Business Policies, Anti-Fraud Code and Internal Regulation of Operation of the Board of Directors.

³⁰ The Companies Circle of the Latin American Corporate Governance Roundtable was created by the OECD, the IFC and its founding members at a meeting in May 2005. It brings together leading companies with experience of implementing good corporate governance practices in Latin America. Its objectives are: 1) to share with its members and the broader community of Latin American firms practical solutions to the corporate governance challenges facing companies in the region; and 2) to contribute to the work of the Roundtable the views and experiences of companies that have successfully undertaken corporate governance reforms. See www.oecd.org/daf/companiescircle.

Figure 12. ISA and Isagen price-to-earnings ratios (2009 - 2013)



Source: Bloomberg

5.3. Isagen S.A. E.S.P.

Isagen generates electricity, builds projects and markets energy solutions. It was created in 1995 as a spin-off of ISA when Colombia opted to end the vertical integration of its energy sector. This followed serious power generation problems in the early 1990s, resulting in a large blackout and a long period of rationing, which prompted a reform of the sector's structure and its regulatory framework. This included Law 142 on utilities and Law 143 on the electricity industry, both introduced in 1994, which separated the generation and marketing of electricity from its transmission and distribution.

Isagen owns and operates five hydroelectric plants and one thermal plant. Like ISA, it has its headquarters in the city of Medellín and its shareholders include the EPM conglomerate (see Annex 2), which is also a competitor to Isagen in some areas. As a result, the two companies have jointly drawn up detailed corporate governance norms for the proper management of conflicts of interest.

As of December 2012, Isagen had a market value of USD 2 billion and assets worth USD 3.8 billion, while its revenues reached USD 979 million and its direct employees numbered 570. In July 2013 the Colombian government announced plans to sell its entire participation in the company. The 57.66% stake is currently held by the MHCP.³¹

According to the 2011 Código País Survey of the implementation of corporate governance practices by companies on the National Securities and Issuers Register (section A.3.2.1.), Isagen was for the fifth consecutive year among those that had implemented the largest number of recommended measures (38 out of a total of 41). This compared to an average of 25 for the 160 companies included in the survey (Table 6).

³¹ The decision of the government was issued via a decree available here: <http://wsp.presidencia.gov.co/Normativa/Decretos/2013/Documents/JULIO/30/DECRETO%201609%20DEL%2030%20DE%20JULIO%20DE%202013.pdf>.

Table 6. Implementation of the Código País – Top 15% companies

No.	Issuer	Totally Implemented	Partially Implemented	Not Implemented	Excluded
1	Grupo Nutresa S.A.	38	0	0	3
2	Sociedades Bolívar S.A.	38	0	0	3
3	Isagen S.A. E.S.P.	38	0	1	2
4	Renting Colombia S.A.	37	1	0	3
5	Leasing Bolívar S.A. CF	37	0	1	3
6	Bolsa de Valores de Colombia S.A.	37	0	0	4
7	Bancolombia S.A.	36	1	0	4
8	Bancamía S.A.	36	0	1	4
9	Banca de Inversión Bancolombia S.A.	36	1	0	4
10	Factoring Bancolombia S.A. CF	36	1	0	4
11	Leasing Bancolombia S.A. CF	36	1	0	4
12	Ecopetrol S.A.	35	1	1	4
13	Emgesa S.A. E.S.P.	35	1	1	4
14	Codensa S.A. E.S.P.	35	1	1	4
15	Celsia S.A. E.S.P.	35	1	0	5
16	Bbva Colombia S.A.	35	0	2	4
17	Helm Bank S.A.	35	2	0	4
18	Banco Davivienda S.A.	35	2	0	4
19	Bnp Paribas Colombia	35	1	1	4
20	Bancoldex S.A.	35	4	0	2
21	Interbolsa S.A.	34	0	2	5
22	Interconexión Eléctrica S.A. E.S.P.	34	3	1	3
23	Edatei S.A. E.S.P.	34	1	2	4
24	Promigas S.A. E.S.P.	34	4	0	3

Source: Financial Superintendency (2011)

6. Privatisation process in Colombia

Current political trends in Latin America and the region's level of economic development mean that SOEs have acquired an important role in driving countries' development (CAF, 2012). This is reflected, for example, in a clear tendency for SOEs to adopt company structures, more professional - albeit not independent - boards of directors, the appointment of managers on merit and increased transparency. Large privatizations of the previous decades, sometimes at inadequately low prices, contributed to leaner SOE sectors where these new trends are visible.

The current size of Colombia's state-owned sector is due to an important extent to the privatisation process that took place as from the 1970s and, particularly, in the 1990s (Box 5). Since then, the Colombian government has implemented a policy of privatisation, capitalisation and divestment of public assets. The numerous transactions that have taken place since then have used different mechanisms, including some listings on the stock market. This was, for example, the case of Ecopetrol whose IPO in 2007 represented the last stage of a restructuring process that began in the 1990s and involved both the separation of its market regulation

functions (see section B.1.1.) and the divestment of non-oil activities such as the transport of natural gas.³²

Box 21. Privatisation in Colombia

When faced with the problems of a large foreign debt and hyperinflation, most Latin American reacted by privatising state-owned enterprises. Although these processes differed between countries, reflecting their particular social, economic and political problems, they were generally implemented quickly and in an ill-co-ordinated way. It is difficult to argue that there was a long-term privatisation policy with clear objectives and specific medium-term sales targets and, in fact, the sale of assets in the region became a competition between countries to attract capital from the rest of the world. Financial needs and the speed with which enterprises were sold meant that countries had no control over regulation and, ultimately, over the bottom line for consumers. Similarly, they failed to take account of the possible negative impact on fiscal finances.

When Colombia embarked on its privatisations, Latin America had already acquired experience and this, together with the country's own practices, enabled it to implement them in an orderly fashion, with some specific objectives and some sector targets. In this sense, the process was relatively successful as regards its effectiveness. Specific studies are, however, still required to determine whether it was also efficient. The country's approach to managing public policy was a decisive factor in the results in that it provided a degree of order and permitted ex-ante evaluations and ex-post monitoring not only for the central government and political players but also the entities that financed the process.

Source: Hernandez 2004

Article 60 of the Constitution establishes that, when the state sells its stake in an enterprise, it must take measures to diversify the ownership and shares must be offered to workers and solidarity organisations on preferential terms. Those eligible for these special conditions are: i) active and retired workers of the enterprise being privatised and of the entities in which it holds a majority stake; ii) former workers of the enterprise being privatised and of the entities in which it holds a majority stake, providing they were not dismissed with just cause; iii) associations of employees and former employees of the enterprise being privatised; iv) workers' unions; v) federations and confederations of workers' unions; vi) employee funds; vii) mutual investment funds; viii) unemployment and pension funds; and ix) cooperatives.

These constitutional principles were further developed by Law 226 of 1995³³ and their main aspects include:

- The corresponding minister and the Minister of Finance and Public Credit must present the project for the sale of the enterprise to the Council of Ministers. If the Council of Ministers approves it, it must then be submitted for approval by the government.
- The shares or mandatory convertible bonds to be sold must first be offered on special amortisation and financing conditions to all those defined in the enterprise's charter as having priority status. They have a period of two months in which to respond to the offer.

³² *Empresa Colombiana de Gas (Ecogas)*, a subsidiary of Ecopetrol in charge of natural gas transportation, was put up for public auction in 2006 and was acquired for USD 1.3 billion by *Empresa de Energía de Bogotá (EEB)*, which had been privatised in 1997. It was subsequently transformed into a stock company and renamed *Transportadora de Gas del Interior (TGI)*. The acquisition was financed on the international market through the placement under Securities Act Rule 144 of 10-year bonds for USD 750 million and 7-year bonds for USD 610 million. At the time, this was Colombia's largest ever international bond issue (Gutiérrez & Pombo, 2009, and Bernal, 2009).

³³ See http://www.secretariassenado.gov.co/senado/basedoc/ley/1995/ley_0226_1995.html#1.

Only then can the shares not acquired by these persons be sold at a price and on conditions that cannot be inferior to those of the preferential offer.³⁴

It should be noted that the process for the capitalisation of SOEs, including their listing, does not have to comply in a strict sense with the diversification of ownership referred to above. However, this has applied in some specific cases such as the capitalisation of Ecopetrol where Law 1 118 of 2006, drawn up for this particular process, expressly called for application of the principles of diversification of ownership. Different experts have concurred in indicating that, as compared to the procedure established in Law 226, privatisation through the stock market has the great advantage of allowing the transaction to be completed within a reasonable period of time. The two months allowed for the response of those eligible for special conditions implies a degree of uncertainty whose avoidance is recommended by financial advisers.³⁵

A further advantage of placement on the stock market of any stake in an SOE larger than 10% is that, as explained in the next section, this immediately lifts several administrative burdens, characteristic of central governments, that affect some SOEs in which the state has a stake of more than 90%. At least partial privatisation means that these companies become subject to private law, making it easier for them to compete with private companies on equal footing.³⁶

In 2011, under the national development plan, it was agreed that the Colombian state would be able to sell minority participations (under 10%) under a simplified mechanism when not deemed strategic in nature (article 258 of Law 1 450 of 2011). Also, as already mentioned, in July 2013 the Colombian government announced plans to sell its controlling stake in Isagen.

7. Legal form of Colombian SOEs

Colombian SOEs fall into two broad categories: i) Industrial and Commercial State Companies (*Empresas Industriales y Comerciales del Estado* or EICEs), which are statutory corporations wholly owned by the state and whose origin and norms are established by law; and ii) Mixed-Ownership Companies (*Sociedades de Economía Mixta* or SEMs) in which the state has a stake and which can take any legal form and are generally governed by the norms applicable to the private sector. An important degree of complexity is, however, introduced into this classification by three additional factors:

- The law establishes that SEMs in which the state holds a stake of 90% or more are to be treated as EICEs and, regardless of their legal form, are, therefore, governed by the norms applying to the latter.
- There is, in addition, a special category of SOEs, known as Social State Companies (*Empresas Sociales del Estado* or ESEs), which are wholly owned by the state but not

³⁴ Share sales between state bodies are excluded from this procedure.

³⁵ It should be noted that some jurisprudential theses maintain that capitalisation is viable under the terms of Law 226 without a preferential offer, providing the transaction does not result in the state ceding control of the enterprise.

³⁶ It is worth mentioning that a similar result can be obtained by means of legal reform, with the need to dispose of any shares, as it is the case of Bancoldex, which was relieved from the administrative burdens applicable to other SOEs where the state owns more than 90% of the shares in order to facilitate its competitive commercial operation.

structured as EICEs. Created by the central government or by sub-national bodies, their purpose is the direct provision of healthcare services.

- Finally, as established by the Constitutional Court³⁷, some types of mixed or privately owned utility companies (*Empresas de Servicios Públicos* or ESPs) are considered SOEs. Law 142 of 1994 states that: i) mixed public service companies³⁸ are those in which the state, sub-national bodies or their decentralised bodies have stakes of 50% or more; and ii) privately owned public service companies in which a majority stake is held by the private sector (or by entities created by international conventions that opt to be subject to private sector rules).

7.1. Industrial and Commercial State Companies (EICEs)

In accordance with article 85 of Law 489 of 1998, EICEs are statutory corporations, created or authorised by law, which undertake activities of an industrial or commercial nature and of economic management under private law, except in the cases established by the law. Their principal characteristics are: (i) they have their own legal personality; (ii) they are administratively autonomous; (iii) they are financially autonomous; and (iv) they have their own capital composed entirely of common public goods or funds, their product or the earnings they receive as a result of their activities as well as contributions from the state in those cases authorised by the Constitution. The capital of EICEs can be represented as quotas or shares of equal nominal value.

The direction and administration of EICEs is the responsibility of their boards of directors and a manager or president. The decisions that EICEs take for the development of their own industrial, commercial or economic management activity are subject to the provisions of private law. The contracts which they sign in the pursuit of their purpose are, on the other hand, governed by the provisions of the General Statute of Procurement by state entities. The general regime applicable to these companies is established in articles 85 and 94 of Law 489 of 1998. As discussed in section B.1.2., the insolvency regime applying to them is not the general regime established in the country's bankruptcy law.

7.2. Mixed-Ownership Companies (SEMs)

SEMs are entities, authorised by law and established in the form of commercial companies with state contributions and private capital, which undertake activities of an industrial or commercial nature subject to private law. They are public entities, but created under a company contract. Typically, they take the form of stock companies (Box 3) but when the state and sub-national or decentralised bodies have a stake of 90% or more, they must adopt the norms governing EICEs.

The difference in the administrative burden on EICEs and SEMs is an important incentive for reducing the state's stake to below 90% in order to allow them to compete on equal terms with other market players.

³⁷ Sentence C-736 of 2007.

³⁸ Mixed public service enterprises typically taken the form of stock companies and, on the corresponding matters, are subject to the Commercial Code.

PART B. REVIEW UNDER THE OECD GUIDELINES

CHAPTER I: EFFECTIVE LEGAL AND REGULATORY FRAMEWORK

The first chapter of the Guidelines establishes that, in order to avoid market distortions, the legal and regulatory framework for state-owned enterprises should ensure a level playing field in markets where state-owned enterprises and private sector companies compete. The framework should build on, and be fully compatible with, the OECD Principles of Corporate Governance.

In many of its aspects, the legal framework for Colombian SOEs is compatible with the OECD standards of corporate governance since it, in general, shares the position that state-owned enterprises should not receive preferential treatment. However, as shown in this section, there are a number of actual practices that hamper achievement of this objective, involving political authorities in the running of SOEs and creating evident conflicts of interest.

1.1. Separation of functions

Guideline I.A states that there should be a clear separation between the state's ownership function and other state functions that may influence the conditions for state-owned enterprises, particularly with regard to market regulation.

In the case of the MHCP, which is responsible for financial affairs (together with other entities such as Banco de la República), the separation of functions as regards its role as representative of the state in financial enterprises is achieved, according to the authorities, by not involving officials of the General Directorate of Financial Regulation in SOE management issues. These officials do not sit on any SOE board or take part in any of the discussions that may take place at the Ministry as a result of its role as representative of the owner (MHCP). Furthermore, the MHCP has recently reported the creation of a new unit for financial analysis and regulation (*Unidad de Proyección Normativa y Estudios de Regulación Financiera*) to separate functions even more. It will have some degree of additional independence thanks to an oversight council with 2 (out of five) independent members, although the head will be appointed by the President. It is expected to start operating in 2014 (Decree 4 172 of 2011).

Nevertheless, by law or under the enterprises' statutes, the Minister of Finance and other senior Ministry officials must participate *ex officio*, or as a result of delegation, in the boards of different EICEs and SEMs for which the Ministry is responsible. A similar situation is also found in several other ministries. This inevitably generates a conflict of interest that is only partially mitigated by the authorities' efforts to establish Chinese walls or other similar forms of containment as to prevent the exchange of information that could cause conflicts of interest. When a minister must by law participate in an SOE's board – and in some cases also be required to chair it – there is at least a perception in the market of a lack of due separation between regulatory affairs and the enterprise's management. A number of CEOs interviewed for this report spoke about the problems this entails. Some SOEs are, for example, unable to

participate fully in technical discussions within their business associations when sector reforms are being debated or, at least, their participation is viewed with mistrust.³⁹

A good example of the separation of regulatory and commercial functions is provided by the restructuring of Ecopetrol in 2003 under which the National Hydrocarbons Agency (ANH) was created. Ecopetrol had previously been responsible for designing oil policy and supervising its implementation whilst, at the same time, competing as a state oil company with the private sector (see Annex 4). This confusion of roles discouraged the participation of private players in the market, leading to a critical drop in the country's oil reserves. The reform established that Ecopetrol would confine itself to the oil business, competing on equal terms with other companies, while the ANH would take responsibility for the sector's administration and regulation. However, both the Finance Minister and the Minister of Mines and Energy continue to be ex officio members of Ecopetrol's board.

A case in which some ambiguity of roles persists is Coljuegos, the SOE that has a monopoly on gambling. Coljuegos's objectives include "the issue of regulation of the games of chance for which it is responsible", "the definition of the characteristics with which individuals or legal entities must comply in order to operate the games of chance for which it is responsible" and "the design of annual plans for the combat of illegal operation of games of chance". The annotations to Guideline I.A emphasise the importance of avoiding a confusion of roles such as that seen in Coljuegos and which are common in public service monopolies as well as in industries that have recently been deregulated or partially privatised.

1.2. Simplification of operational practices and legal form

Guideline I.B recommends that governments strive to simplify and streamline the operational practices and legal form under which SOEs operate. Their legal form should allow creditors to press their claims and initiate insolvency procedures.

As discussed in section A.7., SOEs can be subject to different legal regimes depending on their legal form as determined by their charter. With the exception of EICEs, which the OECD classifies as statutory corporations, Colombian SOEs are, in general, subject to private law and structured as commercial companies. The particular situation of EICEs is not fully aligned with the Guidelines' recommendation that, as far as possible, governments should base the legal form of SOEs on private law and avoid creating a specific legal form when this is not absolutely necessary for the enterprise's objectives. This recommendation reflects a belief that the adoption of commercial structures increases transparency and, by making state commercial activities comparable with those of the private sector, facilitates their control as well as levelling the playing field for private competitors in increasingly deregulated and competitive markets.

With the exception of EICEs and the SEMs which are assimilated to the former because the state holds a stake of 90% or more, it is, in general, the country's Commercial Code and its related regulation that serve as the legal and regulatory framework for SOEs. It establishes norms on the composition of boards and the election of a company's administration, usually based on the electoral quotient system described in Box 10.

However, depending on the sector, SOEs may also be subject to specific sector norms. This is the case of listed and utility companies. In their acts and legal contracts, SOEs must adhere to

³⁹ Private actors are very clear that the minister proposing the reform chairs the enterprise's board and that its CEO is nominated and can be removed by the President of the Republic.

the general procurement regime and to specific norms for certain sectors or activities such as insurance and financial activities. In addition, as indicated above, special rules apply to EICEs and SEMs which determine the regime applicable to their acts and contracts (see section A.7.).

Procurement by SOEs is governed by private law when they compete with the domestic or international private and/or public sector and when they operate in regulated markets. The state also requires that they have a procurement manual aligned with the principles of the administrative and procurement function established in the general state procurement statute. However, according to the MHCP, the government does not interfere in SOEs' procurement and its influence is limited to that which it could exercise through the board of directors if it has a role in the authorisation of procurement (MHCP).

In the case of labour relations, SOEs' employees may be subject to different rules than those applicable to the employees of private companies. In certain cases, when an SOE's employees are considered to provide services to the state, they are classified under Colombian law as *public employees*⁴⁰ or *official workers*⁴¹. Public employees have a legal and regulatory relation with the public administration which means that they require an act of appointment, their situation is governed by law excluding the possibility of negotiating a change in conditions, and they are subject to contentious-administrative jurisdiction under public law. Official workers, on the other hand, have a work contract with the administration or, in other words, have a contractual relationship similar to that of private sector employees. However, in contrast to the latter, official workers have a minimum of guarantees established by contract, permitting negotiation of the other terms of their employment and even collective agreements.⁴² Controversies between official workers and their employers are usually subject to common labour jurisdiction.

The employees of SOEs whose acts are governed by private law are also subject to the provisions of common labour law. Some SOEs have adopted collective agreements that protect their employees as regards pension and labour rights and, in some cases, include incentive-based remuneration plans.

The annotations to Guideline I.B state that, in some cases, "SOEs are also to a large extent protected from insolvency or bankruptcy procedures by their specific legal status. This is sometimes due to the necessity to ensure continuity in the provision of public services". This is the case in Colombia. Law 1 116 of 2006, through its regulation of the insolvency and bankruptcy regime, seeks to protect creditors and foster the recovery and survival of viable companies. However, in article 3, it expressly excludes from this regime all "state-owned companies and state industrial and commercial companies at the national and any other level", without clarifying the regime to which they are subject by default.

In the case of SOEs in the financial and utilities sectors, special norms, which apply supplementary, establish specific liquidation procedures (with laws designed to ensure continuity of the service or the system of payments). In other cases, such as EICEs or the SEMs which are

⁴⁰ Public employees are considered to include those employees undertaking management activities or activities of trust defined in the statutes of EICEs and in SEMs in which the state has at least a 90% stake (article 5 of Decree 3 135 of 1968, article 2 of Decree 1 848 of 1969, article 3 of Decree 1 950 of 1973, article 1 of Law 909 of 2004, article 3 of Decree 3 130 of 1986 and jurisprudence).

⁴¹ Official workers are considered to include those who provide services to EICEs and SEMs in which the state holds a stake of more than 50%, providing they do not qualify as public employees (article 5 of Decree 3 135 of 1968, article 3 of Decree 1 848 of 1969 and article 3 of Decree 1 950 of 1973).

⁴² It should, however, be borne in mind that the employees of public services do not have the right to strike.

assimilated to the former because the state holds a stake of more than 90%, liquidation must be authorised by the President of the Republic.

However, even in those SOEs with a supplementary norm establishing their liquidation regime⁴³ and, certainly, for all other SOEs (including listed companies like Ecopetrol that are not EICEs or, for example, utilities, but are “state-owned companies” as prescribed by article 3 of law 1 116), it is not clear which regime applies by default. As a result, their creditors do not seem to have a clear procedure for exercising their rights in the face of insolvency. The Commercial Code contains basic norms to which they can use but these, in general, provide a level of protection for creditors and investors that is inferior to that afforded by Law 1 116.

1.3. Public service and other obligations and responsibilities

Guideline I.C requires that any obligations and responsibilities that an SOE is required to undertake in terms of public services beyond the generally accepted norm should be clearly mandated by laws or regulations. Such obligations and responsibilities should also be disclosed to the general public and related costs should be covered in a transparent manner.

Under Colombian law, SOEs are viewed as a supplementary public policy tool in the sense that they exist to provide certain goods or services, which the state expects them to produce under market conditions without political intervention beyond that which could be exercised by any controlling shareholder. According to the MHCP, SOEs are not at the service of ministries or authorities nor administratively subordinate to them and, therefore, do not have obligations and responsibilities in terms of public services beyond those envisaged by the country’s legislation for any public or private entity that performs the same functions.

Moreover, according to the MHCP, Colombian SOEs are generally not subject to special rules as regards their commercial practices and are governed by the common regime under which they compete on equal terms with companies in which the state does not have a stake. In addition, the public procurement statute establishes that the state may not procure directly from SOEs when they compete with private companies, requiring a bidding process. This provision is based on the constitutional principle of material equality under which the state must guarantee equality of conditions and a level playing field.

Two enterprises corresponding to the MCIT serve as examples, with different results, of how Colombia seeks to balance the social objectives of its SOEs with their commercial sustainability. On the one hand, there is *Artesanías de Colombia*, whose objective is to promote Colombian craftwork in the domestic and international market, assisting producers and, albeit to a lesser extent, collaborating in the marketing of their products. The company is highly dependent on state support for the fulfilment of its functions (see Annex 3), drawing over 60% of its annual budget from fiscal revenues which, in this case, is considered investment rather than a subsidy to the sector. On the other hand, Colombia’s development bank, Bancoldex, which operates as a second-tier bank, has fulfilled its mandate of increasing the availability of credit to exporters and SMEs, with its assets and ROE showing sustained annual growth over the past five years (see Annex 3).

Satena, an airline linked to the Defence Ministry and owned by the MHCP, is another example. The company has the public service obligation (Box 6) to provide air transportation coverage to the most remote regions of the country (which has a mountainous geography and a

⁴³ Decree-law 254 of 2000 amended by Law 1 105 of 2006.

large territory) and is expected to compete with other commercial airlines and develop a sustainable business model. But the company has failed to find such a balance and its results are disappointing (see Annex 3). In the absence of clear quantification of the cost of its non-commercial objectives it is not easy to assess whether the failure to perform is due to mismanagement or to the heavy burden imposed by the state (which the Guidelines recommend to be compensated to the SOE by the government).

Box 22. Satena's corporate objectives

SATENA's principal social purpose is provide air transport services and to implement the policy and general plans that the National Government adopts on air transport for the country's less developed regions, contributing to social, cultural and economic development and integration and linking remote regions to the national economy and life.

SATENA is the only state airline obliged to serve areas to which, for reasons of geography, public order and poverty, no other operator has services. Precisely in this way, it reflects the state in developing and fulfilling its purposes and objectives, undertaking work that is vital for the economic and social development of the regions it serves and integrating them with the country's main economic centres.

Source: <http://www.satena.com/quienes-somos/naturaleza-de-satena/29>

1.4. General application of laws and regulations

Guideline I.D indicates that SOEs should not be exempt from the application of general laws and regulations. Stakeholders, including competitors, should have access to efficient redress and an even-handed ruling when they consider that their rights have been violated.

In general, Colombian SOEs are subject to the general legal regime and receive special treatment only in a very few areas. As indicated in section B.1.2., one of these areas, at least partially, is bankruptcy law.

The annotations to Guideline I.D recommend that both SOEs and the state as shareholder "should not be protected from challenge via the courts or the regulatory authorities, in case they infringe the law" and add that stakeholders "should be able to challenge the state as an owner in the courts and be treated fairly and equitably in such case by the judicial system". In the case of Colombia, stakeholders can seek to enforce their rights through different mechanisms that allow them to challenge the acts of both SOEs and the state itself. These mechanisms include an appeal for annulment with or without the re-establishment of certain rights, appeals for direct compensation and contractual controversy appeals⁴⁴ (Box 7). These appeals are seen by the contentious-administrative jurisdiction. When stakeholders appeal to the ordinary courts against administrative acts, they must, given the presumption of legality, demonstrate having first used all the available administrative mechanisms.

In addition to alternative dispute resolution mechanisms such as conciliation, negotiation and mediation, Colombian SOEs can voluntarily submit to the jurisdiction of arbitration tribunals. Homologation, review and annulment mechanisms are available to challenge some of these decisions.

⁴⁴ Under Law 1 437 of 2011, the Code of Administrative and Contentious-Administrative Procedure, these actions are known as *means of control*.

Box 23. Stakeholders' means of redress

Appeal for annulment. This is a public action which can be filed by any person, without a time limit and without demonstrating personal legal interest, requesting that the administrative act in question be declared null. It seeks to determine the legality of an act in the light of higher norms or, in other words, the Constitution or laws.

Appeal for annulment and re-establishment of a right. This is an action that seeks i) annulment of the act in question and ii) recognition of a specific legal situation, re-establishing the right that may have been ignored or violated by the administrative act that is declared null. The time limit for this action is four months.

Appeal for direct compensation. This action seeks compensation for the damages generated or caused by an act, omission, event or operation of the state or, in other words, the cause of anti-legal damages which the person is not obliged to bear. The time limit for this action is two years.

Contractual controversy appeal. Any of the parties to a contract can request that it be declared void, with the corresponding declarations, sentences and restitutions, that its review be ordered, that non-compliance be declared and that the party responsible be ordered to pay compensation for damages and that other declarations and sentences be issued. This is a private action that can only be filed by interested parties. However, the Public Prosecution Service can also request that a contract be declared void if it has a direct interest in it. The statute of limitations for this action is two years as from the end of the contract and the time limit for filing the action is two years.

Source: MHCP

Stakeholders can use executive action to obtain enforcement of the definitive ruling of the judge in the last stage of a legal case, which constitutes a writ of execution. In the absence of voluntary compliance with a sentence issued by the contentious-administrative jurisdiction, a year must elapse from the date of the sentence before the judge can order its enforcement while sentences against a public entity that involve liquidation or payment of money can only be enforced after ten months. This does not, however, exclude the application of injunctions in the intervening period.

As regards their responsibilities, SOE directors do not enjoy any special privileges or immunity. Persons appointed as directors of SOEs for which the MHCP is responsible are only offered insurance as public servants, covering their responsibility for non-intentional acts or events that occur in the exercise of their functions and the civil, disciplinary and fiscal expenses they may incur.⁴⁵

1.5. Flexibility of the legal and regulatory framework

Guideline I.E states that the legal and regulatory framework should allow sufficient flexibility for adjustments in the capital structure of SOEs when this is necessary for achieving company objectives.

The legal regime and the statutes of SOEs, in general, offer some degree of flexibility for adjustments in their capital, permitting capital increases and decreases, mergers and divestments. All these processes are subject to approval by the enterprise which, in general,

⁴⁵ This insurance applies only to ministry officials at the director and subdirector levels and those officials responsible for expenditure. SOEs carry additional insurance for the risks of their directors, whether employees of the MHCP or not.

corresponds to the shareholders' meeting but may also require a reform of its statutes or approval of the regulator. In addition, privatisation processes are subject to the regime established in Law 226 of 1995 (section A.6.).

In some cases, changes in the structure of an SOE's capital may, depending on the nature of the operation, require a legal reform, decree or decision by the MHCP's Asset Committee. In those enterprises in which the state's interests are represented by the MHCP, capital increases or decreases and mergers require prior review by the Asset Committee.

Some of the EICE (and SEMs assimilated to EICEs) representatives interviewed for this report drew attention to the rigidity of the legal framework and, in particular, their dependence on legal reforms as among the principal obstacles to the company's proper functioning. At Banco Agrario, for example, the shareholders' meeting decided two years ago to list the company or implement some other mechanism for the diversification of its ownership, but these plans have been postponed pending the political support required for the necessary legal reforms.⁴⁶

1.6. Access to finance

Guideline I.F indicates that SOEs should face competitive conditions regarding access to finance. Their relations with state-owned banks, state-owned financial institutions and other SOEs should be based on purely commercial grounds.

Colombian SOEs normally use the financial or capital markets for financing and do not receive any additional support from the state. State-owned banks are expected to treat SOEs without any preference and in general SOEs are not engaged in substantial related party transactions or provide each other commercial credit.

Only in exceptional cases does the government guarantee SOE borrowing directly. This occurs when an SOE could not alone finance a project through the financial system or in the case of multilateral lending organisations which, in general, request a state guarantee, regardless of the borrower's solvency. The provision of a state guarantee is transparently regulated by Decree 2 681 of 1993, which was partially modified by Decree 95 of 1994. It establishes that a company seeking a state guarantee must comply with the conditions it defines and, in addition, set up collateral judged adequate by the MHCP.⁴⁷ At present, for example, Isagen has a state guarantee for the loan it obtained in 2005 from the U.S. Overseas Private Investment Corporation which required this as a condition for the loan with an initial value of USD 212 million (MHCP).

It should be mentioned that different market actors consider that, in Colombia, there is a widespread perception that public enterprises are implicitly guaranteed by the state, even when the law dictates otherwise. Although this has no basis in the law or regulation, there are, in fact, precedents in which the state has covered the outstanding debts of enterprises in which it only

⁴⁶ As explained in section A.7., a reduction of the state's stake to less than 90% would bring the bank under a legal regime that is less bureaucratic and more consistent with its competitiveness in Colombia's dynamic financial market.

⁴⁷ Article 24 of Decree 2 681 of 1993 states that these conditions include: a) approval of CONPES for the provision of the guarantee and the loan or the liability, according to the case; b) approval of the Public Credit Commission for the provision of the guarantee if this is for a period of more than one year; and c) compliance with the other requirements established in the Decree for the guarantee of a loan or the issue and placement of public debt on the domestic or international market, depending on the state entity undertaking these operations.

had a stake, without being obliged to do so. In one of these cases, the state was sued to cover the pensions of the employees of an agricultural company declared bankrupt in which it had only a minority stake. Another interesting case is that of the Urrá hydroelectric project in which the state had to cover the social responsibilities that arose from a change in the legal framework and which the company was unable to cover out of its own resources (Box 8).

Box 24. Urrá dam case

The design stage of the Urrá hydroelectric project began in 1979 and envisaged the construction of two dams (Urrá I and II) in the Alto Sinú area, a north-western region of Colombia. At that time, the project was considered financially viable and justified by the need to expand the country's hydroelectric system. In 1988, when the government gave the go-ahead for the project, it authorised construction of only Urrá I. In October 1992, the company, Multipropósito Urrá S.A., was formed and, in 1993, began construction of the dam and plant.

This called for the resettlement of 589 rural families and 22 families from the *Embera Katía* indigenous community. The latter appealed to the Constitutional Court on the grounds that they had not been consulted about the dam's construction and obtained a favourable ruling under which the company was ordered to pay monthly compensation to each indigenous inhabitant of the area for a period of 20 years. This triggered a significant increase in the population of the affected area, with the arrival of indigenous people from other parts of the country seeking to also benefit from the compensation. In addition to these monthly payments, the company was also ordered to pay compensation for the area of land that would be flooded by the dam. These additional costs, explained largely by the more conservationist nature of the new Constitution adopted in 1991, had naturally not been taken into account when the project was designed a decade earlier.

Through to 2009, the company ran an operating loss, due partly to the effect of the exchange rate on the value of the overseas borrowing used to finance the plant's construction. In this context, the state was obliged to take on responsibility for the payments owing to the displaced population and for the flooding of land, becoming a creditor of the project. In 2008, it capitalised an important part of the debt and, as of December 2012, the remaining portion amounted to approximately USD 500 million.

Source: MHCP

CHAPTER II: THE STATE ACTING AS AN OWNER

The second chapter of the Guidelines recommends that the state act as an informed and active owner and establish a clear and consistent ownership policy, ensuring that the governance of state-owned enterprises is carried out in a transparent and accountable manner, with the necessary degree of professionalism and effectiveness.

This is one of the chapters of the Guidelines that probably pose the greatest challenges for Colombia's SOE sector. Although the authorities have made clear efforts to professionalise these enterprises and increase their efficiency, this has not included the systematic and transparent development of a structure of state ownership. As a result, Colombia does not have an ownership policy as recommended by the OECD, although some partial guidelines have been established. Similarly, there is neither a centralised ownership entity nor sufficient coordination between the key players to facilitate better administration of the interests of the state. In addition, the boards of SOEs have limited independence and, in some cases, even the CEO is nominated by the political authorities, hampering the convergence of Colombian practices with OECD recommendations in this field.

2.1. Ownership policy

Guideline II.A states that the government should develop and issue an ownership policy that defines the overall objectives of state ownership, the state's role in the corporate governance of SOEs, and how it will implement its ownership policy.

Through the National Council for Economic and Social Policy (CONPES), the Colombian government prepares policy papers, some of which address strategies related to the ownership of SOEs. Some of these documents also refer to the government's privatisation policy or the programme for divestment of assets and diversification of the ownership of SOEs. For some companies, specific development plans also exist. These documents are public⁴⁸ and citizens can challenge them through the fundamental right of petition and request that the government provide information about the policies to be adopted.

Apart from these documents which, as indicated, address specific aspects of the ownership of SOEs, Colombia does not have a uniform and public ownership policy as recommended under Guideline II.A. This is partly a natural consequence of the fragmentation of a sector in which responsibility is distributed among different ministries without central coordination of their efforts. This should not, however, prevent the central authority - probably the President of the Republic or the CONPES - from considering the adoption of a global policy that could steer

⁴⁸ In this sense, the CONPES documents incorporate several of the Guidelines' recommendations which suggest that: "In developing and updating the state's ownership policy, governments should make appropriate use of public consultation. The ownership policy and associated company objectives should be public documents accessible to the general public and widely circulated amongst the relevant ministries, agencies, SOE boards, management, and the legislature." See https://www.dnp.gov.co/Portals/0/archivos/documentos/PRAP/PPS_Normatividad/3281.pdf and <https://www.dnp.gov.co/Portals/0/archivos/documentos/Subdireccion/Conpes/3425.pdf>.

improvement of the sector's corporate governance and provide clear guidelines for ministries and the SOEs' boards. The annotations to Guideline II.A recommend that:

“A clear, consistent and explicit ownership policy will provide SOEs, the market and the general public with predictability and a clear understanding of the state's objectives as an owner as well as of its long-term commitments.”

The annotations also warn that the existence of multiple and contradictory objectives of state ownership can lead either to inertia or excessive state intervention in matters or decisions that should be left to the enterprise, undermining their functioning. It is, therefore, recommended that the state clearly establish its objectives which “may include avoiding market distortion and the pursuit of profitability, expressed in the form of specific targets, such as rate-of-return and dividend policy”. In addition, the annotations warn that the presence of trade-offs between these objectives makes it advisable for the state to define its priorities and leave operational matters to SOE boards, respecting their independence.⁴⁹

2.2. Political intervention and operational autonomy

Guideline II.B states that the government should not be involved in the day-to-day management of SOEs and allow them full operational autonomy to achieve their defined objectives.

As discussed above, despite characteristics that include being subject to private law and undertaking for-profit industrial or commercial activities, Colombian SOEs are perceived as expressions of state activity and a further tool for the implementation of public policy. However, according to the country's authorities, this does not mean that the enterprises are at the service of different ministries and authorities, or that they owe obedience to them under a structure of administrative subordination. Instead, it is the activity of the state that requires or makes advisable the existence of a state company to provide the corresponding goods or services. The enterprise is, therefore, expected to undertake its activity in market conditions without political intervention beyond that which any controlling shareholder could exercise through votes and nominations to the board.

In this sense, the objectives of a number of the SOEs consulted for the preparation of this report clearly explain what they understand as their commercial and social objectives and how they balance them. Banco Agrario's corporate objectives offer a good example (Box 9).⁵⁰

The MHCP has indicated that SOEs can receive instructions from the government as regards laws, decrees or development plans that affect all companies in a particular sector of the economy, regardless of whether they are state or privately owned. This is consistent with the Guidelines which advocate limiting intervention of the ownership or coordination entity to issues and policies of a strategic nature. The Colombian authorities have also indicated that the government does not intervene in the commercial policies of SOEs:

⁴⁹ The annotations add that by setting its objectives and priorities, the state can also avoid situations in which SOEs have excessive autonomy in setting their own objectives or in defining the nature and extent of their public service obligations. The state should, in addition, strive to be consistent in its ownership policy and avoid modifying the overall objectives too frequently.

⁵⁰ Also see Annex 3 for financial information about the bank.

“Its intervention occurs when, given the size of its stake, it has a right to a seat on the board and this director, therefore, represents the position of the Ministry. Similarly, at shareholders’ meetings of enterprises in which the Ministry has a stake, decisions are approved or not by its representatives in accordance with the interests of the state. It is, therefore, clear that the government guides its representatives on boards and at shareholders’ meetings informally and allows each SOE to act with independence. However, strategic decisions about the SOE may be put before the Asset Committee” (MHCP, p. 53).

Box 25. Banco Agrario’s corporate objectives

Social purpose. The objective of Banco Agrario de Colombia S.A. is to develop the activities of a commercial bank, financing principally, but not exclusively, activities related to the rural, agricultural, fishing, forestry and agribusiness sectors. At least 70% of new active lending operations must be to finance rural, agricultural, fishing, forestry and agribusiness activities and no more than 30% of new credit operations will be to finance sub-national bodies and activities other than those mentioned above, prior authorisation by the Board of Directors.

Mission. We are a commercial bank that focuses on the agricultural sector, with the country’s widest coverage, and offers specialised financial solutions, supported by a competent human team and with technologies that integrate and ensure effective, high-quality processes, creating value for our clients, collaborators and shareholders in accordance with their risk tolerance, in order to foster Colombia’s economic and social development.

Vision. To be in 2015 the principal financial ally of the agricultural, official and micro-finance sectors, recognised for its specialised financial solutions, its coverage of all the country’s municipal districts and as the promoter of the development and financial inclusion of Colombia’s rural population.

Source: <http://www.bancoagrario.gov.co/acerca/Paginas/Entidad.aspx>

When the Colombian state decided to partially privatise some of its enterprises, such as ISA, Isagen and Ecopetrol, it entered into unilateral undertakings in favour of their new investors, establishing limits on its powers to intervene in the companies’ affairs and promoting more independence in their boards of directors (see Annex 4). In these undertakings, known as “Declaration of the Nation as Majority Shareholder”, it took on a series of obligations and offered guarantees on corporate governance matters such as dividend distribution, decisions by shareholders’ meetings, the right of exit and the setting aside of certain board seats for candidates proposed by the regions where the respective company operates and by minority shareholders (see Box 12). Without this voluntary decision on the part of the state, minority shareholders would not obtain seats on the boards of some of these companies.

These undertakings were for a period of ten years and served as a guarantee for investors, particularly as regards clarity, a greater participation in decisions about the company and the application of best corporate governance practices. In almost all cases, the guarantees and rights enshrined in these undertakings were incorporated into the companies’ statutes within the ten-year period and, therefore, became permanent.

2.3. Independence of boards

Guideline II.C recommends that the state let SOE boards exercise their responsibilities and respect their independence.

As a general rule for listed companies, Law 964 of 2005 establishes that at least 25% of directors must be independent. No similar rules exist for unlisted companies. This Law also defines the conditions for a director to be considered independent (see Box 15) and regulates their election under the electoral quotient system⁵¹ (Box 10).

Box 26. Electoral quotient system

In Colombia, board members are elected by shareholders at the Annual General Meeting (AGM) through a system called “electoral quotient.” In this system, holders of voting shares are requested to cast their votes for competing lists of board members, each list making up the entire board, rather than individual candidates. The selection of individual board members then takes place as follows:

First, the total number of votes present at the AGM is computed and the quotient “Q” is calculated by dividing this computed number by the total number of seats on the board up for election/re-election, and rounding down Q to the lowest integer number. Holders of voting shares are then asked to cast their votes for the competing lists of board members and a tally is prepared. Each list “Ln” receives a number of votes “Vn”. The number of votes cast on each list is then divided by the quotient Q. The result for a given list is a number consisting of an integer “In” and a fraction “Fn”. Seats allocation takes place as follows. Each list of board members is first allocated as many seats on the board as its In integer number. If the sum of the In numbers is less than the total number of seats up for election/re-election, the remaining seat(s) are allocated on the basis of the highest Fn fractions, in decreasing order.

Although the system was devised to introduce a measure of proportional representation, in practice, board candidates of minority shareholders are seldom elected because of the concentrated ownership structure of companies.

Source: World Bank 2003a

As discussed above, the Colombian authorities have explained that the country’s institutional framework does not facilitate political intervention and aims for enterprises to attain operational autonomy whilst remaining under the “tutelage” of the body to which they are linked. On this point, the MHCP has indicated that:

“The boards of SOEs take decisions autonomously but must align their conduct and decisions with the government policies established in development plans. In the case of the MHCP, (...) the Asset Committee (...) is the administrative body responsible for drawing up policies for the control, guidance and protection of investments and for defining the Ministry’s position on the decisions that must be adopted in the enterprises in which it is a shareholder. The MHCP does not, therefore, exercise control of any type over the enterprises’ boards and becomes involved, for example, either when the member of the board that represents the enterprise requests guidance on a decision or when the Ministry adopts a strategic policy that affects an enterprise and this is matter for the board and not the shareholders’ meeting.” (MHCP, p. 53)

However, as discussed above, these same institutional arrangements prescribe the presence of ministers on SOE boards and this is, in many cases, a permanent rule enshrined in their statutes and even in the laws under which they were created, as in the case of almost all

⁵¹ Article 44, final point, of Law 964 of 2005 states that: “In any case, all members of the board of directors will be elected by the shareholders’ meeting using the electoral quotient system or any other system determined by the National Government in exercise of the power conferred by the third point of article 39 of this law”.

EICEs and many SEMs that are assimilated to EICEs. Moreover, in other cases, an enterprise's CEO and other key personnel are nominated directly by the President of the Republic.

This direct political presence, and potential for intervention, is clearly at odds with the Guidelines which recommend that the ownership entity avoid electing an excessive number of board members from the state administration. Moreover, the Guidelines argue that employees of the ownership entity, professionals from other parts of the state administration or from political constituencies should only exceptionally serve as directors of SOEs provided that they meet the required competence level and do not act as a conduit for undue political influence. As described in section B.6.3., this is not always the case in Colombia.⁵²

It should, however, be noted that these weaknesses in the corporate governance framework of some Colombian SOEs are not uncommon in Latin America. Reinforcement of the independence of SOE boards was one of the clear recommendations made to the Chilean authorities in the framework of that country's accession to the OECD. The reform of the statutes of Codelco, a mining company and the largest Chilean SOE, had its origin in these OECD recommendations and involved reforms under which ministers ceased to be directors of the company and the board's powers over the CEO were increased (OECD, 2011).⁵³ PEMEX, Mexico's state oil company, received similar recommendations in a report prepared by the OECD Secretariat and delegates from the Working Party at the request of the company and the country's authorities (OECD, 2010).

The MHCP reports that the state as owner does not intervene in the day-to-day management of SOEs but confines itself to policy issues of a strategic nature. The authorities also indicate that the SOE directors appointed by the state have a duty to act with complete independence since they are personally responsible⁵⁴ for board decisions. Directors do not receive instructions from government officials and must not pass on or facilitate confidential information to anyone. Similarly, when directors are elected by stakeholders, they are requested to prepare a report on the company that is made available to the general public and the stakeholders they represent.⁵⁵

As indicated in section B.6.3., directors' fees are a further issue that complicates board's independence. The MHCP has established a scale of fees based on SOEs' assets and payment capacity and, within these limits, allows shareholders' meetings to set fees as they deem appropriate. In a number of enterprises, however, directors' fees are non-existent or very low and do not adequately compensate the time and effort involved, particularly if the aim is to attract independent directors with experience in the private sector.

On the other hand, public officials may not, as a general rule, receive more than one income that has its source in the National Treasury. An exception is made in the case of directors' fees

⁵² As shown in section B.6.3., a review of a sample of 45 large Colombian SOE boards shows that political appointees account on average for 22% of board seats and state officials hold another half of the board positions.

⁵³ Chile undertook to apply similar criteria in a still pending general reform of the composition of the boards of the rest of its SOEs.

⁵⁴ On this point, Article 200 of the Commercial Code states that "administrators will respond jointly and unlimitedly for the damage that, by intent or negligence, they cause to the company, its partners or third parties. This responsibility does not apply to those persons who did not have knowledge of the action or omission or voted against it, providing they do not implement it. In cases of non-compliance, the exceeding of functions or infringement of the law or a company's statutes, the administrator will be assumed to be at blame".

⁵⁵ The report of the representative of minority shareholders in Ecopetrol can be found at <http://www.ecopetrol.com.co/contenido.aspx?catID=453&conID=76382>.

and public officials are permitted to receive additional remunerations from up to two SOEs at the same time. According to the opinion of several experts, in some cases directors' fees are used to reduce the gap that exists in the salaries of officials with respect to remunerations in the private sector. It is not uncommon, however, to find senior public officials who, in addition to their other duties, serve as directors of three or four SOEs (although paid in only two). This suggests that their presence on the boards of these enterprises is not only prompted by the matter of remunerations but, nonetheless, raises questions as to whether they have the time to fulfil a professional role as a director of all these SOEs as well as their ministerial tasks.

2.4. Centralisation of ownership functions

Guideline II.D indicates that the exercise of ownership rights should be clearly identified within the state administration and may be facilitated by setting up a co-ordinating entity or, more appropriately, by the centralisation of the ownership function.

Colombia does not have a unit that centralises or explicitly co-ordinates the different ministries to which SOEs are linked to or owned by. This is another area in which the Colombian government should consider the Guidelines recommendations which suggest the clear identification of ownership functions in a single entity which is either independent or under the authority of one ministry. This would help to clarify ownership policy and its orientation, ensuring its more consistent implementation.

According to the annotations to the Guidelines, centralisation of the ownership function would also reinforce and bring together relevant competencies by permitting the organisation of work teams that gain in knowledge and experience of key matters such as financial reporting (see section B.5.1.) and board nomination (see section B.6.3.). In addition, the Guidelines suggest that centralisation can play an important role in promoting transparency and accountability in SOEs while, at the same time, serving as an efficient way of separating the state's ownership functions from its other activities, particularly market regulation and industrial policy.

2.5. Accountability of the co-ordinating or ownership entity

Guideline II.E recommends that the co-ordinating or ownership entity be held accountable to representative bodies such as the Parliament and have clearly defined relationships with relevant public bodies, including the state supreme audit institutions.

The structure and administrative fragmentation of Colombia's SOE sector means that each ministerial unit has its own powers and responds individually to audit institutions, principally the Comptroller General's Office (see section A.4.8.). Ministries compile information about the enterprises for which they are responsible and present it to Congress individually.

2.6. State's exercise of ownership rights

Guideline II.F recommends that the state as an active owner exercise its ownership rights according to the legal structure of each company. These rights and responsibilities include: 1) being represented at general shareholders' meetings and voting the state shares; 2) establishing and actively participating in well-structured and transparent board nomination processes; 3) setting up reporting systems that allow regular monitoring and assessment of SOE performance; 4) maintaining continuous dialogue with external auditors and specific state control organs, when

feasible; and 5) ensuring that remuneration schemes for SOE board members foster the long-term interest of the company and can attract and motivate qualified professionals.

Colombian ministries, as the state's representatives in the enterprises for which they are responsible, exercise many of the functions indicated in Guideline II.F, starting with representation at shareholders' meetings and voting of its shares. On this point, the MHCP adds that:

“For the general shareholders' meetings of state-controlled enterprises which, by law, must take place at the latest in March of the year following the end of the fiscal year, the Investment Bank Division, which administers the state's portfolio, holds meetings known as pre-shareholders' meetings. These are attended by the person who will represent the state-MHCP as well as by the enterprise's administration in order to discuss the agenda of the shareholders' meeting and, if there are problems about which the enterprise needs to inform the shareholders' meeting, establish the required guidelines.” (MHCP, pp. 58-59)

Regarding the nomination and election of SOE directors, according to anecdotal information obtained in preparation of this report, the processes lack the formality and pre-established procedures recommended by the Guidelines.⁵⁶ They advocate a structured nomination process in which the ownership entity plays an active role, recognising that this will be facilitated if, in contrast to the Colombian case, there is single centralised co-ordinating entity. The Colombian authorities could consider the recommendations contained in a recent report on the best practices of OECD countries as regards the formation of SOE boards (Box 11).

The lack of a centralised entity is probably what has also impeded comprehensive reporting on the functioning of Colombian SOEs. Different ministries have implemented mechanisms through which to gather information about individual enterprises as recommended by Guideline II.F.3, but this is neither centralised nor consolidated.

According to the MHCP, SOEs are obliged to use external auditors (*revisores fiscales*) and report to their shareholders and stakeholders in accordance with the national system of accounting principles (see section B.5.3.).

Finally, although Colombia does not have a general policy on the fees of SOE directors, the MHCP has, through its Asset Committee, established parameters based on the enterprises' assets. In addition, as discussed above, the President of the Republic empowered the MHCP to set the fees of directors of public institutions, EICEs, SEMs and those enterprises in which the state has a majority stake. Similarly, he delegated to the MHCP the power to set salaries that include those of the public employees of non-financial state entities linked to the MHCP and the presidents of state financial institutions.

⁵⁶ The MHCP has explained that candidates for board seats are selected based on their experience and expertise as well as the confidence the Ministry has in them. It also selects independent directors, consulting the possible candidates beforehand. See also section B.6.3.

Box 27. Boards of directors of SOEs: an overview of national practices

This report outlines some of the key elements of best practices define as a robust board nomination policy framework, including: i) specifying the person or body responsible for nominations; ii) being transparent about any qualifications that may be required or guidelines that exist on appointments; and iii) pursuing a consistent approach across all SOEs.

Nominating procedures vary across countries, but in the majority of jurisdictions, as the report concludes, the relevant line ministry is exercising the right of nomination. In more centralised systems, the Treasurer or Finance Minister is often vested with the nomination power, or the nomination power may be split between the sectorial Minister and the Treasurer. It is also common in OECD countries that the nomination decision of a Minister is subject to some form of veto by a wider group of Ministers, the Cabinet or Head of State (e.g. Sweden).

Some SOEs have board nominations committees operating much like private sector enterprises while in others they report to the AGM, which is the body that nominates the board members. This is the case of Norway, for instance, where the nomination committee is composed of three independent members and one government representative and reports to the AGM. In some jurisdictions, the role of nomination has been handed to an independent body that either appoints nominees or recommends them to the government. The report explains that the use of external advisors expands the search base of candidates and applies professional techniques that stands in contrast to the often informal practices used to nominate candidates. This practice is in line with the Guidelines and promotes depoliticizing of the board appointment process.

The report also describes the measures that governments take to improve nominations. It shows that some jurisdictions have adopted gatekeeper arrangements to provide a clearinghouse for applications, enabling applicants to be considered from a wider variety of sources but nevertheless subject to a uniform assessment process. Where a centralised ownership unit has been established, it is common for it to have responsibility for soliciting/receiving applications and then vetting them against any pre-determined qualification criteria.

When it comes to defining the desired qualifications for candidates to serve on an SOE board, about half of the jurisdictions surveyed by the report have established clear criteria, such as years of education and quantifiable experience requirements (Poland, Israel and Greece are some examples). The other half uses qualitative characteristics and more holistic descriptions to member qualities focusing on the outcomes required (e.g. Sweden). The advantage of this approach is that it more flexibly accommodates board members whose profile might not meet standard criteria, but who may nevertheless add value to the board.

New Zealand, for example, uses gap analyses of the board to select candidates. After the gap analysis is conducted, potential nominees are examined and a short list is developed and presented to ministers. Chile, for example, has the ownership unit drawing nominations from a wide variety of sources; Slovenia has established an Accreditation Committee to manage all stages of identifying potential candidates; and Portugal has taken a similar approach. Finland is reported to be outsourcing the development and maintenance of the pre-qualified database of candidates to a recruitment consulting firm. The use of recruitment consultants is relatively wide spread and several jurisdictions have noted that they outsourced services, particularly for Chair appointments, where an SOE was particularly large or where an SOE was facing particular challenges.

Source: OECD, 2013c

CHAPTER III: EQUITABLE TREATMENT OF SHAREHOLDERS

Chapter III of the Guidelines recommends that the state and state-owned enterprises recognise the rights of all shareholders and, in accordance with the OECD Principles of Corporate Governance, ensure their equitable treatment and equal access to corporate information.

As mentioned earlier, Colombian legislation and the practices observed during preparation of this report indicate that minority shareholders' rights are well recognised and subject to a range of guarantees from the state and its enterprises. This is reflected in different measures and public policies and is also consistent with the country's 6th place on protecting investors in the World Bank's 2013 Doing Business ranking.

3.1. Ensuring equal treatment

Guideline III.A indicates the co-ordinating or ownership entity and the SOEs should ensure that all shareholders are treated equitably.

Although Colombia does not have a centralised co-ordinating or ownership entity, the state has sought through different actors to attract investors and build closer links between SOEs and their stakeholders. In the "Declarations of the Nation as Majority Shareholder", for example, it undertook a series of obligations in favour of the minority shareholders and stakeholders of a number of companies, listed and otherwise, in which it holds a controlling stake (Box 12).

Similarly, in other SOEs, it has signed shareholder agreements⁵⁷ that seek to protect minority shareholders in areas that include dividend distribution policies and the calculation of profits, the summoning of shareholders' meetings, operations with related parties, disclosure policies, liquidity mechanisms, the adoption of international accounting standards, board decisions, board composition and the sale of shares to third parties. One example of a shareholders' agreement is that adopted by Isagen in December 2006.⁵⁸

In addition, Colombian legislation establishes special mechanisms for the protection of minority shareholders such as those contained in article 141 of Law 446 of 1998, under which any group of shareholders that represent less than a 10% stake in a company and are not represented on its board can request the intervention of the Financial Superintendency whenever they consider that a decision by the shareholders' meeting, the board or an enterprise's legal representatives is directly or indirectly detrimental to their rights. Other important norms establish exit rights in the event of a merger, spin-off or transformation and high voting quorums for sensitive matters such as profit distribution (78% quorum); the issue of

⁵⁷ Under article 70 of Law 222 of 1995, two or more shareholders may undertake "to vote in the same or a specific way at shareholders' meetings. This agreement can stipulate that one or more of them or a third party is allowed to represent them all at the shareholders' meeting or meetings. This stipulation will have effect as regards the company providing the agreement is in writing and is submitted to the company's legal representative for safekeeping in the offices of its administration. On all other matters, neither the company nor its other shareholders will be answerable for non-compliance with the terms of the agreement".

⁵⁸ The text in Spanish is available at http://www.isagen.com.co/comunicados/oferta_acuerdo_accionistas.pdf.

ordinary shares placed without being subject to preferential rights (70% quorum); and payment of dividends in the form of treasury shares (80% quorum).

Box 28. State's statement in favour of minority shareholders of Ecopetrol

In the case of Ecopetrol, the State's declaration issued on 26 July 2007 states that best practices recommend that companies have a board with the appropriate professional expertise and that its nomination be "transparent and independent in order to avoid future conflicts of interest". It explains that, to this end, "the Nation has unilaterally decided to enter into an undertaking" with the company's minority shareholders for a period of ten years under which it will vote at shareholders' meetings in accordance with a list of commitments that "seek to guarantee the application of good corporate governance practices" in the company. These commitments include:

i) Dividend policy. "In order to effectively guarantee the right of all shareholders to receive dividends in accordance with the Law", the state declares that dividends will be paid out of liquid profits and establishes a procedure for their calculation that considers balance sheet profits less the losses of previous years, legal reserves and tax provisions.

ii) Board composition. The state undertakes to put forward two (out of a total of nine) candidates for the board who have been proposed by the departments (regions) where the hydrocarbons exploited by the company are located and by minority shareholders, and to vote for these candidates. It will require that the candidates are suitable and comply with the legal definition of independent directors.

iii) Agenda of shareholders' meetings. The state undertakes to vote for motions that seek to permit the inclusion of matters additional to those envisaged in the agenda of the company's extraordinary shareholders' meetings if proposed by a shareholder who represents at least a 2% stake in the company. In addition, it undertakes to transform this commitment into a permanent statutory norm.

iv) Decisions by shareholders' meetings. The state undertakes that the disposal of assets with a value equivalent to 15% or more of the company's market capitalisation will be discussed and decided affirmatively only if supported by minority shareholders who represent at least 2% of the shares subscribed by minority shareholders. In the absence of this support, the state must call a new meeting at which the decision will be adopted without this special quorum. In addition, it undertakes to transform this commitment into a permanent statutory norm.

v) Exit right. If it is not possible to reach agreement on the share price for exercise of the right of exit, the state will accept the arbitration of an investment bank selected by the Chamber of Commerce of Bogotá.

Source: http://www.ecopetrol.com.co/documentos/40316_Declaracion_del_Accionista_Mayoritario_26-07-07.pdf

3.2. Transparency towards all shareholders

Guideline III.B indicates that SOEs should observe a high degree of transparency towards all shareholders.

As issuers of publicly traded securities, Colombia's listed SOEs must disclose material information to the markets on which they are registered, both in Colombia and overseas.⁵⁹ There are no rules that allow the state to receive any early notice, so information must be disclosed to all shareholders at the same time. In order to comply with their reporting obligations in the Colombian market, SOEs use the Financial Superintendency's Integrated Securities Market Information System (SIMEV). Their reporting obligation comprises all material information

⁵⁹ Ecopetrol, for example, reports in the United States through the SEC's EDGAR system and, in Canada, through the Canadian Securities Administration's SEDAR system and the information system of the Toronto Stock Exchange (TSX).

defined as “all situations related to the issuer that would have been taken into account by a prudent and diligent expert in decisions related to the issuer or in the exercise of his political rights”. This is regulated by Decree 2 555 of 2010.

In addition, all SOEs, whether listed or not, are obliged to report to the General Accounting Office through the MHCP’s CHIP system, to the Comptroller General’s Office through its SIRECI system and the Fiscal Statistics Information System (SIDEF). In some cases, they must also report to the MME’s Integrated Management System (SIGME), the Financial Superintendency or the Company Superintendency. Further, some also have to report to the Utilities Superintendency, through another system known as SUI, and to other regulators.

This multiplicity of reporting often involves the same basic information which must be processed and published differently by public bodies, at diverse times of the year. According to SOE administrators, this implies an important work load that could easily be simplified through unification and standardization of some of these reports or the methodologies used for their publication, as well as the sharing of information.

3.3. Active policy of communication and consultation with all shareholders

Guideline III.C indicates that SOEs should develop an active policy of communication and consultation with all shareholders.

According to the MHCP, Colombian companies have in place different mechanisms, adopted in response to legal requirements or voluntarily, through which they make information available to shareholders or answer their questions. These mechanisms vary depending on the volume of information and the company’s geographic location.

The law provides shareholders with the opportunity to inspect a company’s books and papers, except for those documents subject to corporate confidentiality. Under this right of inspection, established by article 379 of the Commercial Code, companies must put their books and papers at the disposal of shareholders to enable them to obtain information about their administrative and financial situation. This right can be exercised within the 15 working days prior to a shareholders’ meeting in which the company’s end-of-year financial statements will be examined.

The Código País recommends companies to make available to investors a point of contact to serve as a channel of communication. In 2012, 93% of financial companies and 98% of real sector companies reporting under the Código País said they adopted the recommendation (Financial Superintendency). The voluntary mechanisms that companies have adopted for the attention of investors include traditional and non-traditional channels. The latter include call centres, e-mails, chat and offices for personal attention and, in the case of the former, mobile units, stands and educational talks and seminars offered particularly by listed companies. Many Colombian companies also post information on their websites, including their approved financial statements.

3.4. Facilitation of minority shareholders’ participation in shareholders’ meetings

Guideline III.D recommends that the participation of minority shareholders in shareholders’ meetings be facilitated in order to allow them to take part in fundamental corporate decisions such as board election.

As indicated above, all SOE shareholders have, in general, the same rights, without discrimination between private and state shareholders, except in a few cases where, for legal or statutory reasons, certain nominations or posts depend expressly on the decision of the state. Colombia's three listed SOEs, which are naturally those with more minority shareholders, have developed a culture that seeks to maintain close and fluid relations with their investors who attend shareholders' meetings in very large numbers. Their shareholders' meetings are, in addition, broadcast live on Internet and television and often involve small presents and souvenirs from the company that shareholders take with them after the meeting. The table below shows participation in Ecopetrol's shareholders' meetings (Table 7).

Table 7. Attendance at Ecopetrol's shareholder meetings

Year	Shareholders (individuals and companies)
2008	10.879
2009	8.722
2010	10.617
2011	8.604
2012	14.696

Source: Ecopetrol, 2013

As described in more detail in Annex 2 for EPM, but also true for many other SOEs as well, active minority shareholder participation in the company's affairs is viewed by many SOEs as 'shielding' it from the risk of undue political influence that could affect its sustainability. This is another reason why SOE foster mechanisms of communication with shareholders and stakeholders.

Furthermore, Colombia has recently regulated the use of proxy voting (via External Circular 22 of 2012 by the Financial Superintendency) and custody of securities (via Decree 1 243 of 2013) to facilitate shareholder participation.

As also discussed above, the state has, in the case of a number of SOEs, also issued declarations and signed shareholders' agreements for the purpose of guaranteeing the due representation of the interests of minority shareholders and stakeholders. Agreements have also been signed between minority shareholders, in some cases with the enterprise's support, to regulate situations such as the election of the director to whom they have a right under the state's undertaking to ensure them a seat on the board.

Isagen has a shareholders' agreement under which the state undertakes to include an independent candidate (for both director and alternate director), elected by minority shareholders, in its list of candidates for board seats. The candidate must be previously proposed by minority shareholders who hold less than 3% of the shares in circulation. Without this state undertaking, minority shareholders would be unable to elect a director.⁶⁰

⁶⁰ At Ecopetrol, minority shareholders have their own agreement to elect their candidates for the board of directors: http://www.ecopetrol.com.co/documentos/57875_Ecopetrol_revela_acuerdo_de_accionistas_minoritarios_06-02-12.pdf.

CHAPTER IV: RELATIONS WITH STAKEHOLDERS

Chapter IV of the Guidelines addresses relations with stakeholders, indicating that the state ownership policy should fully recognise the state-owned enterprises' responsibilities towards stakeholders and request that all SOEs report on their relations with them.

Relations with stakeholders are quite developed among Colombian SOEs whose emphasis on communicating their activities is reflected in numerous initiatives. However, in contrast to a number of OECD countries, they do not give priority to dialogue with employees, due partly to a past marked by great tension with the unions of large state companies.

4.1. Recognition and respect of stakeholders' rights

Guideline IV.A recommends that governments, the co-ordinating or ownership entity and SOEs themselves recognise and respect stakeholders' rights established by law or through mutual agreements, and refer to the OECD Principles of Corporate Governance in this regard.

Although in Colombia there is not a practice or generally applicable institutional framework that addresses this issue, but rather a scattered legal and regulatory environment can be found, it is possible to identify different expressions of a culture of respect for stakeholders' rights. It is not clear whether this is principally a result of the implementation of public policies or reflects local culture, but companies certainly strive to improve their channels of communication with stakeholders. They also actively participate in local and international related initiatives, in a bid to draw attention to their corporate responsibility or policies of transparency on the protection of the environment or human rights.

The annotations to Guideline IV.A indicate that the application of the OECD Principles on respect for stakeholders "implies full recognition of the contribution of various stakeholders and encourages active and wealth-creating co-operation with them". It also adds that "stakeholders should have access to legal redress in the event their rights are violated".

By law and, in some cases, as a result of undertakings entered into voluntarily by the state, special rights have been created for the inhabitants of communities or regions where enterprises have their activities. These include a right to speak and vote on key issues such as the election of the board. In the case of privatisations, the state is also obliged under constitutional and legal norms to take measures to diversify ownership and to offer workers and solidarity and worker organisations shares on preferential terms (see section A.6.). In addition, the Constitution establishes the right of sub-national bodies to elect directors of enterprises that provide public services in their territory (see section A.3.1.1.).

The information gathered for this report indicates that Colombian SOEs have developed an important culture of corporate responsibility. This is seen at all levels and not only among large companies, although the activities of the latter naturally have greater visibility. A very interesting example is EPM, an EICE that is wholly owned by the Medellín municipal government. It has implemented a business strategy that has received international recognition for its efforts to generate value for stakeholders (see Annex 2).

There are no equivalent norms establishing employee representation on SOE boards. Some experts interviewed for this report attributed this to the conflicts seen in the recent past with the unions of some large state companies. According to information presented by the Trade Union Advisory Committee to the OECD (TUAC)⁶¹ in the context of discussion of the reports on Colombia prepared by the OECD's Regulatory Policy Committee (RPC) and Public Governance Committee (PGC), protection of workers' rights, particularly as regards collective bargaining, is weak (Box 13). Colombia's labour laws and, in general, worker treatment have also been questioned by the ILO, eight of whose key conventions Colombia has ratified. On the basis of the information available, it is not clear whether, in this field, the track record of SOEs is better or worse than the rest of the market.

Box 29. TUAC's position regarding labour rights in Colombia

In TUAC's view, collective insecurity and recurrent failures to meet internationally recognised labour standards on public governance and regulatory quality in Colombia include: i) the exceptional severity of the human rights risks to trade unionists and other human rights defenders in Colombia, including assassination; ii) the violation of freedom of association and collective bargaining, which are essential forms of regulation of the labour markets; iii) the weak enforcement of labour law; iv) the defect in the police, public prosecution and judiciary leading to high levels of impunity in cases related to violence against trade union members; and v) the absence of substantive social dialogue between government and trade unions.

TUAC also points out that for many years the supervisory mechanisms of the ILO have identified numerous ways in which Colombia's labour laws fall short of the core labour standards, the minimum set of rights to be guaranteed by all countries. Further, it claims that the government of Colombia's has a very poor record enforcing the labour laws it has on the books.

TUAC also mentions that public sector workers do not enjoy the right to collective bargaining in Colombia and even though President Santos recently adopted a reform extending bargaining rights for public sector workers, Decree 1 092 of 2012 was adopted without consultation with Colombian trade unions and is regarded by worker's representatives as not containing all of the rights and guarantees necessary to be consistent with relevant ILO conventions 151 and 154 ratified by Colombia.

Source: TUAC's submission to the RPC meeting of 23-24 April 2013.

4.2. Information about stakeholder relations

Guideline IV.B indicates that listed or large SOEs, as well as SOEs pursuing important public policy objectives, should report on stakeholder relations.

According to the information gathered for this report, there is, given the lack of a central co-ordinating entity, no general requirement for SOEs to report on stakeholder relations. There are, however, numerous examples beyond the three listed SOEs of enterprises which report on a regular basis, adhering to different reporting methodologies (including the UN Global Compact, the Global Reporting Initiative, Integrated Reporting and ISO 26000).⁶² Many of them also submit their reports for external assurance of the quality of the information they contain. The

⁶¹ The Trade Union Advisory Committee to the OECD (TUAC) is one of the two organisations officially recognised by the OECD Council to conduct formal relations between the OECD and stakeholders. It contributes in several areas of the Organisation's work through policy dialogue and consultations.

⁶² See <http://www.unglobalcompact.org/AboutTheGC/index.html>; <http://www.globalreporting.org/>; <http://www.theiirc.org/>; and <http://www.iso.org/iso/fr/home/standards/iso26000.htm>.

table below shows the different media and communications channels used by ISA to relate to its stakeholders, including its shareholders (Table 8).

Table 8. ISA's communication with stakeholders

Stakeholder groups	Information channels	Participation means
Employees	Social networks (Facebook, Youtube, Twitter, LinkedIn) Internal Bulletin (Ticas) ISATV Environmental Bulletin On line Bulletin Email Annual and sustainability reports	Social networks (Facebook, Youtube, Twitter, LinkedIn) ISANET ISATV Primary groups Performance evaluation Surveys on organizational climate Reputational surveys (twice a year) Dialog and accountability
Supply chain	Social networks (Facebook, Youtube, Twitter, LinkedIn) Website page "servicios al proveedor" Annual and sustainability reports	Social networks (Facebook, Youtube, Twitter, LinkedIn) Inbox: proveedores@isa.com.co Meetings with suppliers Annual survey on quality and satisfaction perception Performance evaluation Website Dialog and accountability
Society	Social networks (Facebook, Youtube, Twitter, LinkedIn) Website Multimedia Letters to authorities and community Press releases Radio programme: "ISA Conecta Regiones" Posters News wall Annual and sustainability reports	Social networks (Facebook, Youtube, Twitter, LinkedIn) Letters and requests Road shows Education and training Hotline ISA +018000941341 Inbox: isa@isa.com.co Website Reputational surveys (twice a year)
State	Social networks (Facebook, Youtube, Twitter, LinkedIn) Reports and information to regulators Quarterly results Shareholder's meetings Press releases Website Annual and sustainability reports	Social networks (Facebook, Youtube, Twitter, LinkedIn) Reputational surveys (twice a year) Letters and requests Workshops with public entities Board meetings Dialog and accountability Road shows
Clients	Social networks (Facebook, Youtube, Twitter, LinkedIn) Client Bulletin Report on management indicators Website page "Negocios ISA" Client support Director Publicity and marketing Annual and sustainability reports	Social networks (Facebook, Youtube, Twitter, LinkedIn) Client support centre: +5743157143 Inbox: gestioncomercial@isa.com.co Client satisfaction survey Reputational surveys (twice a year) Meetings with clients Visits to clients Website Dialog and accountability
Investors	Shareholder's meetings Social networks (Facebook, Youtube, Twitter, LinkedIn) Bulletin, tax certification and account statement Information on news, relevant facts and quarterly results. Annual and sustainability reports Meetings with investors, brokers and analysts. Website	Investor relations office Shareholder's meetings Social networks (Facebook, Youtube, Twitter, LinkedIn) meetings with investors Regional points for mailing Inbox: accionesisa@isa.com.co Shareholder's hotline: +018000115000 Medellin local line: +95743602472 Medellin fax: +95742686880 Website Dialog and accountability

Source: ISA, 2013

4.3. Compliance programmes for internal codes of ethics

Guideline IV.C emphasises that SOE boards should be required to develop, implement and communicate compliance programmes for internal codes of ethics. It adds that these codes should be based on country norms, in conformity with international commitments and apply to the company and its subsidiaries.

All entities subject to the supervision of the Financial Superintendency, SOE or privately-owned, are required to adopt a code of ethics and conduct. It is the responsibility of the board of directors that the code is adopted and it is a joint responsibility between the board and the management for the code to be implemented.⁶³

As discussed above, corruption represents a significant challenge in Colombia (see section A.2.) and it is, therefore, encouraging to find that practically all enterprises linked to or owned by the MHCP report having adopted codes of ethics and, in one way or another, monitor compliance with their terms. Several companies also reported having manuals for the prevention of fraud, corruption, asset laundering and financing of terrorism.

Ecopetrol, for example, has in place a process for receiving reports of misconduct that operates under strict confidentiality and privacy parameters. This online service is operated by an external company and can be accessed at any time by telephone or Internet, allowing the person making the report to do so anonymously but also to receive a code number through which to verify the status of the report. The company's compliance official informs the audit committee on a monthly basis about the reports received through this mechanism and the cases that remain open and have been closed, including the measures adopted.

However, according to the Measurement of Business Transparency in Public Service Companies (MTE-ESP) 2012,⁶⁴ carried out by the local chapter of Transparency International, *Corporación Transparencia por Colombia*, the weakest aspects of the 22 public and private companies who voluntarily agreed to be assessed are their ethics, including the corporate governance mechanisms underpinning it.

⁶³ See sections 7.5.1 and 7.7.1.3 of External Circular 7 (*Circular Básica Jurídica*) of 1996 by the Financial Superintendency. The rules also establish the obligation to adopt whistle-blowers' mechanisms and anti-fraud procedures.

⁶⁴ In 2012, 22 companies (including SOEs and private sector entities) in the energy and gas, water, aqueducts and sewage and information and communications technologies sectors, which provide services to over 28 million Colombians, submitted voluntarily for the fifth consecutive year to assessment of their transparency mechanisms and policies. The assessment, which considered openness, dialogue, clear rules and company control, was based on international principles and standards that permitted identification of opportunities for improvement and possible risks of institutional corruption.

CHAPTER V: TRANSPARENCY AND DISCLOSURE

Chapter V of the Guidelines recommends that state-owned enterprises observe high standards of transparency in accordance with the OECD Principles, which in turn ask the corporate governance framework to ensure that timely and accurate disclosure is made on all material matters regarding the corporation, including the financial situation, performance, ownership, and governance of the company.

Overall, transparency and disclosure standards applicable to SOEs in Colombia match those of the private sector and include additional reviews by a number of controlling public bodies. The absence of a coordination entity for the sector is however reflected in the lack of, or insufficient disclosure of, information about the sector as a whole. In the preparation of this report it was not possible to find a single academic paper or official report with quantitative information about the size and composition of the SOE sector in Colombia.

5.1. Aggregate annual reporting on SOES

Guideline V.A establishes that the co-ordinating or ownership entity should develop consistent and aggregate reporting on state-owned enterprises and publish annually an aggregate report on SOEs.

As indicated above, Colombia's lack of a centralised unit for SOE administration and institutionalised coordination of the different ministries responsible for these enterprises means that their management is fragmented. The information they produce is furthermore not consolidated by any central government body and there is no aggregate report on the performance and situation of the SOE sector. As part of a consultancy work engaged by the government to rationalize the management of the sector, an international consultancy firm is in the process of producing at least a partial report of the SOE sector as a whole, covering the most important firms. This report is however not yet completed or publicly available.

As also mentioned above, the MHCP has its own system for consolidating public financial information, known as the Consolidator of Fiscal and Public Financial Information (CHIP).⁶⁵ It is responsible for channelling the financial, economic and social information of public bodies, including SOEs, to central institutions, under the administration and supervision of the General Accounting Office, and to the general public. Its primary purpose is to monitor the fiscal and financial performance of public bodies, based principally on macroeconomic and financial data. It seeks to control and evaluate fiscal management and its reports are, therefore, designed to provide the information required to define transfers to sub-national bodies, adopt macroeconomic policies, control specific and aggregate borrowing and, in general, conserve the

⁶⁵ The CHIP system contains the following information: registers of transactions and financial results reflected and registered in the budget, accounting registers, treasury accounts and, in a broad context, sub-national budgets, covering movements in assets, income, expenditure and borrowing and variations in assets and liabilities in general. The information reflects flow variables (including budget implementation and cash operations) and stocks (for example, borrowing levels and net worth) which, as a whole, provide information for fiscal analysis and monitoring, generally accepted accounts and their links to the national accounts. See www.chip.gov.co/schip_rt/.

state's fiscal and financial equilibrium. In this sense, these reports do not pursue the objective of presenting information About the SOE sector as a whole.

Although the CHIP system is not designed to generate specific reports on the performance and situation of SOEs, the authorities have indicated that fiscal control bodies, auditors and the general public can access this information in pursuit of their own institutional responsibilities and for academic and research purposes or as general information. It bears mentioning, however, that this comes at a considerable "information cost" to the individual, compared with a situation in which the government compiles, processes and disseminates the information.

5.2. Internal audit

Guideline V.B indicates that SOEs should develop efficient internal audit procedures and establish an internal audit function that is monitored by and reports directly to the board and to the audit committee or the equivalent company organ.

Law 489 of 1998 created the National Internal Control System in which some SOEs are included (all EICEs and SEMs assimilated to EICEs). Its objective is to "integrate in a harmonic, dynamic, effective, flexible and sufficient way the functioning of the internal control of public institutions so that, through the application of suitable management tools, they strengthen their full and timely compliance with state functions". The system's administrative authority is the President of the Republic who is supported for this purpose by the Director of the Administrative Department of the Public Function. It is the president of the Republic who appoints the head of internal audit within SOEs under the system (Law 87 of 1993 and the Anti-Corruption Statute). Each four months, the head of internal control must publish a detailed report on the entity's website.⁶⁶

The Directorate of the National Internal Control System, which reports to the President of the Republic, establishes a system of organisation and sets plans that include verification and evaluation methods, principles, norms, procedures and mechanisms which all bodies subject to internal control must adopt. Pursuant to Law 489 of 1998, Colombian SOEs are expected to develop their internal control systems following the Standard Model of Internal Control (MECI), defined for the whole public sector and that provides a structure for monitoring the strategy, management and evaluation that is geared towards the meeting of objectives.

For SOEs under its supervision, the Financial Superintendency issued External Circular 38 of 2009 and External Circular 7 of 1996 containing the instructions they must follow in relation to their internal audit department. Under these rules the internal auditors must report to the board of directors, via the audit committee, as recommended by the Guidelines. These instructions define internal control systems as

"the set of policies, principles, standards, procedures and monitoring and evaluation mechanisms established by the board of directors or equivalent governing body, senior management and other employees of an organization to provide reasonable assurance regarding the achievement of the following objectives: i) Improve efficiency and effectiveness in the operations of the entities subject to inspection and supervision (...); ii) To prevent and mitigate the occurrence of fraud, arising both within and outside of organizations; iii) Perform a proper risk management; iv) Increase reliability and

⁶⁶ See Chapter II of http://www.secretariasenado.gov.co/senado/basedoc/ley/2011/ley_1474_2011.html.

timeliness of information generated by the organization; and v) Give adequate compliance with standards and regulations applicable to the organization.”

5.3. Independent external audit

Guideline V.C recommends that SOEs, especially large ones, be subject to an annual independent external audit based on international standards and adds that the existence of specific state control procedures does not substitute for an independent external audit.

Under article 203 of the Commercial Code, a *revisor fiscal* must be employed by all stock companies, branches of overseas companies and “companies in which, by law or under their statutes, their administration does not correspond to all the partners, when so determined by partners excluded from the administration who represent no less than 20% of the capital”.⁶⁷

The shareholders’ meeting appoints the *revisor fiscal* and its duties include: (i) certification of the quality of internal controls defined broadly (including processes and operations); (ii) certification that the firm complies with laws and bylaws; (iii) signing of financial statements together with the legal representative (World Bank 2003a). Article 215 adds that the *revisor fiscal* must be a public accountant and may not serve as the auditor of more than five stock companies. In the case of firms performing these services, the Code establishes that, for each audit, they must designate a single public accountant who personally carries out this task.

In its 2003 Accounting and Audit ROSC review, the World Bank described that in its opinion the term *revisor fiscal* should not be translated as “statutory auditor” because

“according to internationally accepted practice, the term “statutory auditor” is used to mean independent auditors who audit financial statements. Since a *revisor fiscal* is legally required to perform various activities that do not resemble auditing of financial statement, the term *revisor fiscal* is used throughout this report to mean those practitioners who perform legally required annual audits in Colombia (...) There is an inherent conflict of interest in that the *revisor fiscal* gives the company instructions⁶⁸ and then audits their execution. Market observers express concern about the independent judgment of the *revisor fiscal*, especially in cases where his or her salary is paid by the company.” (World Bank 2003b)

The World Bank concluded that the functions of *revisor fiscal* were not compatible with the functions of an independent auditor of financial statements and even argued that the modern concept of independent audit does not exist in Colombian legal provisions on audit. Since then, although there has been no change in the law, the Financial Superintendency has issued

⁶⁷ Article 13 of Law 43 of 1990 also establishes that all commercial companies, regardless of their nature, must employ an external auditor when their gross assets as of 31 December of the previous year were equivalent to or more than five thousand times the minimum monthly wage (approximately USD 1.48 million) or their gross revenues in that period were equivalent to or more than three thousand times the minimum monthly wage (USD 888 000).

⁶⁸ The ROSC report explains that the *revisor fiscal* is legally required to carry out many activities, including certifying that the enterprise’s internal control system is effective. This makes the auditor virtually responsible for the client’s internal control. The *revisor fiscal* is also required to safeguard the enterprise’s assets and ensure that all the enterprise’s obligations to various government agencies (including tax administration) have been met in a timely way, among others. “Thus, in effect, it requires an enterprise’s auditor to conduct controllership functions that should be the responsibility of management. These activities impede an external auditor’s independence as outlined in the auditor independence rules promulgated by the International Federation of Accountants (IFAC).”

regulations (such as Circular 54 of 2008 and Circular 38 of 2009) that aim to better define the scope of the external audit and internal control functions assigned to the *revisor fiscal*. A particular preoccupation has been the issue of independence, which has been addressed asking for rotation of firms or partners as well as preventing the simultaneous rendering of additional services, even via sister companies. A still pending concern is competence and professional standards of *revisores fiscales* in general, as the law has no additional requirements for the external auditor than those applicable to any public accountant and there is no self-regulatory organisation for auditors (there is only one for accountants) that could impose higher standards or continuous education requirements.

In the authorities' view, the formal report from the *revisor fiscal* in Colombia has all the features that reports from external independent auditors have elsewhere, except that they have some additional aspects prescribed by law. In fact, almost all listed and large supervised entities have as *revisores fiscales* the same big international accounting firms found in most countries.

According to the MHCP, all SOEs are externally audited. Some SOEs have also adopted voluntary policies of rotating their auditors but this is not the usual practice. SOEs are, in addition, subject to the individual and sector specific supervision of bodies such as the Financial Superintendency, the Utilities Superintendency, the Comptroller General's Office and the General Accounting Office which also, in one way or another, audit their results.

5.4. Accounting and audit standards

Guideline V.D states that SOEs should be subject to the same accounting and auditing standards as listed companies and that large or listed SOEs should disclose financial and non-financial information according to high quality internationally recognised standards.

The Commercial Code (article 19) stipulates that all commercial companies must: i) be on the Commercial Register; ii) inscribe on the Commercial Register all the acts, books and documents for which the law requires this formality; iii) maintain regular accounting of their businesses in accordance with legal provisions; iv) conserve in accordance with the law correspondence and other documents related to their business or activities; v) report to the corresponding judge default on current payment of their commercial liabilities; and vi) refrain from unfair competition.

Colombian SOEs must report their results in accordance with two parallel systems.⁶⁹ For public purposes, they must apply the accounting regime contained in the Single Accounting Plan (*Plan Único de Cuentas*) of the General Accounting Office, the body that regulates public sector accounting, and governed by Law 298 of 1996. For general accounting purposes, Colombia is in the process of migrating to IFRS and expects that all state enterprises will have made the transition by the time they prepare their 2015 financial accounts (MHCP).

Colombia's generally accepted accounting practices are defined by the government through regulatory decrees (at present, Decree 2 649 of 1993) and by resolutions issued by the superintendencies and the tax and customs authorities. For both accounting and reporting the functional currency is the Colombian peso.

⁶⁹ These parallel systems are explained by the Colombian public sector's need for a mechanism which permits not only the provision of the information necessary for taking business decisions but also the accounts and information required for preparation of its annual accounts.

The auditing principles applicable are defined by Law 43 of 1990, which regulates auditors' conduct, and by Decree 2 469 of 1993, which establishes the applicable standards.⁷⁰ As mentioned, the 2003 World Bank ROSC on accounting and audit argued that legal provision related to audit in Colombia did not fit the modern concept of independent audit because of the additional functions (mostly internal control) assigned by the law to the *revisores fiscales*. The authorities have reported that they are in the process of reviewing the Colombian standards on audit vis-à-vis ISA, with the aim to fully converge with international standards by 2015.

5.5. Disclosure of material information

Guideline V.E indicates that SOEs should disclose material information on all matters described in the OECD Principles of Corporate Governance and, in addition, focus on areas of significant concern for the state as an owner and the general public. Examples of such information include: 1) a clear statement of the company's objectives and their fulfilment; 2) the company's ownership and voting structure; 3) any material risk factors and measures taken to manage them; 4) any financial assistance received from the state and commitments made on behalf of the SOE; and 5) any material transactions with related entities.

As discussed in previous sections, because of the absence of a coordination unit for the SOE sector, companies report under several sectorial or ministerial requirements. They are often required to deliver the same information, mostly financial, at different points in time, without a single or overarching guide that would focus on the issues listed by Guideline V.E. Some of the topics listed there, such as any financial assistance received from the state, are not subject to any reporting requirement on a regular basis.

SOEs are however obliged to report and publish the general information required by law for all companies, depending on whether they are listed or not. In addition, they submit financial, economic and social information quarterly to the MHCP's CHIP system and annually to the General Accounting Office. They also report to other entities as in the case of financial companies which must file monthly reports with the Financial Superintendency.

Based on demands by line ministries, many SOEs also prepare annual reports on their performance which discuss their results not only from a financial perspective. This is compulsory for listed companies and their reports are readily available. However, it is also possible to access the reports of other companies that post them on Internet. It is, however, striking that many SOEs confine information such as the identity of their directors (which should, in the majority of cases, be public) to a password-protected Intranet or simply do not disclose this information.⁷¹

⁷⁰ Article 7 of Law 43 of 1990 establishes the generally accepted accounting norms which include evaluation of the internal control system, the obligation to provide a professional opinion on the reasonableness of the information contained in financial statements including whether they are in accordance with generally accepted accounting principles, and the requirement to indicate reservations about the report in a clear and unequivocal manner. A code of ethics for auditors is contained in articles 35 to 38.

⁷¹ As of September 2013 this includes Electrocaqueta <http://200.21.186.75/ec/junta/index.php>, Cedelca <http://www.cedelca.com.co/index.php?section=2>, EMSA <http://www.emsa-esp.com.co/index.php?id=470> and even Banco Agrario <http://www.bancoagrario.gov.co/acerca/Paginas/default.aspx>.

CHAPTER VI: THE RESPONSIBILITY OF BOARDS

The last chapter of the Guidelines indicates that the boards of state-owned enterprises should have the necessary authority, competencies and objectivity to carry out their function of strategic guidance and monitoring of management and should act with integrity and be held accountable for their actions.

As will be shown in this section, the boards of Colombian SOEs are, in general, still far from attaining the characteristics and producing the results recommended by the Guidelines. Some boards, particularly those of listed companies, have created mechanisms and sought the necessary support to enhance their professionalism and earn the trust of the market, but challenges still abound. As discussed above, the most important of these relate to the level of political intervention which, albeit not geared to influencing enterprises' functioning, has a structural importance in that political appointees sit on and, in some cases, chair their boards.

6.1. Mandate and ultimate responsibility for the company's performance

Guideline VI.A recommends that the boards of SOEs be assigned a clear mandate and ultimate responsibility for the company's performance and that the board should be fully accountable to the owners, act in the best interest of the company and treat all shareholders equitably.

The composition and functions of Colombian SOE boards are defined principally in the statutes of the respective enterprises; in Law 964 of 2005 for listed companies; and in a number of other laws and the Commercial Code for unlisted ones. Article 196 of the Commercial Code states that

“a company's representation and the administration of its goods and businesses will be in accordance with the provisions of its charter and the regime for each type of company. In the absence of such provisions, it will be understood that the persons who represent the company may implement all the acts and sign all the contracts that fall within the company's purpose or relate directly to the existence and functioning of the company.”

Article 438 of the same Code adds that, in the case of stock companies

“unless the statutes indicate otherwise, it will be assumed that the board of directors has sufficient powers to order the implementation of any act or the signing of any contract that falls within the company's purpose and to take the decisions necessary for the company to fulfil its objectives. The limitations or restrictions on the above powers that are not expressly indicated in the charter inscribed on the commercial register cannot be contested by third parties.”

The Código País (see section A.3.2.1.) establishes that the board “must serve as a bridge between the company and its shareholders and investors” whilst, at the same time, guaranteeing equitable treatment and the quality of corporate information. In addition, it indicates that it is the

board's responsibility to ensure compliance with the corporate governance standards applicable to the company. The board functions envisaged in the Código País are described in Box 14.

Box 30. Functions of the board of directors under the Código País

There are many areas in which a company's board plays a decisive role. The principal objectives of a board are, on the one hand, to design the issuer's strategy and, on the other, to supervise its implementation. As a result, the board must monitor both the activities of senior management and the protection of shareholders' rights.

In the pursuit of these objectives, the board is charged, in addition to the functions established by law or the company's statutes, with (i) planning and finance functions that allow it to establish the issuer's strategic vision; (ii) identification of risks and the implementation of policies for their mitigation; (iii) the establishment and modification of accounting policies in accordance with the applicable accounting norms; and (iv) possession of the information which must be presented to shareholders in addition to that required by law or regulation.

Source: Código País, Section 2.3.

In general, the boards of Colombian SOEs appear to have a sufficient mandate for the exercise of their tasks, particularly as regards the need to balance an enterprise's public policy objectives with its financial sustainability. Political intervention is, however, an important impediment to the operation of boards. As discussed below, due to the presence of ministers and a majority of state officials among their members, or simply because they do not have the power to appoint the CEO, boards may lack the full means to implement their mandate or find themselves in the middle of a conflict of interests that is difficult to resolve.

6.2. Monitoring of management and strategic guidance

Guideline VI.B recommends that SOE boards carry out their functions of monitoring of management and strategic guidance, subject to the objectives set by the government and the ownership entity and that they have the power to appoint and remove the CEO.

Under Colombian legislation, the board has, as a general rule, the power to appoint and remove the CEO. As indicated above, there are, however, some SOEs in which the President of the Republic's constitutional power to "nominate the presidents or managers of national public institutions" implies that he directly appoints their CEO. This is the case of the vast majority, but not all, EICs and a significant number of SEMs, as well as all the SOEs of the Ministry of Defence about which this report gathered information.

The statutes of some SOEs establish minimum or suitability criteria for the appointment of the CEO, which the President must respect, but this is not the usual case. Several SOEs interviewed for this report identified the designation of their CEO by the government as one of their principal corporate governance deficiencies, emphasising the damage that constant leadership rotation (in line with the political cycle) causes to continuity of the management's work.

The appointment (or dismissal) of an enterprise's chief manager by an authority other than its board is at odds with the Guidelines, which draw attention to the importance of these powers for boards to fully exercise their monitoring function and feel responsible for the SOE's performance. The annotations to Guideline VI.B suggest a possible compromise by

recommending that the board's appointment or dismissal of the manager should be in agreement or consultation with the ownership entity.

Even when the CEO of the SOE is appointed by the board, the large presence of representatives of the public sector or directly of ministers implies an important risk that political criteria may prevail. Some enterprises have introduced norms that, as far as possible, seek to guard against potential political pressures in the manager's appointment. ISA, for example, has enshrined a number of requirements for the chief manager's selection in its statutes. Similarly, Ecopetrol's statutes establish the CEO's election by the board for a period of two years (with the possibility of indefinite re-election or free dismissal before the end of that period) and that the board, with the agreement of the CEO, may dismiss all the company's senior executives or delegate this power to the CEO.

As indicated above, the Guidelines establish that SOE boards should be protected from direct and undue political interference that could distract them from focusing on achieving the objectives agreed on with shareholders (usually the state itself in its role as controlling shareholder). In this regard, the *ex officio* presence of ministers represents an important risk. The overriding opinion among OECD countries is, therefore, that the recommendation of independence should be understood as implying that ministers do not participate in SOE boards. As also discussed above, the Chilean authorities decided, in the framework of that country's accession to the OECD, to reform the statutes of Codelco, its largest SOE, barring ministers, undersecretaries, other public officials designated directly by the President of the Republic and employees of the Finance and Mining Ministries from being members of its board (OECD, 2011). A similar recommendation was also included in a report prepared by the OECD to improve the functioning of the board of PEMEX (OECD, 2010).

6.3. Composition and exercise of objective and independent judgment

Guideline VI.C posits that the boards of SOEs should be composed in such a way that they can exercise objective and independent judgement, indicating that good practice calls for separation of the functions of the chair of the board and the CEO.

For SOEs that are securities' issuers, article 44 of Law 964 of 2005 establishes the general regime as regards board composition and includes norms to protect their independence. In particular, it requires that boards have a minimum of five and a maximum of ten members of whom at least 25% must be independent, providing a definition (Box 15). If a company's statutes also envisage alternate directors, the norm requires that the deputies of independent directors also be independent.

The law also establishes that persons subject to certain recusals may not serve as directors of listed companies. The Financial Superintendency performs a suitability control for persons appointed as CEOs or directors of entities under its supervision, ensuring formal compliance with the grounds for recusal described in External Circular 29 of 2006.⁷²

Article 44 of Law 964 of 2005 regulates the election of directors of listed companies, stipulating the electoral quotient system (see Box 10) as the default mechanism. In addition, it

⁷² This monitoring is regulated by article 14 of Law 795 of 2003 that states: "Those with legal representation of supervised institutions, except branch managers, once appointed or elected and before performing this function, must take possession and take an oath by which they oblige to perform their duties diligently while managing the company, to meet legal obligations and enforce the rules, orders and instructions issued by the Superintendency in the exercise of its powers."

establishes the mandatory separation of the posts of CEO and chair of the board. According to the MHCP, the statutes or charters of Colombian SOEs in general also establish that the CEO may not be member of the board.

Box 31. Definition of independence for board members

The second point of article 44 of Law 964 of 2005 establishes that, for the purposes of the appointment of the directors of companies governed by law, the following persons will not be considered independent:

1) Employees or executives of the issuer or any of its branches, subsidiaries or controllers, including those persons who have held such posts in the year immediately prior to the appointment, except in the case of the re-election of an independent person;

2) Shareholders who, directly or through an agreement, direct, guide or control the majority of the entity's voting rights or determine the majority composition of the bodies for its management, administration or control;

3) Partners or employees of associations or companies that provide advisory or consultancy services to the issuer or companies that belong to the same economic group as the issuer, when income on this account represents 20% or more of their operating revenues;

4) Employees or executives of foundations, associations or companies that receive important donations from the issuer, with important donations are understood as those that represent over 20% of the total donations received by the respective institution;

5) Administrators of an entity of which a legal representative of the issuer is a director;

6) Persons who receive from the issuer remuneration other than fees as a member of the board, the audit committee or any other committee created by the board.

Source: Law 964 of 2005.

For SOEs that are not securities' issuers, regulation is less specific and, in the absence of explicit norms, they are governed by their statutes. The Organic Statute of the Financial System establishes that boards of entities subject to the supervision of the Financial Superintendency should not have a number of members related to the entity itself that allow them, by themselves, to achieve the necessary quorum to adopt any decisions. The utilities law, on the other hand, establishes that on the boards of these companies the state's interests must be represented by MHCP employees, thereby limiting the election of independent directors.⁷³

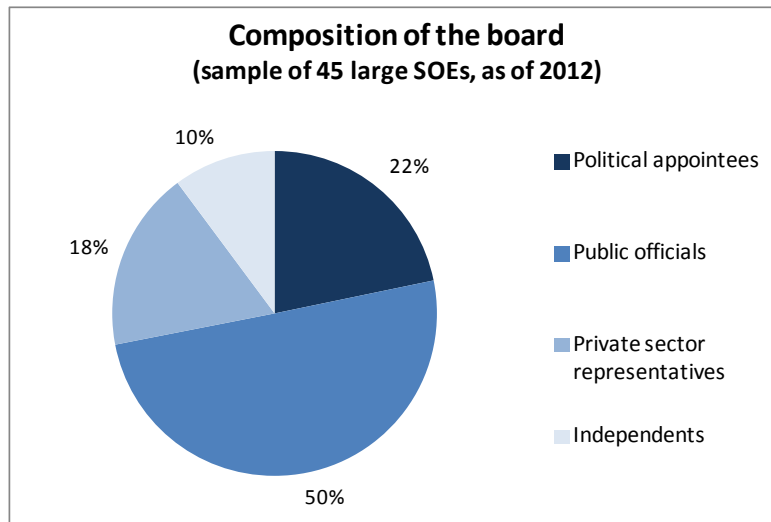
A sample of information about the composition of the boards of 45 large SOEs⁷⁴ selected by the MHCP for this report shows that political appointees and public officials make about three

⁷³ According to some of the experts interviewed for this report, this norm was introduced to protect these enterprises from the influence of local political leaders who exerted pressure to obtain a seat on their boards which could be used as an electoral platform. The downside of this measure is that there is little or no room for appointing independent directors. A related issue is that of directors' remuneration since, as indicated in section B.2.3., a seat on a well remunerated SOE boards is said to be sometimes used as a way of complementing the salaries of senior public officials regardless of whether those persons' capabilities match the needs of the board.

⁷⁴ The sample includes the following SOEs: Acueducto Metropolitano Bucaramanga; Agencia Logística de las FF.MM.; Artesanías de Colombia; Banco Agrario; Bancoldex; Bolsa Mercantil de Colombia; Caprovimpo; Casur; Cedelca; Cedenar; Cenabastos de Cúcuta; Club Militar; Ciac; Cisa; Colombia Telecomunicaciones; Corabastos; Cotecmar; Cremil; Circulo de sub-oficiales de las FF.MM.; Dispac; Ecopetrol; Eedas; Electrocaquetá; Electrohuila; Emsa; Fen; Finagro; Findeter; Fng; Fondo Rotatorio de la Policía;

quarters of the members of the board (not including alternate directors), while independents occupy only 10% of the seats (Figure 13). Political appointees make about one quarter of the board and include Ministers, Vice-Ministers and other high-level authorities.

Figure 13. Composition of the board



Source: MHCP

The MHCP has indicated that to select directors of the SOEs linked to or owned by the Ministry, the Direction of Investment Banking jointly with the Secretary General (legal counsel) prepares a list of suitable candidates that have stood out for their professional excellence, in accordance to both the profile required in the company's statutes and the restrictions established by law. This list is approved by the Ministry's Asset Committee and then submitted to the vote of the shareholders' meeting.⁷⁵ In the case of independent directors, the same procedure is used but with prior verification of their compliance with the definition of independence. In general, the SOEs for which the MHCP is responsible tend to have more independent directors than other SOEs, but this is also partly due to the fact that they belong to sectors where the Código País applies and where the law requires a minimum 25% of independent members for listed companies.⁷⁶

The opposite is generally the case of the SOEs linked to the Ministry of Defence where, according to the information received from the GSED, the majority of directors are members of the armed forces or the Ministry itself and there are barely any independent directors at all. This

Granabastos; Gecelca; Gensa; Hospital Militar; Icfé; Indumil; ISA; Isagen; La Previsora Compañía de Seguros; Positiva; Satena; Sociedad Hotelera Tequendama; Terminal de Transportes de Pereira; Urrá, and Vecol. The definition of political appointee, for the purpose of this survey, includes all ministers; vice-ministers; mayors; governors and other similar high-level authorities. Independents are those that meet the definition described in Box 15.

⁷⁵ Some enterprises have established additional requirements for candidates to their boards. In Ecopetrol, for example, they must have knowledge and experience of the company's activities and/or in the industrial, commercial, financial, stock market, administrative, legal or other related fields, have a good name and be recognised for their professional suitability and integrity and not be simultaneously members of more than five boards including that of Ecopetrol.

⁷⁶ For SOEs in the financial sector, for example, independents make 12% of the board and private sector representatives occupy another 36% (MHCP).

is, for example, the case of *Sociedad Hotelera Tequendama* whose board is formed by the Minister of Defence (or his delegate), a delegate of the President of the Republic, the Commander in chief of the armed forces, the director of the Pension Administration of the armed forces, the director of the armed forces' Logistics Agency, a director elected by the shareholders' meeting (who is a public official) and a representative of the company's private shareholders (who, although this is not indicated on the company's website, appears to comply with the definition of independence). Given the nature of the company's activities, it is clear that its board would benefit significantly from the inclusion of board members from the private sector with experience in hotel industry as well as independence.

Within this context of quite limited involvement of independent directors among SOE boards, it would be important to address any potential impediments or disincentives for the development of a sufficient pool of qualified candidates willing to join SOE boards. Two possible factors were identified during this review. The first is related to the Anti-Corruption Statute (see Box 2) that established a series of recusals to prevent persons who leave the public sector from immediately representing private interests. Under article 4 of the Statute, these recusals, in particular that of not signing contracts with the state for a period of two years, also extend to persons who have served on SOE boards, even their independent members. This has reportedly discouraged potential candidates from joining SOE boards.⁷⁷ Amendment or a possible reinterpretation of the rule has been suggested as a means to overcome this problem.

A second factor that can discourage independent directors from joining SOE boards, is a perception that some instances of control exercised by the Comptroller General's Office (CGR) (see section I.5.8.) are related to legitimate business decisions taken by SOE boards. Because a challenge by the CGR can include recovery of lost state assets ("*detrimento patrimonial*") from individual board members, possible candidates can also conclude that they risk personal liability, including for SOE losses related to a commercial strategy or other business decision. This perception can also affect the functioning of boards, leading them to set too low levels of risk for entrepreneurship or value-creation.⁷⁸ This could be mitigated by greater legal development of the standards of diligence expected of companies and by providing a clearer framework for SOE boards to take decisions with diligence and loyalty, perhaps also within safe harbours. The development of a set of clear criteria as a type of "business judgment rule", such as that used in the jurisprudence of the State of Delaware in the United States, could be considered.⁷⁹

An additional relevant aspect of the functioning of the boards of Colombian SOEs is the practice of appointing alternate directors. Although common in Latin American SOEs, this is not

⁷⁷ The Statute establishes that contracts with the state may not be signed by "persons who have held senior posts in state entities and the companies of which these entities form part or to which are linked in any way during a period of two years subsequent to ceasing in the exercise of their public post when the purpose of the contracts is related to the sector in which provided services. This incompatibility also applies to persons with a first degree relationship by birth, a first degree relationship by marriage or a first degree civil relationship with the former public employee".

⁷⁸ In interviews with several managers and board members, many examples of the kinds of sub-optimal decisions that might result from board members' fear of being held liable by the CGR were offered. These included insufficient hedging in case they be held liable for the cost of the protection that was not actually invoked; preference for more liquid investments offering a steady lower return (like a low interest paying bank deposit), rather than a more volatile but significantly higher return asset to avoid the risk of having to liquidate it in a potentially bad pricing scenario; lower investments in research and development in case the board were to be held liable for projects that fail even if other projects were successful.

⁷⁹ There, it is the person challenging the board decision that bears the burden of proof and must show that the directors, in order to take the contested decision, violated their fiduciary duties of good faith, loyalty and due care. Otherwise, the decision cannot be reviewed unless it was ruinous or, in other words, of a nature that no business person in their right mind would have accepted (see OECD 2013b).

recommended by the Guidelines and was identified by the Latin American White Paper on Corporate Governance (OECD, 2004) as one of the weak points of corporate governance in the region. One of the principal drawbacks of alternate directors is they typically do not attend meetings when the director does so (and it is also common that they are not remunerated for doing so when they voluntarily attend).⁸⁰ As a result, their knowledge of the company's activities is patchy and their work on the board lacks continuity. In order to comply with the Guidelines, a board should work as a collegial body. This requires a cohesion and continuity that alternate directors are not usually able to provide.

The Código País recommends that if alternate directors are appointed, they should remain well informed about the issues subject to the decision of the board. In 2012 compliance with this recommendation was 70% for companies within the financial sector that have alternate directors (about three quarters of the sample have them) and 56% for those in the real sector, where entities with alternate directors make about two thirds of the total (Financial Superintendency, 2012).

6.4. Employee representation

Guideline VI.D indicates that, if employee representation on the board is mandated, mechanisms should be developed to guarantee that this representation is exercised effectively and contributes to the enhancement of the board skills, information and independence.

Colombian legislation does not envisage employee representation on boards and companies do not usually adopt this practice voluntarily. In the preparation of this report, no SOE with employee representatives on its board was identified.

6.5. Board committees

*Guideline VI.E recommends that, when necessary, SOE boards should set up specialised committees to support the full board in performing its functions, particularly in respect to audit, risk management and remuneration.*⁸¹

For issuers of publicly traded securities, article 45 of Law 964 of 2005 establishes the obligation to have an audit committee formed by at least three directors and including all the independent directors. External Circular 38 of 2009 from the Financial Superintendency requires an audit Committee from all companies under its supervision. Other rules from the Superintendency also require the creation of risk committees.

The Código País further recommends that, as well as an audit committee, companies voluntarily set up at least two other committees: an Appointments and Remunerations Committee and a Corporate Governance Committee (Box 16). In addition, for the sake of the transparency of their functions, it recommends that the committees and their responsibilities be included in the company's internal regulation on the functioning of its board.

⁸⁰ For the enterprises for which it is responsible and which have alternate directors, the MHCP adopted a policy that both the director and the alternate director attend meetings so that the latter has the same level of information and can fulfil his function adequately.

⁸¹ The annotations to Guideline VI.E argue that "the setting up of specialised board committees could be instrumental in reinforcing the competency of SOE boards and in underpinning their critical responsibility in matters such as risk management and audit."

Box 32. Board committees under the Código País

For the satisfactory fulfilment of its functions, it is desirable that the board be supported by committees responsible for specific issues, without this implying delegation of the responsibilities of the board or its members. In order to ensure clarity about the functions and scope of each committee, it is advisable that they be included in the board's Internal Functioning Regulation.

- *Measure 23:* It is recommended that, in addition to the Audit Committee required by law, the issuer form other permanent committees for other issues and, specifically, Appointments and Remunerations and Corporate Governance. These committees should include at least one member of the board.
- *Measure 24:* It is recommended that an Appointments and Remunerations Committee be established with functions that include, but are not restricted to, supporting the board by: i) reviewing the performance of senior management, understood as the CEO and the tier immediately below the CEO; ii) proposing a remunerations and salary policy for the issuer's employees, including its senior management; iii) proposing the appointment and removal of the company's CEO or the person exercising this function, as well as this person's remuneration; iv) proposing the objective criteria for hiring the issuer's principal executives; and v) undertaking other functions in accordance with the nature of the committee's objective.
- *Measure 25:* It is recommended that a Corporate Governance Committee be established with functions that include, but are not restricted to, supporting the board by: i) seeking to ensure that shareholders and the market in general have complete, accurate and timely access to the information which the issuer must disclose; ii) reporting on the activities undertaken by the Audit Committee; iii) reviewing and evaluating the way in which the board fulfilled its duties during the period; iv) monitoring the negotiations carried out by members of the board with shares issued by the company or other companies in the same group; v) supervising compliance with the administrators' remunerations policy; and vi) undertaking other functions in accordance with the nature of the committee's objective.
- *Measure 26:* It is recommended that the Audit Committee's functions include: i) expressing an opinion in the form of a written report on possible operations planned with related parties, verifying that they take place in market conditions and are not at odds with the equal treatment of shareholders; ii) establishing the policies, criteria and practices that the issuer will use in the preparation, disclosure and communication of its financial information; and iii) defining the mechanisms for consolidating the information of the issuer's control bodies for presentation to the board.

Source: Código País, Section 2.3.

According to the MHCP, the SOEs for which it is responsible do not, in general, have a homogeneous practice as regards setting up committees.⁸² Some unlisted SOEs report that they do not have any committees, not even an audit committee, while others have a long list of five or more committees.⁸³ In general, the enterprises linked to the Defence Ministry report that they do not have committees at all or only have the audit committee.

⁸² On this point, the annotations to Guideline VI.E suggest that, when the law does not require the setting up of committees, the co-ordinating or ownership entity should develop a policy to define in which cases they should be considered.

⁸³ For example, Ecopetrol's board has four committees with their own internal regulation which establishes their objectives, functions and responsibilities. The company's website provides stakeholders and the general public with information about the composition of these committees and their respective regulation. Similar practices by ISA are described in Annex 5.

6.6. Annual performance evaluation

Guideline VI.F indicates that SOE boards should carry out an annual evaluation to appraise their performance.

Colombian legislation does not require board evaluation but the Código País recommends this practice and suggests that it be carried out by the Corporate Governance Committee which must “review and evaluate the manner in which the board fulfilled its duties during the period”.⁸⁴

According to the information provided by the MHCP, board evaluation does not appear to be a consistent practice across Colombian SOEs. Many, in fact, report that they have not implemented this practice at all. This is also the case of the majority of enterprises for which the Defence Ministry is responsible. Lack of evaluation also reflects an absence of clarity about the profile of directors who could be required by the board, beyond those characteristics obviously related to the nature of their commercial or industrial activities.

On the other hand, large SOEs, and certainly those that are listed, have a quite well embedded culture of self-evaluation. ISA, whose board evaluation practices are described in Annex 5, carries this out internally, without the assistance of external advisors, while, in 2013, Ecopetrol will receive its first external and independent diagnosis from a specialised company. This will serve to complement its board’s own annual evaluation of qualitative and quantitative aspects of its operation. In its qualitative review, Ecopetrol’s board analyses the presence of desirable conducts in its operation and that of its committees while its quantitative evaluation measures compliance with targets set by the board. The results of these evaluations are made available to stakeholders and the market in general in the Report on Board Functioning which the company publishes on its website and presents to the general shareholders’ meeting.

⁸⁴ External Circular 038 of 2009 by the Financial Superintendency includes among the functions of the board to “establish formal evaluation mechanisms to assess the management and also systems of remuneration and indemnities tied to the fulfilment of long term objectives and risk levels.”

CONCLUSIONS AND RECOMMENDATIONS

The Guidelines exist to help states to improve the corporate governance of SOEs in the face of difficult challenges. A first challenge is to find a balance between being an active owner while shielding the companies from undue political interference. A second challenge resides in obtaining effective accountability on the performance of its SOEs, given that they involve a complex chain of agents with often unclear, remote and uncoordinated principals. States also need ensure that SOEs compete with private sector companies on a level-playing field, without advantages or disadvantages driven by their public ownership. The recommendations of the Guidelines aim to overcome these challenges and foster a sound policy framework.

Previous sections of this report show that, in many of its aspects, the corporate governance framework of Colombian SOEs is generally compatible with the Guidelines. There are even areas where Colombian practices could be regarded as good examples and have been internationally recognised for their effectiveness, such as in matters relating to equal treatment of shareholders or stakeholders' engagement. The Colombian state has demonstrated its commitment to facilitating minority shareholders' and interest groups' rights. Different line ministries have made sincere efforts to improve the functioning of the SOEs under their responsibility. However, many of these positive developments have occurred on a case-by-case basis within, or under the control of, individual ministries, whereas the biggest challenges remain at the overall, structural level.

The architecture of the Colombian SOE framework contains features that depart from OECD recommended practices. The following paragraphs list, although not in an exhaustive manner, some of the main areas where the Guidelines' recommendations could help the Colombian authorities to leverage all the good corporate governance work done at the individual company level and align themselves with OECD standards. A structural reform, albeit not a complete overhaul, may be required to enhance the ownership function and the operation of the SOE sector.

A cautionary note may be needed, however, to point out that most of the following recommendations are inter-related and may require joint development to be successful. Partial implementation, particularly on certain issues, may even be detrimental. The Colombian authorities should count on the advice and potential collaboration of the Working Party in designing their plans. They should take full advantage of the accumulated know-how and experience of OECD members, remembering that the OECD does not argue in favour of one-size-fits-all solutions, but encourages countries to discover what works in their own circumstances. Lessons learnt by Working Party delegates could provide valuable clues in the development of future Colombian reforms.

Centralisation of SOE ownership functions. The Guidelines (II.D) recommend that the exercise of ownership rights be clearly identified within the state administration. They advocate exercising the ownership function on a whole-of-government basis, expecting states to decide themselves whether this is best accomplished by empowering one ministry, establishing a central ownership unit, through a government co-ordination body or via a corporate holding. Colombia would benefit from such centralisation and a more consistent implementation of its ownership policy since the current system of fragmented ownership leads to a lack of co-ordination and fails to exploit synergies. As advocated by the Guidelines, centralisation of the

ownership function would also reinforce and bring together relevant competencies by permitting the organisation of work teams that gain in knowledge and experience.

Ownership policy. In order to guide and hold accountable the co-ordination body, the Colombian authorities should consider Guideline II.A's recommendation to develop and issue an ownership policy that defines the overall objectives of state-ownership and the state's role in the governance of SOEs. The Presidency or the CONPES could unify and further develop existing policy documents on the subject in order to produce a consistent and explicit ownership policy that would offer the SOEs sector, as well as the market and the general public, a predictable and clear understanding of the state's objectives as an owner and its long-term commitments, as recommended by the Guidelines.

Separation of roles. A well-established ownership co-ordination body, with a clear ownership policy to guide it, would be then able to take over the responsibilities currently assigned to line ministries. This would facilitate convergence with Guideline I.A's recommendation of a clear separation between the state's ownership function and other regulatory functions. Those line ministries that currently have linkages with SOEs would, in most places, remain involved in priority-setting but now in a strictly regulatory capacity. Political representatives would have no need to join SOE boards since the co-ordination body would be championing the state's objectives, and would be unburdened of the additional work and liability that proper board work demands. Other public officials may continue to serve on boards where their expertise is valuable and, although the remaining potential conflicts of interest should be carefully addressed, their task as board members would be significantly easier than it currently is for ministers.

Independence of boards. Political appointees could be replaced by independent directors, ideally with private-sector experience and complementary skills that would enhance the functioning of SOE boards, as recommended by Guideline II.C. This may, however, require rethinking board remuneration in certain companies and perhaps also the current rules that makes the level of board remuneration dependent on a firm's revenues. It is precisely in those firms that most need better management where board remuneration is currently regarded as a luxury they cannot afford. Reforming or reinterpreting some of the rules of the Anticorruption Statute may be however necessary, at least as to prevent that independent directors are barred from contracting with the state after their board tenure. Furthermore, a co-ordinating body could also facilitate the adoption of a well-structured nomination processes for the appointment of board members across the SOE sector (Guideline II.F.2).

Appointment of the CEO. Because the co-ordination body responsible for state ownership would be able to guide boards clearly as to the state's expectations, it should let them exercise their responsibilities with independence (Guideline II.B), including the ability to directly appoint and dismiss the CEO. If the latter is not politically feasible at some SOEs, boards should at least have a significant influence into the selection of candidates considered by the President of the Republic for appointment. Reconsidering current policy settings once board independence and accountability have increased may be easier than it would appear now.

Reporting and accountability. A co-ordinating body such as proposed could also be required to collect and consolidate SOE sector information and prepare an annual report so as to increase transparency and accountability of the ownership function (Guideline V.A). It could also be held accountable and be required to report to representative bodies such as the Parliament (Guideline II.E). Likewise, it could be mandated to keep track of the cost of non-commercial objectives assigned to SOEs as to allow a clear distinction between mismanagement and the burden imposed by the state on certain SOEs performing public functions (Guideline I.C). Of

course, some of these functions could be achieved even without the existence of a co-ordinating body, but would be significantly facilitated by it.

Other relevant issues. As mentioned above, this list is not exhaustive but aims to highlight key areas for immediate consideration, in case the authorities wish to adopt the recommendations of the Guidelines. Previous sections of the report describe many other features of the corporate governance framework that could also be improved. One of these issues refers to SOEs' corporate form, particularly in the case of EICEs and SEMs assimilated to them. Colombia is far from being alone in having statutory corporations, but should reconsider the costs of using an ad-hoc legal form as compared to any advantages it obtains from it. Perhaps a good initial step towards convergence with general corporate practices would be to require them all to adopt the recommendations of the Código País and report on their compliance. Another clear challenge is the exclusion of SOEs from the application of the general bankruptcy law, addressed by Guideline I.B. Finally, steps could also be taken to enhance market understanding of the important role performed by the Comptroller General's Office in auditing SOE performance, possibly combining it with clearer safe harbours that could prevent it from hampering proper board and management entrepreneurship and value-creating risk-taking. External controls are usually a poor substitute for a strong internal audit function reporting directly to the board of directors.

ANNEX 1: DEFINITIONS

State-Owned Enterprises

State-owned enterprises (SOEs) are understood to denote public corporations (as defined by the System of National Accounts – SNA) that are controlled, directly or via other government-controlled institutional units, by the central or federal level of government. “Public corporation” is understood to denote any autonomous public entity involved in commercial activities (not to be confused with publicly traded enterprises). To be classified as a public corporation, a corporation must be (1) controlled by another public unit; and (2) it must be a market producer. Control is defined as the ability to determine the general policy or program of an institutional unit. The definition of being a ‘market producer’ depends on a separate assessment of whether or not the institutional unit charges economically significant prices.

Degree of ownership

Majority-owned enterprises: all enterprises where the State owns more than 50% of the shares or by other means holds effective control. This includes cases where the government: (i) holds the major part of the undertaking’s subscribed capital; or (ii) controls the majority of the votes attaching to shares issued by the undertakings; or (iii) can appoint more than half of the members of the undertaking’s administrative, managerial or supervisory body.

Minority-owned enterprises: all those enterprises in which the state holds between 10 and 50% of the ordinary share capital or voting rights (applying a similar definition as the above). All companies where the state holds a majority of shares or votes is seen as “controlled” and hence SOEs. Companies where the state holds between 10 and 50% of shares or votes are considered as PSOs (partly state-owned enterprises).

Type of enterprise

Listed enterprises: (as well as partly-state owned enterprises) are enterprises whose shares are quoted on a stock exchange or otherwise offered to the general public.

Unlisted enterprises: enterprises whose shares are not publicly traded, but which are incorporated pursuant to general corporate law. In some countries, which do not incorporate public corporations under general corporate law, but which have a comprehensive, generally-applicable law bearing on state-owned enterprises, companies that are subject to such laws should also be reported as SOEs.

Statutory corporations: commercial entities operating subject to their own specific legal framework, outside general corporate law.

Quasi-corporations: autonomous commercial activities carried out inside the general government sector without a specific legal framework. They charge economically significant prices and are ring-fenced from other parts of the public sector inter alia by having separate assets and liabilities.

ANNEX 2: EMPRESAS PÚBLICAS DE MEDELLÍN (EPM)

EPM is a commercial and industrial state company that is wholly owned by the Medellín municipal government. It has implemented a business strategy that has achieved recognition both in Colombia and internationally for its efforts to generate value for stakeholders and has also resulted in the adoption of corporate governance practices that are consistent with the company's strategic development.

EPM was created in 1955 as an autonomous body formed by the water, telephony and electricity assets that were transferred to it from *Empresas Públicas Municipales*. It is a decentralised municipal entity, created under an agreement of the Medellín Administrative Council as an Autonomous Public Establishment and transformed into an Industrial and Commercial State Company (EICE) of a municipal nature in 1997. As an EICE, EPM has legal personality, administrative and financial autonomy and its own capital while, as a public service company regulated by Law 142 of 1994, its acts and contracts are subject to private law, except when expressly indicated otherwise in the Constitution, the law or other regulatory provisions.

EPM's purpose is to provide public aqueduct, sewage, energy and gas distribution, basic commuted fixed public telephony, mobile telephony and other telecommunications services. It may also provide street cleaning services and undertake any other complementary activity related to all these public services and the treatment and reuse of waste. In addition, under its statutes, the company may enter into any type of contract or partnership or form consortia with other individuals and legal entities for the purpose of achieving universality, quality and effectiveness in the provision of public services to its users, fostering general welfare and improvement of the population's quality of life and taking into account technical criteria, legal rigour and rationality in the provision of services as well as considerations of solidarity and income redistribution.

Although the owner of EPM is the Medellín municipal government represented by the Mayor, a number of people interviewed for this report indicated that, in practice, the citizens of Medellín consider themselves to be the 'owner of the company'. Along with the requirements established by the company's board for the development of its corporate governance practices, this perception is one of the factors that has contributed to protect EPM from possible interference in its administration and strategy, with citizens looking out for and protecting the company from interference that could be detrimental to its purpose. This has been accompanied by the development of a culture under which citizens consider themselves 'the DNA of the company'. This culture appears not only to have persisted over time but also to have grown both in Medellín and the regions where EPM currently provides services.

In other words, there has from the start been awareness that EPM, although an autonomous body, is also a public service and, therefore, 'ultimately owned by the citizens of Medellín'. This has helped to foster a policy of transparency towards the public which is kept well informed about its different activities through both the press and other means of communication. For example, in 1957, when a scarcity of foreign currency reduced its stock of spares to levels that posed a risk to the company's operations, its administration expressed the need and importance of communicating this to citizens so that they understood the seriousness of the situation and could help 'to save their companies, particularly the energy company, which is an irreplaceable source of life for the city'.

In this context, the company has developed different practices to facilitate this 'engagement with citizens'. They include the company-municipality governability agreement that serves as a mechanism for protecting its net worth which is reported annually to all citizens, the public event in which it presents its accounts that is broadcast on local television with live questions from journalists and the presentation of its Annual Sustainability Report as well as other community engagement and educational programmes. Since 2009, as part of its 2010-2015 strategic plan, the company has also implemented a plan of engagement with stakeholders that envisages a stable two-way relationship with their representatives, taking into account the different characteristics of different stakeholders.

Although no systematic measurement has been carried out of the results of these practices and how they are perceived by citizens and public opinion in general, a number of specific and sporadic events related to factors that include interference in the company's management, instances of bad management, donations from the company's resources and debates about its ownership indicate citizen acceptance of and commitment to the company's current management model. For example, in the fourth version of the survey carried out by *Corporación Transparencia por Colombia*, the Colombian chapter of Transparency International, which was released in September 2011 and in which 24 public service companies from around the country voluntarily participated, EPM obtained 95 points out of a maximum of 100, positioning it as having 'an outstanding level of development of its transparency practices and mechanisms'.⁸⁵ Similarly, the parent company of Grupo EPM took second place nationally as the public service company with the best transparency practices, increasing its score by six points on the previous year (an average of 89/100) and ten points on 2009 (85/100).

EPM identifies citizens as a paramount factor in 'shielding' it from political changes or decisions that could affect its sustainability and fosters mechanisms of communication with the community and social control. This has also been noted by *Transparencia por Colombia* which, in its 2010 measurement of the components of dialogue and control, highlighted EPM's commitment to promoting citizen participation in control of its management.

Since 1957, EPM has defined the basic principles of its business culture as including the technical, financial and legal planning of projects; transparency towards the public; a policy of 'tariffs of a social nature' differentiated according to users' payment capacity but without affecting the expansion and sustainability of its services; an employee culture of loyalty and pride reflected in job stability, a spirit of service and civic sense; an independent administration and board drawn mostly from the private sector with high qualifications and experience and not involved in party politics; and an aggressive policy of service coverage in poor neighbourhoods of the city (the Dwelling Equipment Plan) that was subsequently expanded to the Metropolitan Area.

Source: IADB, 2012, pp. 2 - 4.

⁸⁵ This study evaluated the components of openness with information, dialogue, control and clear rules through 48 indicators based on best international practices that permitted analysis of the inter-relation of each company with its stakeholders, the effectiveness of client service channels, initiatives for business ethics self-regulation, the effectiveness of internal and external systems of control and good corporate governance practices.

ANNEX 3: OVERVIEW OF COLOMBIAN SOES

1. List of SOEs and basic information:

SOEs	Assets USD	Equity USD	Operational revenue USD	State ownership %	Sector
Empresa de Petróleos de Colombia S.A. - ECOPETROL	52,336,960,000	33,917,468,000	30,953,000,000	88.5%	Oil & gas
Interconexión Eléctrica ISA S.A. E.S.P. - ISA	13,400,914,280	3,177,519,800	2,237,599,000	51.4%	Energy
Banco Agrario	9,461,925,356	923,791,804	970,522,956	100.0%	Finance & insurance
Financiera de Desarrollo Territorial - FINDETER	3,552,023,681	454,009,568	295,360,736	92.6%	Finance & insurance
Isagen S.A E.S.P.	3,505,977,800	1,888,149,640	900,400,280	57.7%	Energy
Fondo de Financiamiento del Sector Agropecuario S.A - FINAGRO	3,505,781,014	337,094,820	151,665,424	65.3%	Finance & insurance
Banco de Comercio Exterior de Colombia S.A. - BANCOLDEX	3,449,805,308	765,163,973	510,399,887	91.9%	Finance & insurance
Positiva Compañía de Seguros	2,600,657,592	532,733,500	2,453,808,188	100.0%	Finance & insurance
Caprovimpo	2,346,084,562	89,815,074	166,764,119	100.0%	Pension & health
Urrá S.A. E.S.P.	1,087,111,113	653,935,754	117,924,280	100.0%	Energy
Generadora y Comercializadora de Energía del Caribe S.A. E.S.P. - GECELCA	839,588,335	623,784,797	679,577,927	100.0%	Energy
La Previsora Compañía de Seguros S.A.	667,105,192	212,794,192	35,084,192	99.5%	Finance & insurance
INDUMIL	407,357,715	232,306,982	209,720,049	100.0%	Defense
Acueducto Metropolitano de Bucaramanga S.A. E.S.P.	381,228,900	321,425,781	51,820,648	15.6%	Transport & telecom
Fondo Nacional de Garantías - FNG	372,207,309	207,517,107	152,845,085	100.0%	Finance & insurance
FORPO	365,405,560	173,673,240	40,944,280	100.0%	Pension & health
Electrificadora del Huila S.A. E.S.P.	345,540,954	266,389,424	167,624,034	83.1%	Energy
Gestión Energética S.A. - GENSA	275,616,599	165,995,044	246,942,368	93.2%	Energy
Centrales Eléctricas de Nariño S.A. E.S.P. - CEDENAR	269,642,939	194,906,145	136,957,631	100.0%	Energy
Casur	236,223,182	160,957,800	1,059,907,707	100.0%	Pension & health
Centrales Eléctricas del Cauca - CEDELCA	231,166,270	151,971,832	256,405	88.5%	Energy
ICFE	215,745,920	212,156,880	11,356,800	100.0%	Pension & health
Financiera de Desarrollo Nacional S.A. - FEN	197,249,110	193,429,912	23,296,156	99.4%	Finance & insurance
Electrificadora del Meta S.A. E.S.P. - EMSA	193,681,218	121,270,437	142,288,480	99.5%	Energy
Agencia Logística de las FF.MM.	192,311,487	53,589,933	274,005,712	100%	Defense
CREMIL	173,677,828	118,993,339	898,806,767	100%	Pension & health
Hospital Militar	162,083,122	24,714,114	119,746,901	100%	Pension & health
Central de Inversiones - CISA	153,143,120	114,721,880	42,222,440	100%	Finance & insurance
COCTEMAR	137,469,277	99,411,851	114,614,343	98%	Defense
Distribuidora del Pacífico S.A. - DISPAC	87,729,274	78,420,238	34,495,670	100%	Energy
Sociedad Hotelera Tequendama	79,166,360	59,992,920	29,161,600	99.9%	Other
Círculo de Suboficiales de las FF.MM.	71,235,072	67,947,820	24,289,541	100%	Other
Satena S.A.	67,111,717	6,619,300	84,348,937	100%	Transport & telecom
Club Militar	61,068,539	50,299,455	17,937,556	100%	Other

SOEs	Assets USD	Equity USD	Operational revenue USD	State ownership %	Sector
Electrificadora de Caqueta S.A. E.S.P	55,233,543	38,552,251	36,709,041	94.4%	Energy
Fondo Ganadero del Meta S.A.	53,336,361	52,234,118	465,516	20.9%	Food & agriculture
CIAC	47,759,326	15,893,883	38,239,461	89.5%	Defense
Central de Abastos de Bucaramanga S.A. - CENTROABASTOS	45,682,631	40,968,289	10,859,297	38.4%	Food & agriculture
Gran Central de Abastos del Caribe S.A. - GRANABASTOS	37,017,745	27,490,933	2,372,350	79.3%	Food & agriculture
Defensa Civil Colombiana	27,907,150	14,428,687	11,281,506	100%	Defense
Empresa de Energía del Archipiélago San Andrés, Providencia y Santa Catalina - EEDAS	23,522,983	22,666,003	1,854,228	100%	Energy
Terminal de Transporte de Manizales S.A.	22,729,803	15,471,535	2,208,937	30.2%	Transport & telecom
Distasa S.A. E.S.P	21,788,277	18,688,546	2,660,691	18%	Energy
Terminal de Transporte de Pereira	20,949,241	19,746,652	2,565,009	71.1%	Transport & telecom
Bolsa Mercantil de Colombia S.A.	14,550,168	26,520,159	10,052,395	11.8%	Finance & insurance
Corporación de Abastecimientos Valle del Cauca S.A. - CAVASA	13,853,748	13,662,199	1,704,906	16.7%	Food & agriculture
Fondo Ganadero Cordoba S.A.	12,590,571	11,271,524	590,667	15%	Food & agriculture
Almidones de Sucre S.A.	12,008,766	10,889,600	1,414,847	100%	Food & agriculture
Terminal de Transporte de Armenia S.A.	11,714,831	10,972,441	6,240,000	21.8%	Transport & telecom
Empresa de Energía Eléctrica del Amazonas	10,584,940	6,365,207	n/a	100%	Energy
Terminal de Transporte de Ibagué	8,124,515	7,584,243	6,430,501	10.4%	Transport & telecom
Artesanías de Colombia	7,415,131	6,682,439	8,071,658	100%	Other
Terminal de Transporte de Bucaramanga	5,631,717	5,021,569	2,977,115	11.1%	Transport & telecom
Terminal de Transporte de Bogotá Pasto S.A.	5,008,371	4,813,352	1,129,072	22.4%	Transport & telecom
Colombia Telecomunicaciones COLTEL	3,511,881	837,367	2,079,411	30.1%	Transport & telecom
Centro de Diagnóstico Automotor de Cúcuta Ltda. - CEDAC	2,855,329	2,792,876	616,580	82.3%	Transport & telecom
Terminal de Transporte de Cartagena S.A.	2,816,815	2,269,881	584,579	10.5%	Transport & telecom
Centro de Diagnóstico Automotor de Risaralda Ltda.	2,751,941	2,349,734	4,030,973	23.7%	Transport & telecom
Pasteurizadora el Holandes S.A.	2,663,627	2,647,224	43,680	33.6%	Food & agriculture
Fondo Ganadero del Magdalena S.A.	2,397,250	2,251,605	699,064	19.9%	Food & agriculture
Fondo Ganadero Boyaca S.A.	2,343,621	2,272,048	410,568	23.4%	Food & agriculture
Centro de Diagnóstico Automotor del Caldas Ltda.	1,856,557	1,777,148	219,737	59.5%	Transport & telecom
Centro de Diagnóstico Automotor de Nariño Ltda.	1,642,975	1,585,771	473,200	17.9%	Transport & telecom
Centro de Diagnóstico Automotor de Palmira Ltda.	1,333,887	1,136,374	640,594	13.4%	Transport & telecom
Centro de Diagnóstico Automotor de Tulúa Ltda.	1,008,448	431,953	543,261	20.8%	Transport & telecom
Nortesandandereana de Lacteos S.A. - NORLACTEOS	827,407	484,509	115,091	16.5%	Food & agriculture
Centro de Diagnóstico Automotor de Popayán Ltda.	522,510	77,646	353,105	11.2%	Transport & telecom
Central de Abastos de Cucuta S.A.- CENABASTOS	n/a	n/a	n/a	75.2%	Food & agriculture
Corporación de Abastos de Bogotá S.A. - CORABASTOS	n/a	n/a	n/a	20.5%	Food & agriculture
Empresa Colombiana de Servicios Veterinarios S.A. - VECOL	n/a	n/a	n/a	62%	Food & agriculture

Source: MHCP, MD, MCIT, and other Ministries (information as of December 31 2012).

2. Consolidated sectorial information:

Economic sector	Number of SOEs	Average state ownership %	Total assets USD	Total equity USD	Total operational revenue USD
Oil & gas	1	88.49%	52,336,960,000	33,917,468,000	30,953,000,000
Finance & insurance	10	86.04%	23,974,447,850	3,767,776,914	4,645,257,458
Energy	14	84.69%	20,348,098,525	7,408,615,119	4,705,290,036
Pension & health	6	100.00%	3,499,220,173	780,310,447	2,297,526,575
Defense	5	97.49%	812,804,956	415,631,336	647,861,071
Transport & telecom	17	32.46%	540,799,438	404,913,623	167,261,660
Other	4	99.96%	218,885,102	184,922,635	79,460,354
Food & agriculture	13	40.10%	182,721,727	164,172,049	18,675,986
Totals	70	78.65%	101,913,937,771	47,043,810,123	43,514,333,140

Source: MHCP (information as of December 31 2012).

3. Selected SOE individual information:

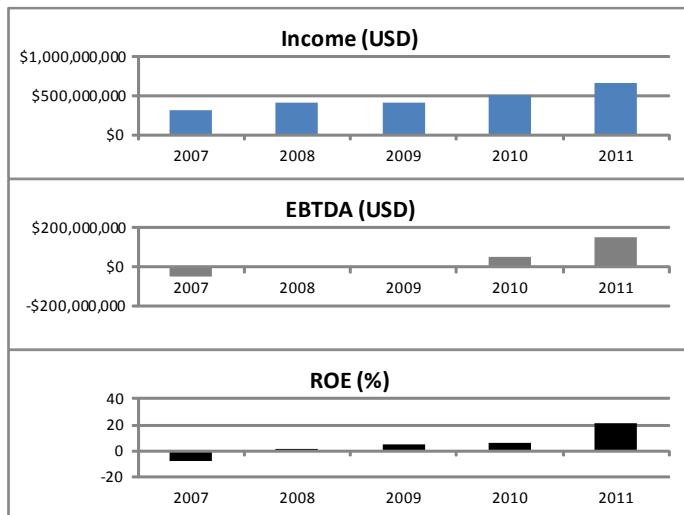
The company descriptions presented below provide additional summarised financial information about a sample of the most important Colombian SOEs, principally in the electricity and financial sectors, which are not covered in detail in the body of this report.

The data is taken from information provided by the MHCP and the preliminary findings of an inventory of SOEs which the Colombian government hired the McKinsey & Co., a consultant, to prepare. This report has not yet been made public. All the figures contained in the graphs have been converted from Colombian pesos to dollars at the exchange rate of June 2013 (USD1=COL\$1 928).

Generadora y comercializadora de Energía del Caribe (GESELCA)

Objective: Generates 8% of Colombia's electricity by burning gas and coal

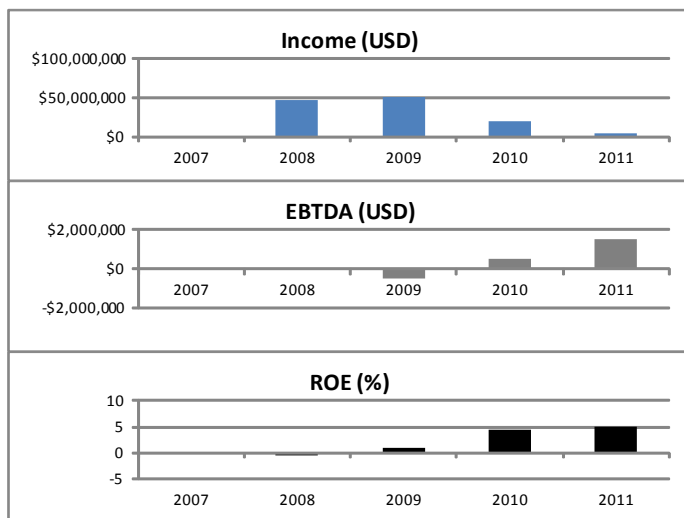
Business: Generates 8% of Colombia's electricity with gas and coal



Empresa de Energía del Archipiélago de San Andres (Eedas)

Objective: Generation of energy

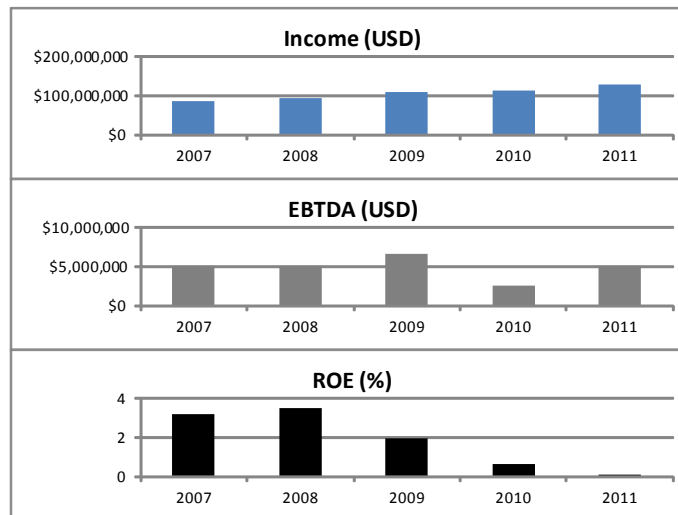
Business: Outsources functions under contract to a private company



Centrales Eléctricas del Narino (CEDENAR)

Objective: Generation and comercialization of energy

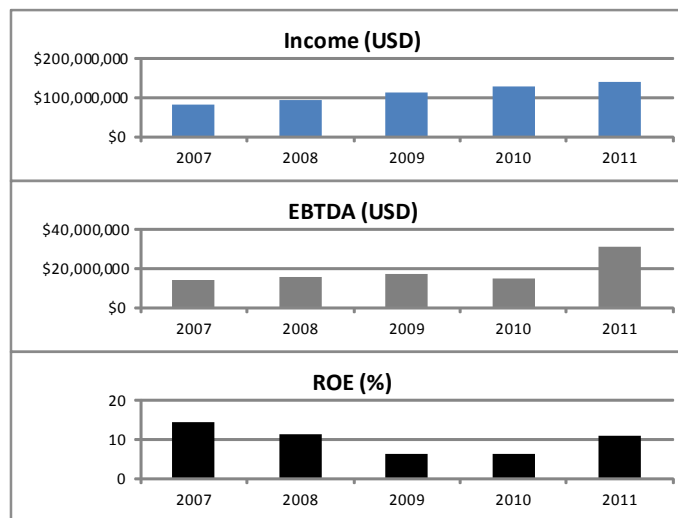
Business: Manages 5 small hidroelectric plants in the regions



Electrificadora del Huila (ElectroHuila)

Objective: Generation of energy

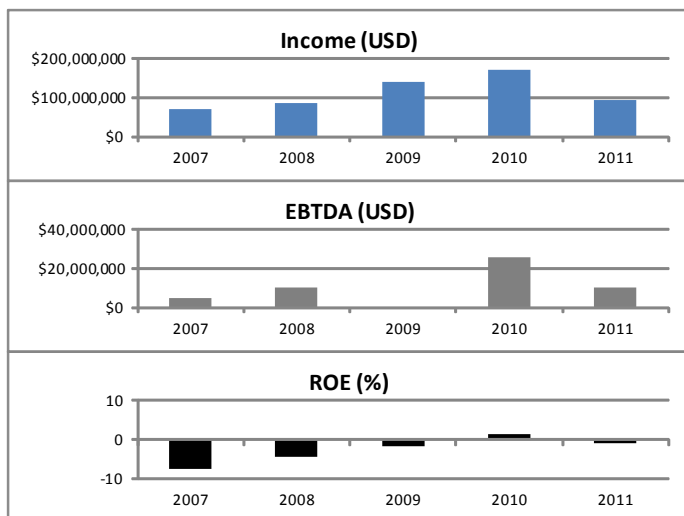
Business: Regional generation and comercialization of energy



Empresa Multipropósito de Urrá (Urrá)

Objective: Generation of energy

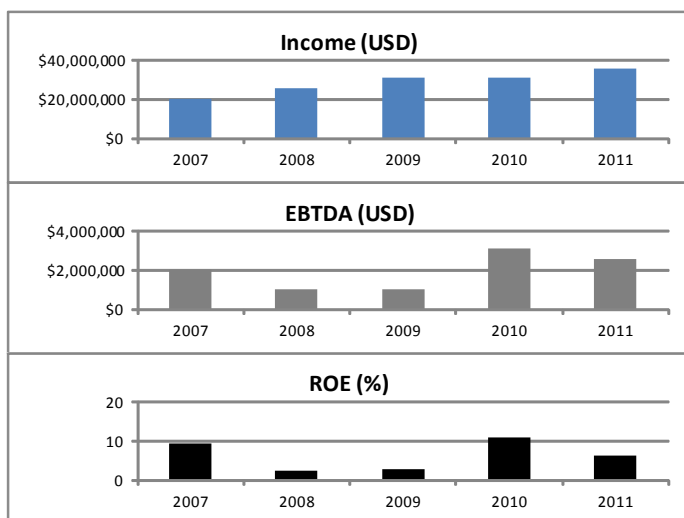
Business: Generates electricity through one hidro plant



Electrificadora del Caquetá (Electrocaquetá)

Objective: Distribution and comercialization of energy

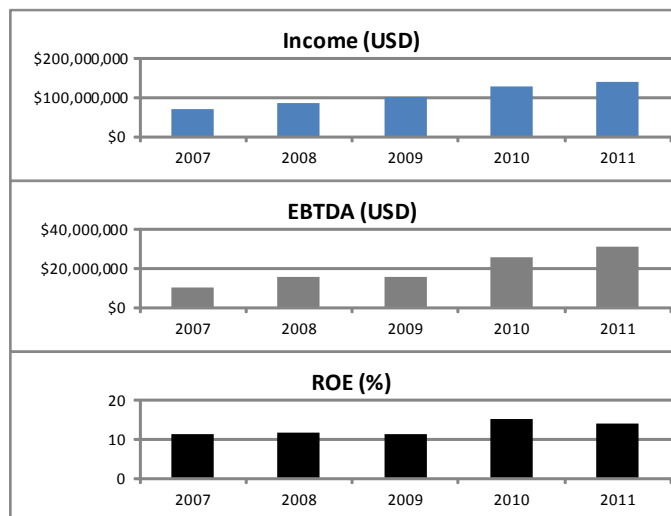
Business: Regional distribution and comercialization of energy



Electrificadora del Meta (EMSA)

Objective: Distribution and comercialization of energy

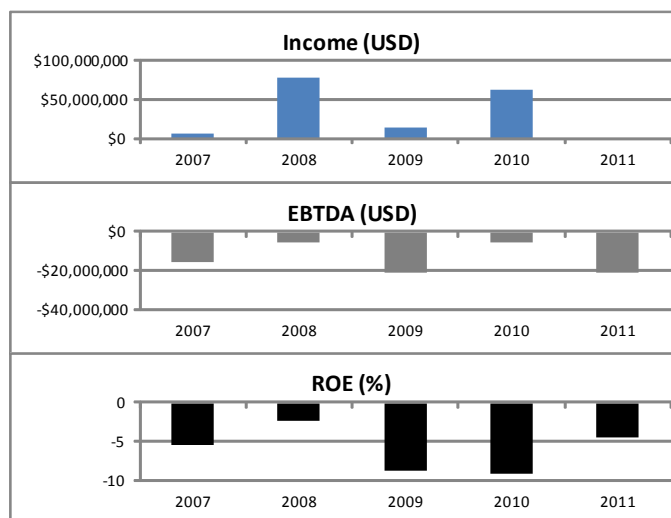
Business: Regional distribution and comercialization of energy



Centrales Eléctricas del Cauca (CEDELCA)

Objective: Commercialization of energy

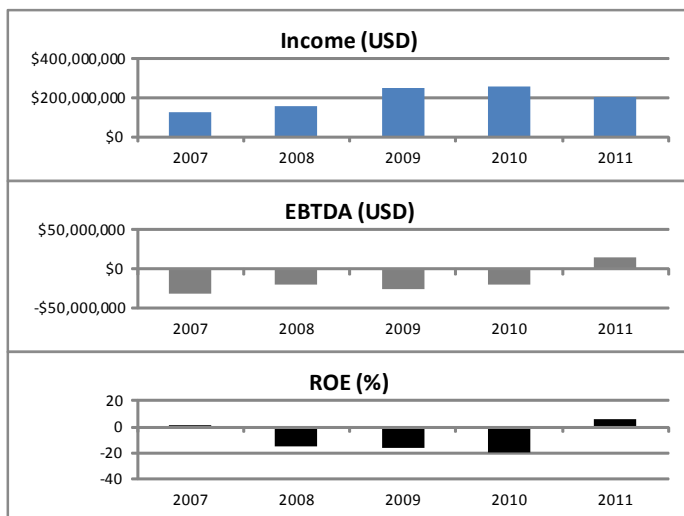
Business: Outsources functions under contract to a private companies



Gestión Energética (GENSA)

Objective: Commercialization of energy

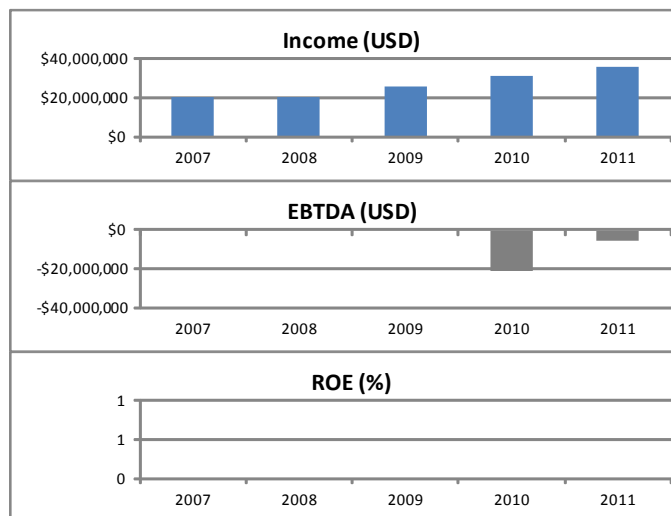
Business: Commercialization of energy



Empresa Distribuidora del Pacifico (DISPAC)

Objective: Distribution and comercialization of energy

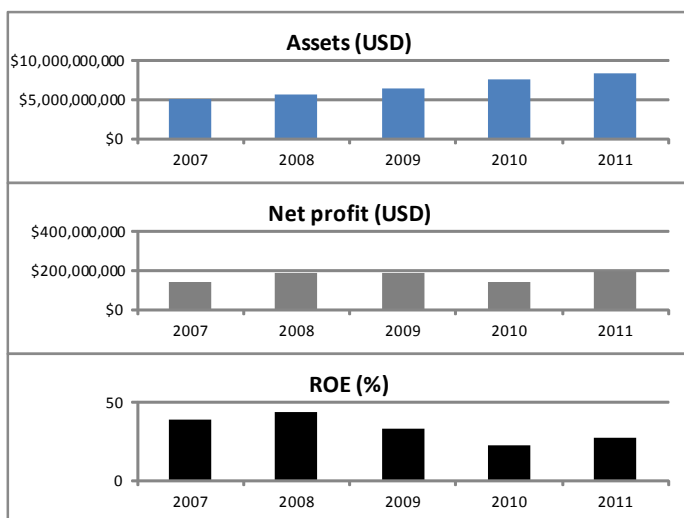
Business: Regional distribution and comercialization of energy



Banco Agrario

Objective: Banking for the agricultural sector

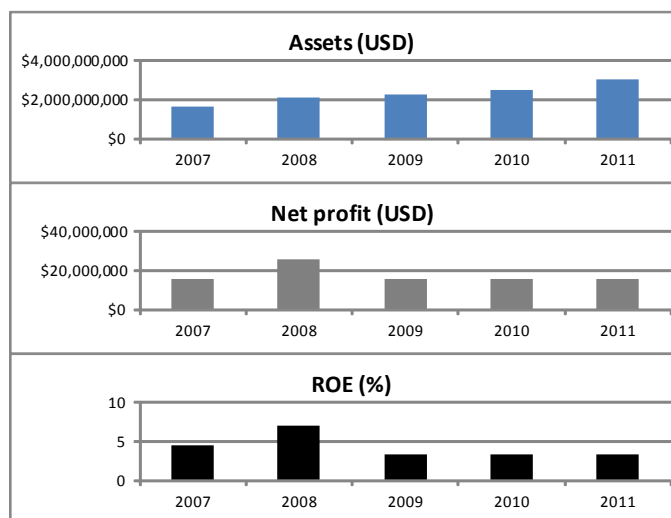
Business: Banking for the agricultural sector



Financiera de Desarrollo Territorial

Objective: Wholesale finance for regional investments

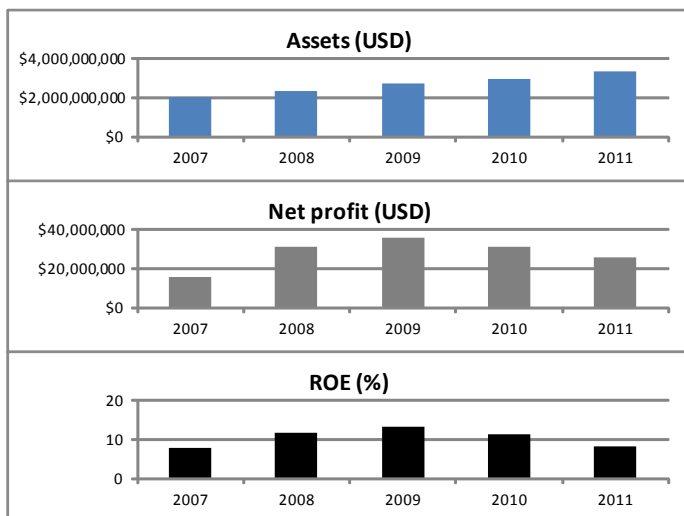
Business: Wholesale finance for regional investments



Fondo Financiamiento Sector Agropecuario (FINAGRO)

Objective: Financing of rural and agricultural development

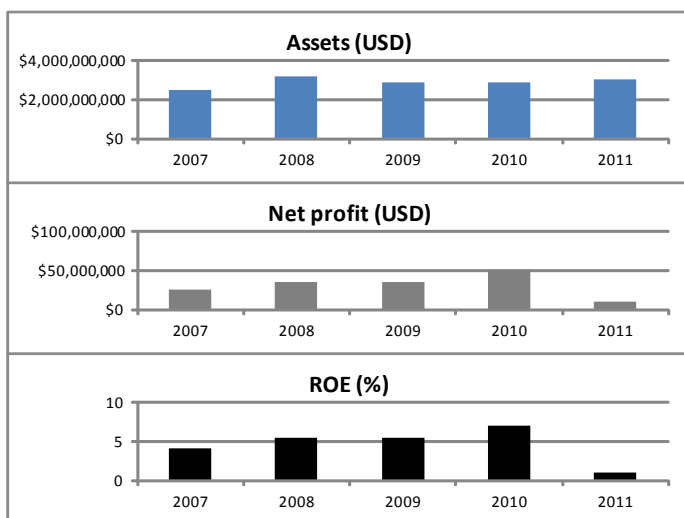
Business: Financing of rural and agricultural development



Bancoldex

Objective: Wholesale financing for exporters and SMEs

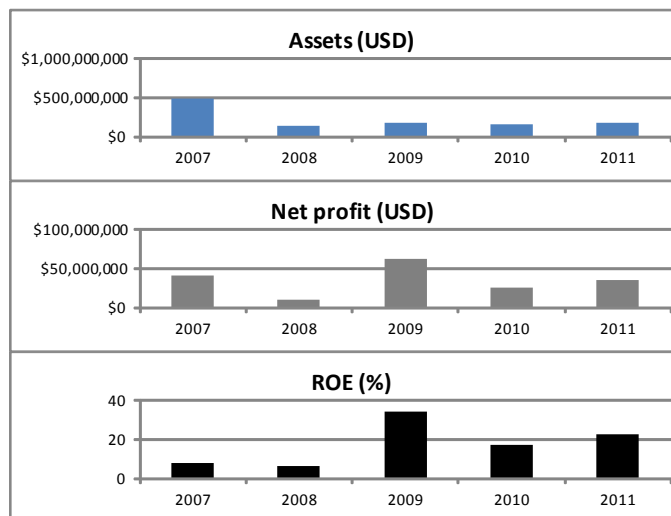
Business: Wholesale financing for exporters and SMEs



Financiera de Desarrollo Nacional (FEN)

Objective: Financing of investment and infrastructure projects

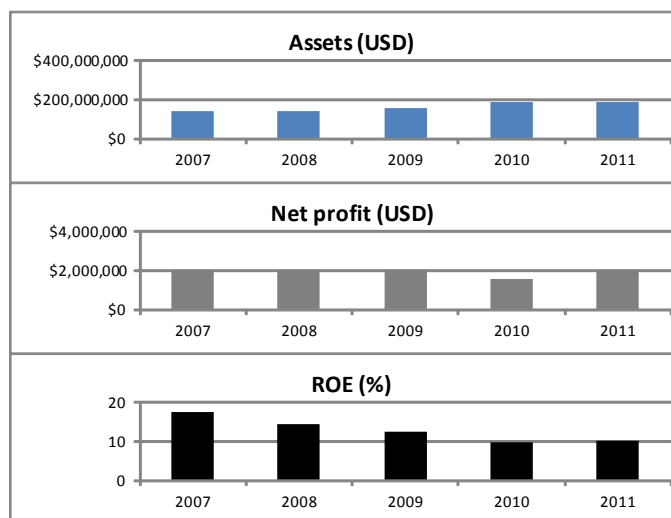
Business: Financing of investment and infrastructure projects



Leasing Bancoldex

Objective: Leasing and corporate loans

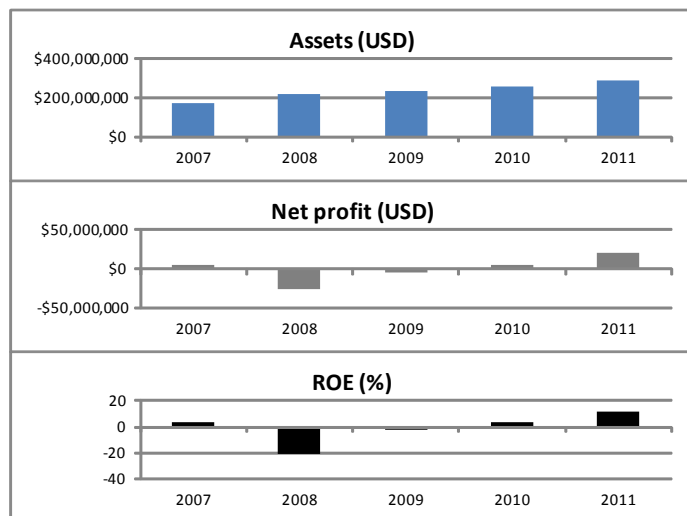
Business: Leasing for SMEs



Fondo Nacional de Garantías (FNG)

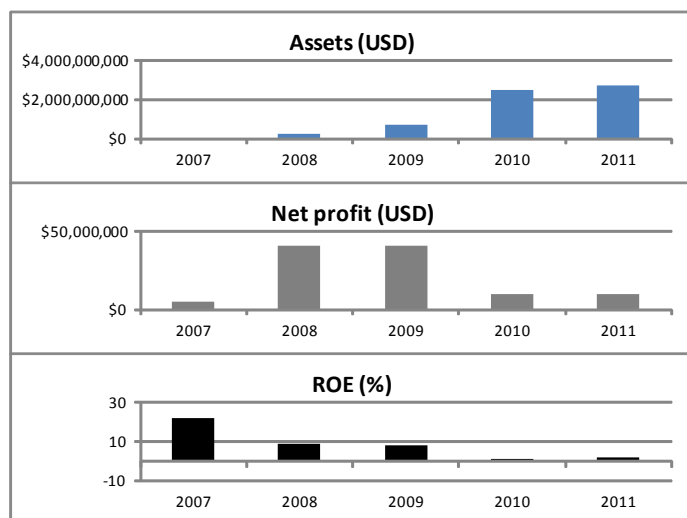
Objective: Credit guarantee for SMEs

Business: Guarantees credits to SMEs up to 50% of the loan

**Positiva Compania de Seguros**

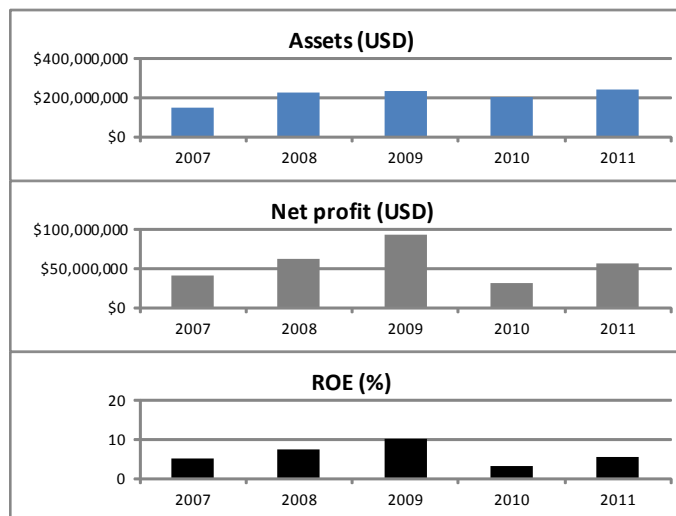
Objective: Life, health and retirement insurance

Business: Life, health and retirement insurance

**Fondo Nacional del Ahorro (FNA)**

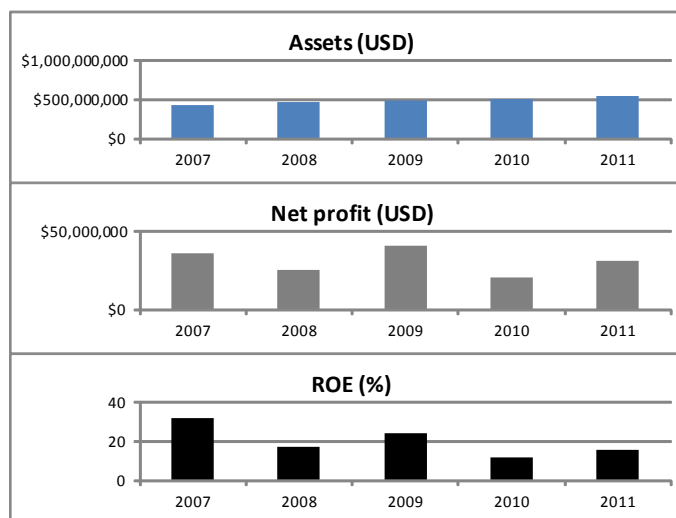
Objective: Manages unemployment insurance funds and other workers' savings

Business: Invests in housing and educational projects

**La Previsora Compania de Seguros**

Objective: General insurance

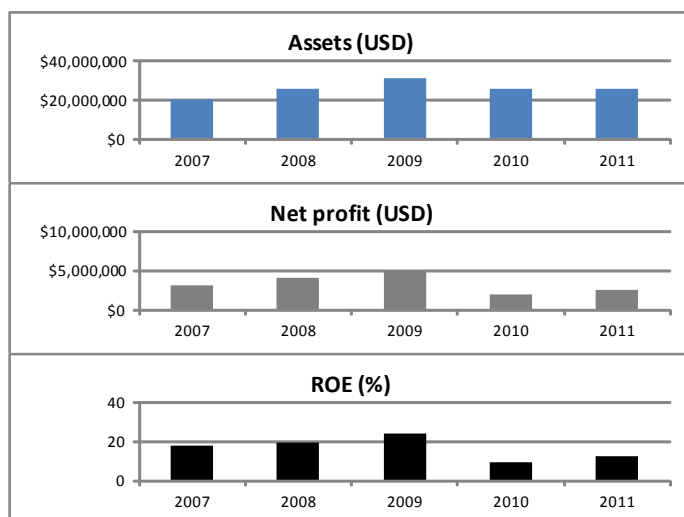
Business: General insurance



Fiduciaria Agraria (Fiduagraria)

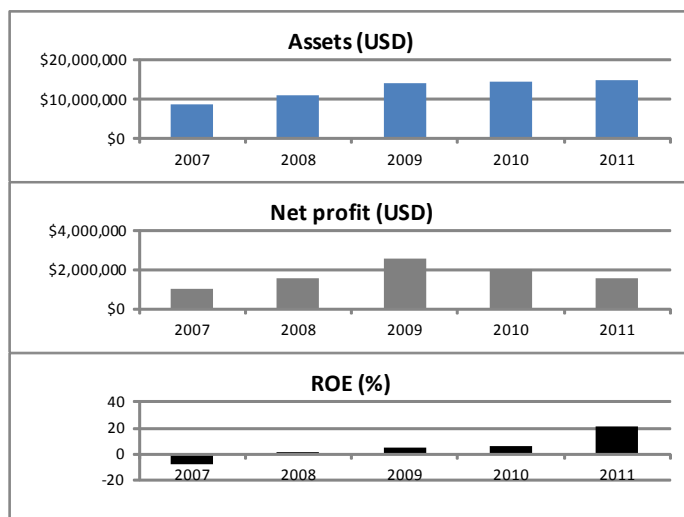
Objective: Trust financial services

Business: Trust financial services for the regions

**Fiduciaria Colombiana de Comercio Exterior (Fiducoldex)**

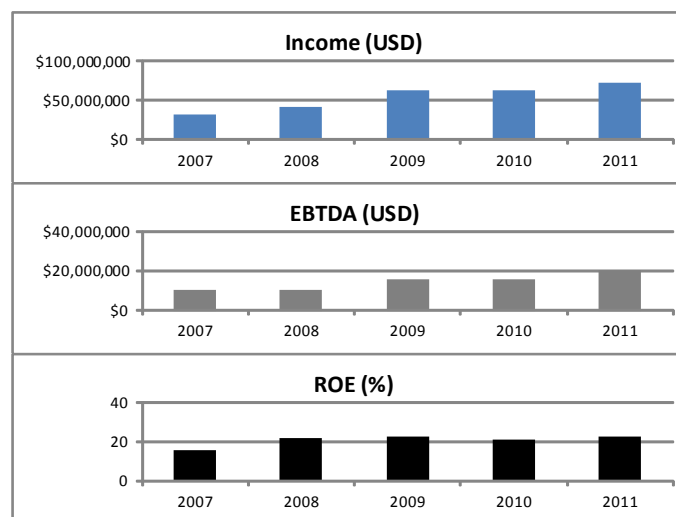
Objective: Trust financial services for exporters

Business: Trust financial services for exporters

**Fiduciaria La Previsora (Fiduprevisora)**

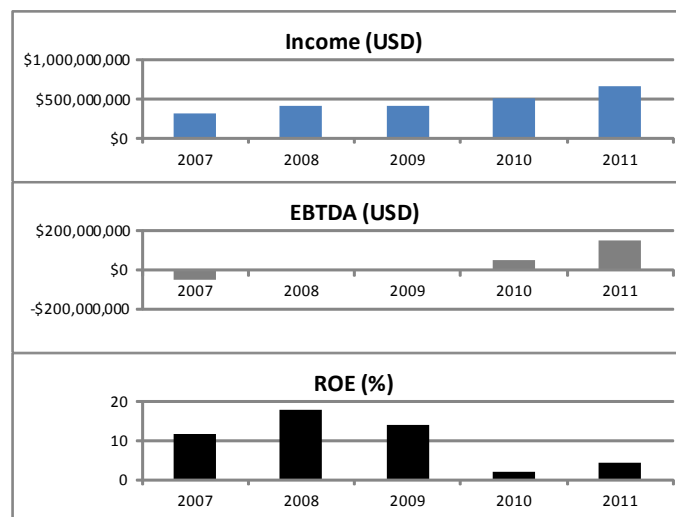
Objective: Trust financial services

Business: Generates 8% of Colombia's electricity with gas and coal

**Fondo Nacional de Desarrollo (FONADES)**

Objective: Social and economic development

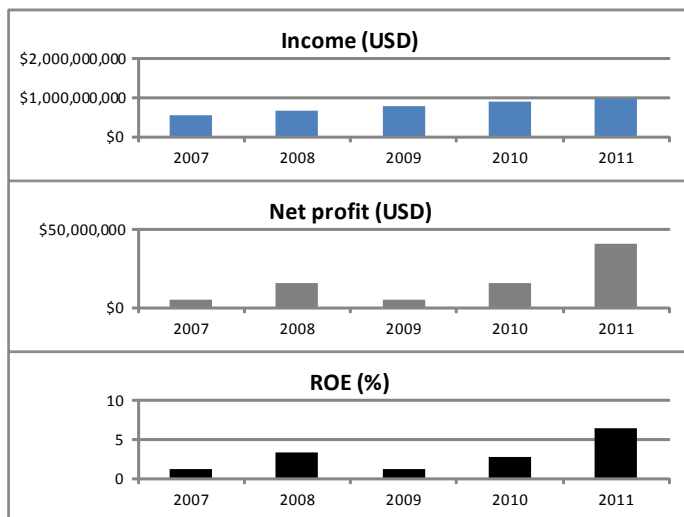
Business: Execution of the National Development Plan



ICETEX

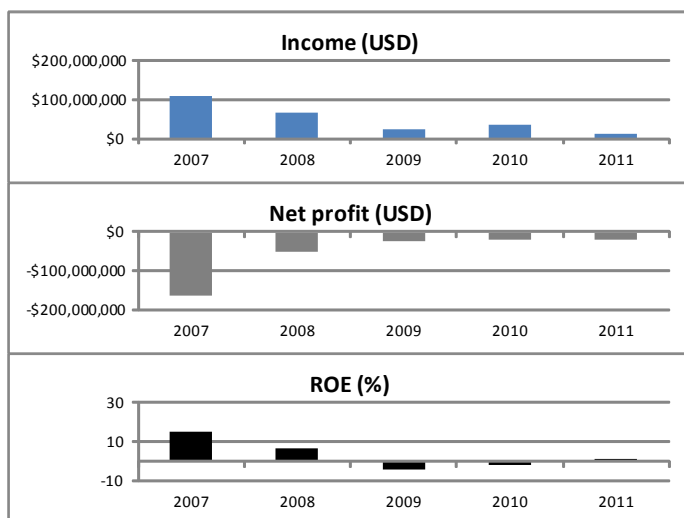
Objective: Student loans and scholarships

Business: Student loans and scholarships

**Central de Inversiones (CISA)**

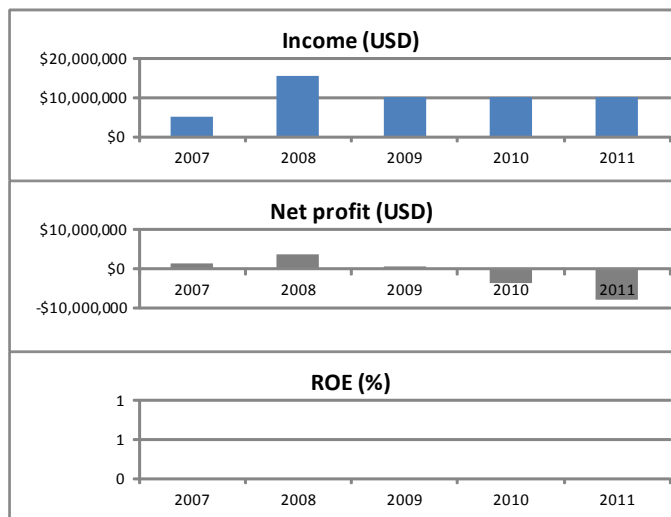
Objective: Manage State assets

Business: Manages mostly real estates and portfolios of public entities

**Bolsa Mercantil de Colombia**

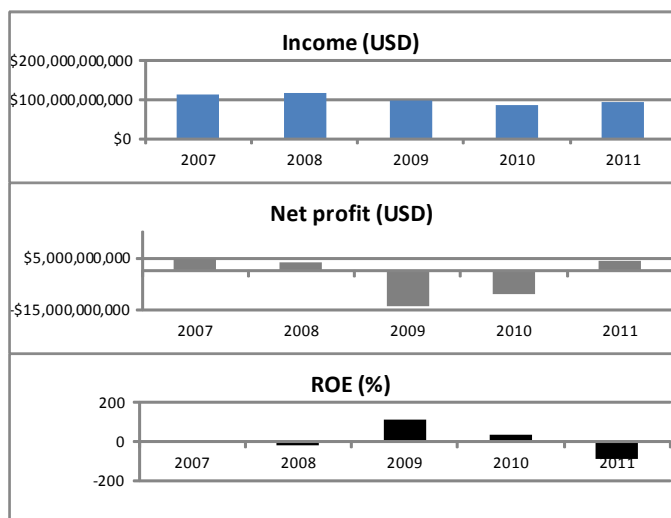
Objective: Trading infrastructure

Business: Trading infrastructure

**Servicio Aereo a Territorios Nacionales (SATENA)**

Objective: Regional air transport

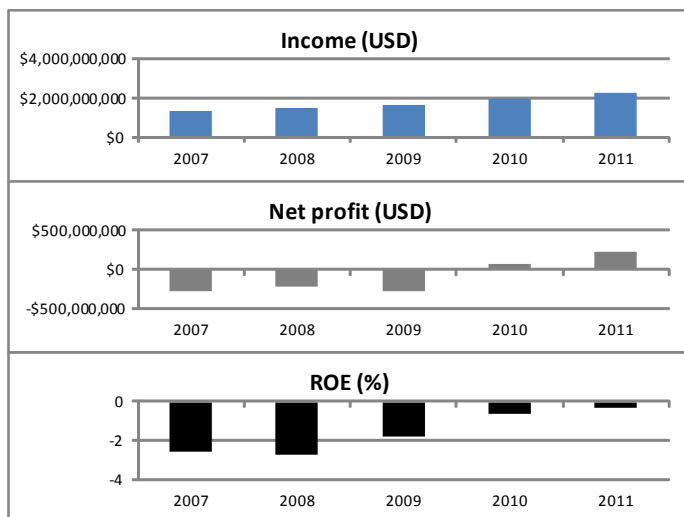
Business: Regional air transport



Gran Central de Abastos del Caribe (Granabastos)

Objective: Market for wholesale commercialization of food and basic products

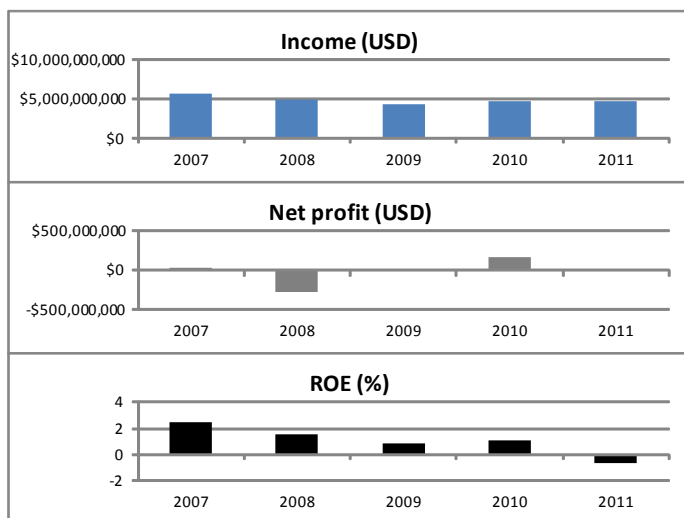
Business: Barranquilla's regional wholesale market



Artesanías de Colombia

Objective: Promote local craftsmanship and commercialization of crafts

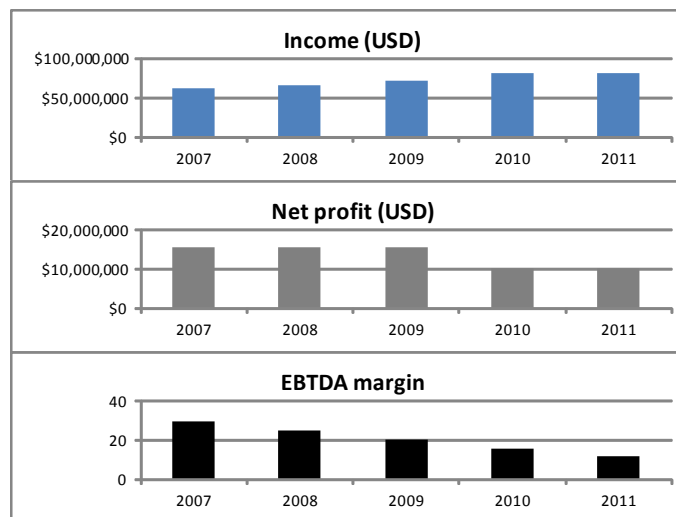
Business: Promote local craftsmanship and commercialization of crafts



Servicios Postales Nacionales (4-72)

Objective: Post service

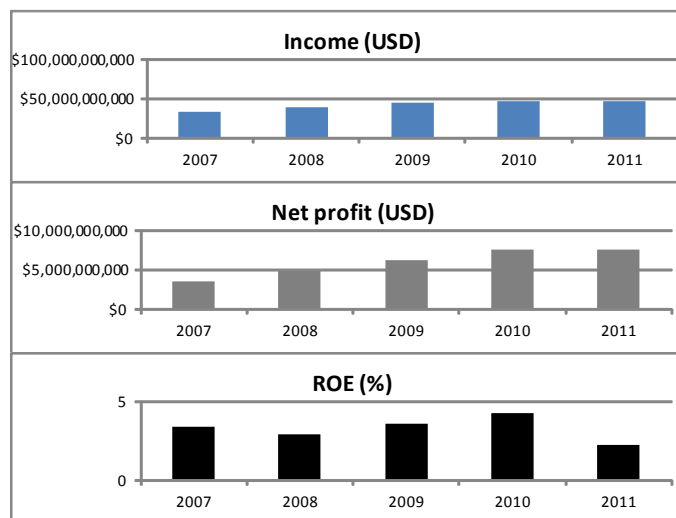
Business: Post service



Acueducto Metropolitano de Bucaramanga (AMB)

Objective: Provide potable water and sewage for the Bucaramanga Region

Business: Provide potable water and sewage for the Bucaramanga Region



ANNEX 4: POLITICAL POINT OF VIEW OF ECOPETROL'S LISTING

The text below corresponds to a speech entitled 'The reasons for the private capitalisation of Ecopetrol' given by the former Minister of Mines and Energy of Colombia, Carlos Caballero Argáez, at the National Oil Forum convened by the fifth constitutional commissions of the Colombian Senate and Chamber of Representatives in October 2006.

Thank you for the invitation to participate in this forum on the bill that opens the way to the capitalisation of *Empresa Colombiana de Petróleos*, Ecopetrol, by private investors. It is a pleasure to be here as a former Minister of Mines and Energy and, above all, as Director of the recently created Alberto Lleras Camargo School of Government of the Universidad de los Andes. The National Congress and its members should be closely engaged with the School's programmes and activities so that its students acquire a full understanding of the state's institutional framework.

I have long considered that reform of state enterprises must seek to improve their economic results for the benefit of their shareholders and that their economic value should increase in a sustained manner. This objective is not achieved automatically by commercial state companies because organisations of this type have neither the autonomy nor the flexibility nor the structure of corporate governance that allow them to take risks and increase their economic value. Both Colombian and international experience shows that this is achieved when a state enterprise has an appropriate governance structure or, in other words, autonomy in all aspects of its operation.

Until the creation of the National Hydrocarbons Agency, the ANH, Ecopetrol fulfilled two functions - that of designing the terms of oil policy and supervising its implementation and, at the same time, that of acting as a state oil company. On the one hand, it was judge and party. On the other, as a partner in association contracts, it lived in a world in which it had to let its partners carry out exploration in order to minimise the risk to its own net worth and enter the business only once oil had been discovered and the fields declared commercially viable. As minister of mines and energy, I opposed Ecopetrol's use of state resources to play Russian roulette in exploration for crude, and said so repeatedly. The division of Ecopetrol into the ANH and Ecopetrol S.A. modified the company's structure, transforming it into a true economic state company and setting it to compete with other oil companies in Colombia and abroad.

In this new context, the Government and Congress had to decide what type of company they wanted Ecopetrol to be. The National Government has opted to invite private investors to be partners in Ecopetrol, implying a modification of its legal statutes and internal governance structure and giving it financial and operational autonomy. In the light of international experience and that of private companies, it seems to me that this was the correct decision. I recommend reading a report on state oil companies that appeared in *The Economist* on August 12. It compares management of state oil companies in Venezuela, Mexico, Saudi Arabia, Brazil and Norway, concluding that the best are, precisely, those that have institutional autonomy and also noting the enormous 'damage' that an abundance of oil reserves can do if their management is left to governments. In this forum, you will also hear about the experience of Brazil's state oil company, Petrobras, which, in my opinion, is the world "star" of these companies.

The presence of private shareholders and private capital also dramatically improves their management because it automatically means that the company's administrators have to answer

to its owners - in this case, Colombians represented by the state and local and international private investors. I must also reaffirm that I am a believer in the virtues of 'popular capitalism'.

With private capital accounting for a 20% stake in the company, Ecopetrol will take the legal form of a mixed-ownership company, very close to that established under private law. The shareholders' meeting will appoint a board of directors and this will be responsible for guiding the company and appointing a CEO to head its administration. And the board will have to answer to shareholders. It will, as we say today, be 'accountable'. This marks the end of the absurd hybrid where I, my predecessors and successors were, as ministers, called on to chair a board all of whose members as well as the company's manager were appointed by and accountable to the President of the Republic. A situation that, in order to act in unison, almost required a CONPES document to establish its policy and avoid fear of the directors being investigated by the Prosecution Service or the Comptroller General's Office which, among other things, prevented taking risks that could result in the company losing money - in an activity, like the oil industry, whose essence is taking risks.

And that's without mentioning financial matters. The company's administration constantly had to negotiate the resources to be transferred to the Finance Ministry, year after year, through different mechanisms - transfers, taxes and dividends - which meant that, as regards its financial administration, Ecopetrol depended totally on the Finance Ministry. In those circumstances, access to credit was impossible without the government's approval and without a state guarantee. And using the international debt market was even more impossible. The company's new structure would permit this.

A state company with private shareholders and shares registered on stock exchanges in Colombia and overseas - for example, New York and Madrid - will be very well scrutinised. The best vigilance of a private company is that provided by the securities market. Share price is a better judge than the Comptroller General's Office. ISA listed six years ago with, if I'm not mistaken, a share price of \$850 that has since risen to over \$5 000. Its investors have benefited. The state, EPM and other regional energy companies and its private shareholders have benefited. And they will very probably continue to benefit because the company has expanded internationally and is implementing an aggressive investment plan.

A company like ISA pays taxes and distributes dividends. It must do so in order to comply with the law and keep all its shareholders happy. I don't have the figures but I think it would be very interesting to ask ISA what dividends it distributed and what taxes it paid between 2001 and 2005. I would bet that what the state received on those counts exceeded what it received in the previous ten or 15 years.

Precisely six years ago, we were implementing the 'ISA: Shares for All' programme. It was, certainly, a risky move as the changes in Ecopetrol are today. At that time, terrorism was doing its worst, attacking electricity pylons mercilessly. But the way in which the operation was structured and managed, the marketing of its shares throughout the country, the defining role played by its manager, Dr. Javier Gutiérrez, and the national government's undertakings as regards treatment of minority shareholders (enshrined in a document entitled 'Declaration of the State as Majority Shareholder') meant that, in its first share placement (there was a second one a year later), the company was able to incorporate 65 000 people as shareholders as well as all Colombia's Pension Funds. And I would recommend that some of you go one day to a general shareholders' meeting (you only have to buy a few shares to do so) to see the transparency of the company's information and its excellent relations with its shareholders. Evaluate the experience of ISA as one of Latin America's principal companies. Would it have achieved that without private shareholders? I don't think so.

The state has neither the vocation, the financial and administrative capacity nor the obligation to invest in businesses of 'risk' such as the oil or financial sectors. We saw the disaster of the state's investments in the financial sector and what has been the experience in the oil sector. This is work that must be undertaken by private investors from Colombia and overseas. In the case of oil, this needs to be done on a larger scale in order to explore, exploit, refine and export crude and fuels. This is the pressing challenge for Colombia. Colombia 'is not an oil country' but it depends on exporting oil for its survival. Look at what has happened to us recently: despite high international oil prices and the fact that our country is an exporter of crude and fuels, it is the only one in Latin America with a deficit in the current account of its balance of payments deficit that will reach around 2% of GDP this year. What will happen the day we don't export oil? Where then macroeconomic stability?

Improving the quality and efficiency of the state and its enterprises implies adjusting to the times, assimilating the lessons learned and taking advantage of local and international experience. Capitalising 20% or more of Ecopetrol with private resources (why fix a limit of 80% on the state's participation? - in ISA, it is 59%) would imply learning the lessons of experience such as those offered by ISA in Colombia, Petrobras in Brazil and other companies around the world. It also implies a socially efficient use of public resources. In that way, we will be able to increase the value not only of the company but also of the assets of the state or, in other words, of all Colombians.

I would like to conclude by reading the last two paragraphs of a column I wrote which the *El Tiempo* newspaper published on August 5: 'The investment of all Colombians in Ecopetrol will be rewarded by a company that expands, is profitable and well administered and that, over the years, will surely increase its economic value. Is this not the objective that the owners of any productive company should seek? It would be a real frustration if Ecopetrol's announced capitalisation were prevented from taking place for political reasons. It would not be understood if a popular President, with majorities in Congress, were unable to implement a project of such importance for the country'."

Source: http://gobierno.uniandes.edu.co/Noticias/descargas_n/Foropetrolero.pdf

ANNEX 5: ISA'S CORPORATE GOVERNANCE PRACTICES (2012)

Board composition and executives

The board of ISA comprises seven directors with their respective alternate directors. They were elected by the company's shareholders in March 2012 and are currently as follows:

Table 9. Members of the board of ISA, 2012

Director	Alternate Director
MME - Minister Dr. Federico Renjifo Vélez	Vice Minister of Energy - Dr. Tomás González Estrada
MHCP - Vice Minister General Dr. Germán Arce Zapata	Director of Public Credit and Treasury - Dra. María Fernanda Suárez Londoño
Isaac Yanovich Farbaiaz	Vice Minister of Mines - Dr. Henry Medina González
EPM - CEO - Juan Esteban Calle Restrepo (IND)	EPM - Energy Director - Jesús Aristizábal Guevara (IND)
Santiago Montenegro Trujillo (IND)	Adriana Huertas Bonilla (IND)
Luisa Fernanda Lafaurie Rivera (IND)	Alejandro Linares Cantillo (IND)
Bernardo Vargas Gibsone (IND)	Carlos Felipe Londoño Álvarez (IND)

Source: ISA

The CEO is elected by the board of directors which must take into account candidates' suitability, knowledge, experience and leadership. Other executives are appointed as stipulated in the company's Human Resources Policy. The company's executives do not have family ties to each other or the board of directors. The CEO is an employee of the company and the company's statutes establish that no employee may be a member of the board.

The fees of board members (directors and their deputies) are set by the general shareholders' meeting. Remuneration is for attendance at meetings of the board and its committees. The CEO's remuneration is set by the board on the basis of the complexities of the post's responsibilities and market guidelines. The remunerations of other executives are set according to parameters established by the board.

Board committees

The company's Code of Good Governance establishes the existence of Committees which are defined as working groups formed by members of the board on the basis of their knowledge and experience. Committees may be of an institutional or occasional nature. In the former case, they are permanent and their responsibilities are established by a board agreement. The institutional committees that the company has established are: the Board and Corporate Governance Committee, the Audit Committee and the New Business Committee.

- *Board and Corporate Governance Committee.* Charged with monitoring and supporting the company's administration on financial matters, matters of human talent, the operation and evaluation of the board, compliance with the Code of Good Governance and evaluation of the CEO.
- *Audit Committee.* Charged with guiding and facilitating the company's internal control, with functions that include ensuring that it has an effective business control system.
- *New Business Committee.* Charged with analysis of new businesses and investments and monitoring those that are being implemented.

Committees that are created occasionally are for the study and analysis or investigation of a specific case. When such a committee is created, the board will appoint its members, define the nature and scope of the study and analysis to be undertaken or the events to be investigated, determine the date at which it must present its report and define other matters as regards its remit and procedures that it deems appropriate, all of which must be established in the board minutes. A director may not belong to more than three committees.

Board evaluation

At ISA, this is considered a tool for improvement, serving as an opportunity to identify strengths, weaknesses and measures of improvement. Its purpose is to foster effective decision making. Through the evaluation mechanisms, it seeks to assess performance, to determine the efficiency and effectiveness with which the board fulfils its functions and its compliance with objectives and to detect possible weaknesses in order to identify opportunities for improvement. In other words, board evaluation is considered a vehicle for learning through reflection and the manner of assessing the performance of individual directors and that of the board as a whole and be accountable to shareholders as regards compliance with targets.

Board evaluation takes three forms whose results are made available to shareholders through an Annual Report presented to the annual general meeting:

- Measurement of compliance with integrated corporate management indicators (finance, clients and market, productivity and efficiency and human talent);
- Board report to the shareholders' meeting on its functioning (meetings, attendance, conflicts of interest, operation of committees);
- Qualitative self-evaluation by directors (individual and collegiate performance, the relevance and depth of matters addressed, strengths and weaknesses).

The Board and Good Governance Committee reviews the questionnaire to be answered, analyses the results and presents a report to the full board. The Report on Board Functioning is published on the company's website and presented to the general shareholders' meeting.

Awards

ISA received the 2011 ANDESCO Corporate Social Responsibility Prize for its "Social and Corporate Governance Performance". The prize was awarded by the National Association of Public Services (ANDESCO) on the basis of a methodology audited by PricewaterhouseCoopers and accredited by the UN Global Compact.

Source: ISA

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