TWO PATHS TO DEVELOPMENT: POLICY CHANNELING AND LISTED STATE-OWNED ENTERPRISE MANAGEMENT IN PERU AND COLOMBIA

Evan B. Shaver*

ABSTRACT

As Latin America becomes an increasingly significant global economic presence, the governance of its corporations has been more closely scrutinized. In part due to the region's history, many of its largest corporations have been state-owned.[1] As state-held corporations across the region have been privatized, however, many states across the region have been reluctant to fully relinquish control.[2] This has created a system in which many large state-owned enterprises (SOEs) are partially owned by sovereign states and partially by private investors. As a result, states are confronted with inherent conflicts as they navigate the roles of governmental administrator and majority shareholder.

This paper builds upon the foundational work of Curtis J. Milhaupt and Mariana Pargendler in *RPTs in SOEs: Tunneling, Propping, and Policy Channeling*. In their paper, Milhaupt and Pargendler name the state's conflicted roles in mixed-ownership enterprises as "policy channeling."[3]

* J.D. (University of Pennsylvania Law School); A.B., Political Science and Linguistics (Columbia University). I am very thankful for Professor Mariana Pargendler's foundational work on this subject and her guidance in preparing this paper.

1. Jeremy Daniels, *South America: A Close Look at Governance in State-Owned Enterprises: Is Something Better than Nothing?*, ETHICAL BOARDROOM (May 4, 2014), https://ethicalboardroom.com/south-america-a-close-look-at-governance-in-state-owned-enterprises-is-something-better-than-nothing/ [https://perma.cc/8QT6-CPDV] (stating that "[w]ithin the South American region the majority of corporations are state-owned or partially state-owned").

2. *See* ALDO MUSACCHIO, EMILIO I. PINEDA AYERBE & GUSTAVO GARCÍA, INTER-AMERICAN DEV. BANK, STATE-OWNED ENTERPRISE REFORM IN LATIN AMERICA: ISSUES AND POSSIBLE SOLUTIONS 4 (2015), https://publications.iadb.org/en/state-owned-enterprise-reform-latin-america-issues-and-possible-solutions [https://perma.cc/8ZRP-74P8] (explaining how many states are reluctant to relinquish control and allow the privatization of previously state-owned companies).

3. Curtis J. Milhaupt & Mariana Pargendler, *RPTs in SOEs: Tunneling, Propping, and*

Policy channeling occurs when a state retains majority ownership of a formerly entirely state-owned enterprise and continues to use the corporation to achieve policy aims that hurt private investors. This has been seen across the developing world as governments pursue strategies that reduce SOE profits and, as a result, investor returns.[4] For example, in 2012 the Children's Investment Fund Management threatened legal action against the Indian government for allegedly artificially deflating coal prices and "robbing the company of billions of dollars in potential revenue and hurting shareholders."[5]

As developing countries seek to attract more capital, particularly from foreign investors, it is imperative that they address policy channeling through improved corporate governance standards. In examining this phenomenon in Latin America, Peru and Colombia provide two distinct models for the management of mixed-ownership companies and the mitigation of policy channeling. By considering and comparing the countries' strategies, Peru and Colombia—and Latin America more broadly—can devise more sustainable, efficient, and beneficial paths to economic development and SOE management. Simultaneously, they can structure their partially state-owned enterprises such that private stakeholders are confident that their investments will be protected.

Policy Channeling, THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS (forthcoming) (manuscript at 2), https://ssrn.com/abstract=3119164 [https://perma.cc/8BAJ-E3WD].

4. *Id.* at 5.

5. Saurabh Chaturvedi, *U.K. Fund Exits Coal India*, WALL ST. J. (Oct. 15, 2014), https://www.wsj.com/articles/childrens-investment-fund-management-sells-coal-india-stake-1413382522 [https://perma.cc/T9QU-USSU].

I. INTRODUCTION AND DEFINITIONS

State-owned enterprises have been a significant focus of corporate governance scholarship in the twenty-first century. Until recently, SOEs largely provided public services in domestic markets, historically providing public services or commodities like electricity.[6] They have, however, in recent years become increasingly influential in international markets and outside of their home countries.[7]

In an attempt to attract capital and to integrate into the global economy, many developing countries have increasingly privatized SOEs.[8] In this process, some states have chosen a more cautious privatization: listing SOEs on capital markets while retaining a majority stake in the corporation.[9] The rationales behind state ownership and retaining a majority stake in a partially privatized SOE are numerous, but largely the same. Generally, states weigh social, economic, and strategic interests.[10] These can include industrial policy, regional development, public goods supply, as well as corrupt motives.[11]

This trend has produced a significant number of "mixed-ownership" SOEs across the developing world.[12] While mixed-ownership SOEs can include enterprises in which a state actor has any amount of ownership, in this paper I will focus on those in which a state has retained a majority stake.

As mixed-ownership SOEs increase in number and influence, they have increasingly made headlines. For example, the Brazilian state-controlled oil company Petrobras has drawn attention in recent years not only for allegations of high-level corruption, but also for Brazilian politicians' use of the company to achieve policy ends.[13] Additionally,

6. OECD, STATE-OWNED ENTERPRISES AS GLOBAL COMPETITORS 22 (2016), http://dx.doi.org/10.1787/9789264262096-en [https://perma.cc/6UJX-MLY2].

7. *Id.*

8. Saul Estrin & Adeline Pelletier, *Privatization in Developing Countries: What Are the Lessons of Recent Experience?*, 33 WORLD BANK RES. OBSERVER 65 (2018).

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Curtis J. Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform*, OXFORD BUS. L. BLOG (Apr. 18, 2017), https://www.law.ox.ac.uk/business-law-blog/blog/2017/04/governance-challenges-listed-state-owned-enterprises-around-world [https://perma.cc/TQ23-76ES] (stating that the practice of state ownership and retention of a majority stake in a partially privatized SOE has produced a significant number of mixed-ownership structures).

13. Milhaupt & Pargendler, *supra* note 3, at 6.

mixed-ownership SOEs have been the subject of disputes in two of the world's fastest-growing emerging market countries: India[14] and China.[15]

Among the key aspects of the study of mixed-ownership SOEs has been the inherent conflict of interests between a state as majority owner and private minority investors. In their paper *RPTs in SOEs: Tunneling, Propping, and Policy Channeling*, Curtis J. Milhaupt and Mariana Pargendler develop a term to describe this phenomenon: policy channeling.[16] They define it as "the state's use of an SOE (as opposed to regulation or taxation) to achieve a public policy or political objective."[17] As economies with large mixed-ownership SOEs like China and Brazil become increasingly influential, analyzing policy channeling will be vital to understanding the global economy.

Much of the corporate governance scholarship analyzing mixed-ownership SOEs and policy channeling has focused on China, the world's second largest economy.[18] There is a gap in the literature, however, around much of Latin America. Considered as a whole, Latin America is the fourth largest economy in the world after the United States, the European Union, and China.[19] Mixed-ownership SOEs across Latin America have also been pivotal in the region's economic development.[20]

To the extent that the corporate governance of mixed-ownership SOEs

---

14. *See* James Crabtree & Sam Jones, *TCI in Legal Threat Against Coal India*, FIN. TIMES (Mar. 13, 2012), https://www.ft.com/content/7e70ca02-6d12-11e1-ab1a-00144feab49a [https://perma.cc/LW5W-35EK] (stating that "[i]n a letter sent to all Coal India board members on March 12, TCI [The Children's Investment Fund] attacked the company and its board for 'not acting independently of India's government.' It also accused the company of 'acquiescence to interference by the Prime Minister's Office' on coal prices and a range of other issues. TCI threatened unspecified legal action against board members.").

15. *See* Nancy Huyghebaert & Lihong Wang, *Expropriation of Minority Investors in Chinese Listed Firms: The Role of Internal and External Corporate Governance Mechanisms*, 20 CORP. GOVERNANCE: INT'L REV. 308 (2012) (examining the conflicts of interest that arise from mixed-ownership structures in Chinese firms).

16. *See* Milhaupt & Pargendler *supra* note 3, at 5 (describing how states use SOEs to advance policy objectives at the expensive of private investors).

17. *Id.*

18. Rob Smith, *The World's Biggest Economies in 2018*, WORLD ECON. F. (Apr. 18, 2018), https://www.weforum.org/agenda/2018/04/the-worlds-biggest-economies-in-2018/ [https://perma.cc/YPV5-LS6T].

19. Raúl Rivera, *Puncturing the 4 Myths About Latin America*, AMERICAS Q. (Spring 2011), http://www.americasquarterly.org/node/2427 [https://perma.cc/T6GU-D3FL].

20. *See, e.g.*, Cecilia Rutkoski Hoff, *Petrobras Still Matters for the Brazilian Economy*, PANORAMA INTERNACIONAL (2016), http://panoramainternacional.fee.tche.br/en/article/a-petrobras-ainda-importa-para-a-economia-brasileira/ [https://perma.cc/7ZUZ-MH6Z] (stating that " . . . as a company partially owned by the state, Petrobras would assume a leading role in national development.").

in Latin America has been discussed, Brazil is often the sole focus. Indeed, the region's most well-known mixed-ownership SOE, Petrobras, has dominated recent global headlines.[21] While Brazil is certainly important as the region's largest economy, other Latin American economies are consistently growing and becoming more significant in the global marketplace.[22]

This paper aims to fill this gap by analyzing the corporate governance of mixed-ownership SOEs in two of Latin America's most competitive economies: Peru and Colombia.[23] Peru and Colombia are two of the largest economies in the region[24] and are among the Latin American countries that have received the most foreign direct investment in recent years.[25] Moreover, both have developed reforms addressing the specific needs of mixed-ownership SOEs.[26]

This essay begins with a discussion of mixed-ownership state-owned enterprises and policy channeling as phenomena. It then explores the reasons for state-ownership, mixed-ownership structures, and the conflicted interests that underlie policy channeling. In particular, it discusses the tension between the role of a state as a political entity responsible for its citizens' welfare and a shareholder concerned with value creation and downside protection. The paper goes on to discuss the state of mixed-

---

21. *See, e.g.*, Julie DiMauro, *Petrobras Corruption Scandal Provides Anti-Bribery Policy Lessons*, REUTERS (June 29, 2017), https://www.reuters.com/article/bc-finreg-petrobras-bribery/petrobras-corruption-scandal-provides-anti-bribery-policy-lessons-idUSKBN19K2A8 [https://perma.cc/J9GR-MLXM] (announcing that Petrobras had agreed to a settlement with The Vanguard Group to end a shareholder suit that was initiated to recover losses due to corruption).

22. *Economy on a Steady Rise in Latin America and Caribbean Region 'Despite International Turbulence' – UN Report*, U.N. NEWS (Aug. 23, 2018), https://news.un.org/en/story/2018/08/1017662 [https://perma.cc/Z9QV-EBUJ].

23. *Competitiveness Index in Selected Countries in Latin America in 2018*, STATISTA (Sept. 2017), https://www.statista.com/statistics/787310/competitiveness-index-latin-america/ [https://perma.cc/F3WC-54SW].

24. *See* OECD, BOARD PRACTICES AND FINANCING FOR LATIN AMERICAN STATE-OWNED ENTERPRISES 13 (2017), https://www.oecd.org/daf/ca/Board-Practices-Financing-Latin-American-SOEs.pdf [https://perma.cc/K476-P7BB] (explaining that, although the Mexican economy is larger than those of Colombia and Peru, almost all Mexican SOEs are fully state-owned and none have stock listed).

25. ALICIA BÁRCENA, ANTONIO PRADO, MARIO CIMOLI & RICARDO PÉREZ, FOREIGN DIRECT INVESTMENT IN LATIN AMERICA AND THE CARIBBEAN 35 (2017), https://repositorio.cepal.org/bitstream/handle/11362/42024/9/S1700815_en.pdf [https://perma.cc/TFH6-TYA5].

26. ALDO MUSACCHIO, EMILIO I. PINEDA AYERBE & GUSTAVO GARCÍA, INTER-AMERICAN DEV. BANK, STATE-OWNED ENTERPRISE REFORM IN LATIN AMERICA: ISSUES AND POSSIBLE SOLUTIONS 2 (2015), https://publications.iadb.org/en/state-owned-enterprise-reform-latin-america-issues-and-possible-solutions [https://perma.cc/8ZRP-74P8].

ownership SOEs in Colombia, starting first with the landscape of these entities in Colombia and later discussing the country's strategies and mechanisms to manage such entities. Similarly, it then analyzes the analogous systems and strategies in Peru. Next, the piece compares Colombia and Peru, focusing particular attention on the structure, financing, and privatization efforts in both countries. Lastly, it concludes by examining Peru's and Colombia's paths forward in continued mixed-ownership SOE reforms, underscoring lessons that each country could learn from the other.

II. POLICY CHANNELING

Under many legal regimes, corporate managers' primary duties are to maximize corporate profits and to further shareholder interests.[27] This dynamic is complicated, however, when a nation-state is the majority shareholder of an enterprise that also has private-sector shareholders. Mixed-ownership state-owned enterprises are formed when a state allows the private sector to invest in an SOE, founds a new SOE in partnership with the private sector, or offers stock in an SOE through partial privatization of that SOE.[28] This structure necessarily pits the interests of the state (as majority shareholder) against those of private investors (as minority shareholders). This conflict of interest can manifest as "policy channeling," in which the state uses "partial ownership of an SOE to achieve social or industrial policy objectives" that decrease pecuniary returns on investment for private investors.[29]

State-owned enterprises are common in developing countries and are often the driving force behind development efforts.[30] This is particularly true in countries that lack robust private sectors.[31] Mixed-ownership SOEs, by design, must navigate the potential for conflicted interests between the state and private sector minority shareholders. Citizens of the majority-shareholder state are the ultimate owners of their country's stake, and thus, the state must consider their interests when making corporate decisions.[32]

27. Einer Elhauge, *Sacrificing Corporate Profits in the Public* Interest, 80 N.Y.U. L. REV. 733, 736 (2005).

28. WORLD BANK GROUP, CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES: A TOOLKIT 244-45 (2014), http://dx.doi.org/10.1596/978-1-4648-0222-5 [https://perma.cc/5LC5-RDN3].

29. *See* Milhaupt & Pargendler *supra* note 3, at 1 (describing how the state can extract private political benefits by engaging in policy channeling).

30. PETER J. MONTIEL, MACROECONOMICS IN EMERGING MARKETS 176 (2d ed. 2011).

31. *Id.*

32. Though the countries' citizens are the ultimate stakeholders, it is important to note

Notably, these SOEs must balance the "tension between the state's dual role as a shareholder and regulator," the state's right to tax, and public policy objectives.[33]

Moreover, while a sovereign entity (or its representatives) may want to maximize an SOE's profits, it inherently has additional politically motivated goals. To this aim, states often use SOEs to extract "*political* private benefits of control" to further public policy or political objectives.[34] Political private benefits of control are those non-pecuniary benefits that, in the service of a political goal, government actors can gain from an SOE and its resources.[35] Frequently, the extraction of these benefits conflicts with corporate managers' desire to maximize profits, thus harming private sector minority shareholders.[36]

While many different types of corporate owners extract private benefits of control, this phenomenon—known as policy channeling—is unique to mixed-ownership SOEs because of the state's unique position as a majority shareholder.[37] Policy channeling is a distinct form of private benefit extraction. States frequently use the corporate form as a political tool for financial, political, and efficiency reasons.[38] It is often used as an alternative means to achieve aims otherwise pursued through regulation or taxation.[39] Indeed, policy channeling is popular "in part because [it] helps shield government action from public law constraints such as mechanisms of accountability and participation."[40] Nevertheless, when states choose to prioritize a policy goal above a corporation's bottom line, minority shareholders suffer.

Many countries in Latin America participated in the widespread privatization movement of recent decades and have continued to denationalize SOEs through the present.[41] The 1980s and 1990s saw a global wave of SOE privatization, resulting in a large number of mixed-ownership SOEs.[42] In doing so, different countries within the region

---

that corporate decision-making in this context is delegated by the citizenry to government leaders.

33. Mariana Pargendler, *State Ownership and Corporate Governance*, 80 FORDHAM L. REV. 2917, 2929 (2012).

34. Milhaupt & Pargendler, *supra* note 3, at 5.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1.

39. *Id.* at 5.

40. *Id.* at 6.

41. UNITED NATIONS DEP'T OF ECON. AND SOC. AFF., PRIVATIZATION IN LATIN AMERICA IN THE EARLY 1990S 2 (1999).

42. Pargendler, *supra* note 33, at 2954.

developed an array of strategies to manage the resulting mixed-ownership enterprises. Despite studies showing that corporate governance of mixed-ownership SOEs in Latin America is better than that of wholly-owned SOEs, there is significant room for improvement.[43]

Since the new millennium, Colombia and Peru have increasingly offered shares in SOEs on public stock exchanges.[44] Throughout this process, the two countries have taken different approaches to SOE privatization and management. As Peru and Colombia continue to develop their respective SOE strategies, both countries should draw inspiration from one another as well as from international norms and guidelines. In doing so, they may form more comprehensively effective regimes to ensure the ongoing use of mixed-ownership SOEs as tools for economic development.

III. COLOMBIAN MIXED-OWNERSHIP SOES

The Colombian government holds stakes in 119 companies, though it has fully privatized many other SOEs since the 1990s and continues to do so.[45] SOE activity accounts for 32 percent of the country's national GDP.[46] All SOEs in Colombia have administrative and financial autonomy, as well as independent legal personality.[47] As such, they are subject to Colombian private law and exempt from the nation's Public Contracting Regime.[48]

---

43. MICHAEL PENFOLD, ANDRÉS ONETO & GUILLERMO RODRÍGUEZ GUZMÁN, DEV. BANK OF LATIN AMERICA, TRANSPARENCY IN THE CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES IN LATIN AMERICA 39-40 (2015).

44. OECD, CORPORATE GOVERNANCE IN COLOMBIA 39-40 (2017), http://dx.doi.org/10.1787/9789264281134-en [https://perma.cc/H2EY-JH3Q]; *see also* *Empresas de la Corporación*, CORPORACIÓN FONAFE, http://www.fonafe.gob.pe/empresasdelacorporacion [https://perma.cc/Q4PF-LRV3] (last visited Mar. 17, 2018) (listing the companies that FONAFE, a state-owned holding company, holds shares in).

45. PHILIP STEVENS, IS THE OECD READY FOR COLOMBIAN MEMBERSHIP? 4 (2018), https://geneva-network.com/wp-content/uploads/2018/04/OECD-and-Colombian-accession.pdf [https://perma.cc/BSP5-PD44].

46. *Id.*

47. L. 489/68, 489/85, 489/97, 29 diciembre 1998, 43.464 DIARIO OFICIAL [D.O.] (Colom.); *see also* Hernando Otero & Enrique Gómez-Pinzón, *Colombia*, *in* LATIN AMERICAN INVESTMENT PROTECTIONS: COMPARATIVE PERSPECTIVES ON LAWS, TREATIES, AND DISPUTES FOR INVESTORS, STATES, AND COUNSEL 149, 153 (Jonathan C. Hamilton, Ómar E. García-Bolívar & Hernando Otero eds., 2012) (explaining the legal characteristics of Colombian state-owned enterprises).

48. L. 1150/14, 16 julio 2007, 46.691 DIARIO OFICIAL [D.O.] (Colom.); Dec. 2474/51, 7 julio 2008, 47.043 DIARIO OFICIAL [D.O.] (Colom.); *see also* OECD, OECD REVIEW OF THE CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES: COLOMBIA 24 (2015), (explaining the characteristics and organization of the Colombian SOE sector).

Nevertheless, because of state capital contributions, SOE activities are still subject to regulation as it applies to state activities.[49]

Under Colombian law, SOEs are categorized as either Industrial and Commercial State Companies (EICEs)[50] or Mixed-Economy Corporations (SEMs).[51] The Colombian Constitutional Court has ruled that both EICEs and SEMs must be authorized by statute, are subject to financial and managerial oversight by the Comptroller's General Office, must disclose business information to Congress, and are bound by the Colombian organic budget law.[52] Moreover, the Court has held that any SOE director or manager is subject to the same recusal policies as public officials.[53]

As defined by Law 489 of 1998, EICEs have the following characteristics: "(a) legal personality; (b) administrative and financial autonomy; [and] (c) independent capital, wholly constituted by public funds, their products, or fees received for the entity's functions or services, and special constitutionally-authorized contributions."[54] EICEs are largely independently run by their boards of directors and management and are free to pursue any activity that management determines is in the company's interest. However, contracts that EICE management signs are subject to the General Statute of Public Procurement.[55]

The same law circumscribes that SEMs are "constituted as commercial enterprises with state support and private capital, which carry out activities of an industrial or commercial nature in conformity with Private Law."[56] SEMs in Colombia are public entities created under a private company contract.[57] Though the original Colombian statute

49. L. 1150/14, 16 julio 2007, 46.691 DIARIO OFICIAL [D.O.] (Colom.); Dec. 2474/51, 7 julio 2008, 47.043 DIARIO OFICIAL [D.O.] (Colom.).

50. *Empresas Industriales y Comerciales del Estado*; L. 489/85, 29 diciembre 1998, 43.464 DIARIO OFICIAL [D.O.] (Colom.).

51. *Sociedades de Economía Mixta*; L. 489/97, 29 diciembre 1998, 43.464 DIARIO OFICIAL [D.O.] (Colom.).

52. Corte Constitutional [C.C.] [Constitutional Court], 31 octubre 2007, Sentencia C–910/07, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); *see also* Curtis J. Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform*, 50 CORNELL INT'L L.J. 473, 500-02 (2017).

53. C.C., 31 octubre 2007, Sentencia C–910/07, G.C.C. (Colom.); *see also*, OECD, *supra* note 48, at 85 n.19 (noting the jurisprudence established by Colombia's Constitutional Court regarding the relationship of SOEs to the executive government).

54. L. 489/85, 29 diciembre 1998, 43.464 DIARIO OFICIAL [D.O.] (Colom.).

55. CARLOS UMAÑA TRUJILLO, BRIGARD & URRUTIA ABOGADOS S.A, PUBLIC PROCUREMENT: COLOMBIA (2012).

56. L. 489/97, 29 diciembre 1998, 43.464 DIARIO OFICIAL [D.O.] (Colom.).

57. *See* OECD, *supra* note 48, at 39 (describing characteristics of mixed-ownership companies (SEMs)).

creating the SEM structure mandated that an SEM have at least 50 percent state support to qualify as such, the Constitutional Court has held that this requirement is unenforceable.[58] SEMs are not bound by the General Statute of Public Procurement.[59] However, if the state's stake in an SEM rises above 90 percent, that SEM will be governed under the same norms as an EICE.[60]

Generally, for all Colombian SOEs, ownership rights are exercised by individual ministries and agencies rather than a centralized body.[61] Often, multiple governmental bodies work in conjunction to run Colombia's SOEs.[62] For example, while the Ministry of Mining and Energy (MME) makes strategic and operational decisions for Ecopetrol—Colombia's largest SOE—the Ministry of Finance acts as its majority shareholder.[63]

Though only three Colombian SOEs under the federal government's[64] control have ever been listed (Ecopetrol, ISA, and Isagen),[65] they constitute an outsized proportion of both the Colombian state's portfolio and Colombia's capital market as a whole.[66] In fact, Ecopetrol—which is also Colombia's largest company—alone forms 46.7 percent of the country's market capitalization.[67] On average, the Colombian state has owned approximately 80 percent of these companies, which contributed fiscal

58. C.C., 1 diciembre 1999, Sentencia C–953/99, G.C.C. (Colom.).

59. *See* OECD, *supra* note 48, at 39 (explaining the characteristics and organization of the Colombian SOE sector).

60. L. 489/97 para. 1, 29 diciembre 1998, 43.464 DIARIO OFICIAL [D.O.] (Colom.).

61. WORLD BANK, CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES IN LATIN AMERICA: CURRENT TRENDS AND COUNTRY CASES 98 (2014).

62. *See, e.g.*, *id*. (noting that "the SOE ownership function in Colombia is decentralized and exercised by several government units simultaneously or sequentially").

63. *Id.*

64. This paper will solely focus on SOEs owned by federal governments. *La Empresa de Telecomunicaciones de Bogotá* (ETC) is currently majority-owned by the city of Bogotá, though the city government announced last year its intent to sell its stake. *Colombian Capital to Sell ETB Shares in Mid-May*, REUTERS (Apr. 26, 2017, 10:47 PM), https://www.reuters.com/article/colombia-etb/colombian-capital-to-sell-etb-shares-in-mid-may-idUSL1N1HZ04Q [https://perma.cc/88GK-4F8A] (announcing that the city government of Bogotá "will begin the sale of its controlling stake in [the] telecommunications company ETB for at least 2.38 trillion pesos ($813 million) in mid-May").

65. The three listed Colombian SOEs are *Empresa de Petróleos de Colombia S.A* (Ecopetrol), *Interconexión Eléctrica S.A. E.S.P.* (ISA), and *Isagen S.A E.S.P* (Isagen). Ecopetrol is a hydrocarbon company that primarily produces petrochemicals, ISA is Colombia's largest power transmission company, and Isagen "generates electricity, builds projects, and markets energy solutions." Isagen was spun-off from ISA in 1995. OECD, *supra* note 48, at 32-35.

66. *See* OECD, *supra* note 48, at 32 (explaining the importance of the three Colombian SOEs to the national government).

67. *Id.*

revenue equal to 1.1 percent of the country's GDP in 2015.[68] Notably, Colombia's three listed, mixed-ownership SOEs have all been in the energy industry.[69] Ecopetrol, ISA, and Isagen were initially wholly owned by the Colombian state and had initial public offerings in the 2000s.[70]

Formed in 1951 as a national oil company, Ecopetrol is the fourth largest petrochemical company in Latin America and has interests in oil fields throughout Colombia in addition to refinery operations.[71] It also operates ports for the import and export of petroleum and manages a pipeline network in Colombia as an integrated oil company.[72] As of February 2018, it had a market capitalization of USD 107.93 trillion.[73] Initially listed on the Colombian Stock Exchange (BVC) in November 2007, Ecopetrol also subsequently listed shares on the New York (NYSE) and the Toronto Stock Exchanges (TSX)[74] as American Depositary Receipts (ADRs).[75] Currently, the Colombian state owns 88.49 percent of Ecopetrol, with minority shareholders (both individual and institutional) holding 11.51 percent.[76]

Interconexión Eléctrica (ISA) is Colombia's largest power transmission company and was founded in 1967 as a 100 percent state-owned enterprise, or an EICE.[77] ISA held its initial public offering on the BVC in late 2000 in which 115 million shares were sold to 62,016 individual and institutional investors.[78] The company issued a second round of shares in 2002, issuing 120 million shares to 47,746 Colombian

---

68. *Id.*

69. *See* OECD, *supra* note 48, at 32-36.

70. *Id.* at 32-35.

71. *ECOPETL:CB*, BLOOMBERG MARKETS, https://www.bloomberg.com/quote/ECOPETL:CB [https://www.bloomberg.com/quote/ECOPETL:CB] (last visited Mar. 16, 2018).

72. *Id.*

73. *Ecopetrol S.A.*, THE WALL STREET J., http://quotes.wsj.com/CO/ECOPETROL [https://perma.cc/C5UU-MRPV] (last visited Mar. 16, 2018).

74. *Ecopetrol S.A. Informa que Aplicará para Deslistarse Voluntariamente de la Bolsa de Valores de Toronto,* ECOPETROL (Feb. 18, 2016), https://www.ecopetrol.com.co/wps/portal/es/ecopetrol-web/nuestra-empresa/sala-de-prensa/boletines-de-prensa/Boletines/Boletines/Ecopetrol-deslistar-voluntariamente-Bolsa-Valores-Toronto [https://perma.cc/KFM6-DZ7B] (announcing that, in January 2016, Ecopetrol decided to remove its ADRs from the TSX).

75. *See* OECD, *supra* note 48, at 33 (detailing Ecopetrol's ownership structure).

76. *Ownership*, ECOPETROL, https://www.ecopetrol.com.co/wps/portal/web_es/ecopetrol-web/investors/equity/ownership [https://perma.cc/627L-L2AB] (last visited Mar. 16, 2018).

77. *Our Company*, ISA, http://www.isa.co/en/our-company/Pages/default.aspx [https://perma.cc/SB79-HS43] (last visited Mar. 16, 2018).

78. *Acciones para Todos*, DINERO (Mar. 22, 2002), http://www.dinero.com/edicion-impresa/finanzas/articulo/acciones-para-todos/5796 [https://perma.cc/U2RM-MV7N].

investors in a state effort to democratize the Colombian stock market and increase the number of Colombians who own stock.[79] Indeed, the Colombian Constitution requires that "[w]hen the State sells its interest in an enterprise, it will take measures promoting the democratization of the ownership of its shares," with particular attention to encouraging ownership by workers.[80] As of January 2018, the Colombian state owned 51.41 percent of ISA, with 10.17 percent owned by the public utility service company Empresas Públicas de Medellín (EPM) and 38.42 percent owned by private investors.[81]

Isagen was spun-off from ISA pre-IPO in April 1995 to create a separate entity containing ISA's power generating assets.[82] In 2007, the Colombian state instituted a "Share Divestiture Program" through which 20 percent of Isagen's shares were listed on the BVC and issued to approximately 70,000 private minority shareholders.[83] In early 2016, however, Colombia sold its majority stake in Isagen to a Canadian asset manager, fully privatizing the enterprise.[84] As such, Isagen is no longer state-owned.

79. *See Shares Program*, ISA, http://www.isa.co/en/Investors/Pages/shares-program.aspx [https://perma.cc/82TB-B4Y7] (last visited Mar. 16, 2018) (explaining that ISA's second issuance of shares was marketed by the Colombian government as "ISA, Shares for All," an initiative to enable Colombians "to find an opportunity for safe investment").

80. CONSITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art.60; *see also*, MARCIA W. COWARD ET AL., CONSTITUTE PROJECT, COLOMBIA'S CONSTITUTION OF 1991 WITH AMENDMENTS THROUGH 2005 17 (2005), https://www.constituteproject.org/constitution/Colombia_2005.pdf [https://perma.cc/J2Z8-P4YG] (emphasizing the State's effort to promote the democratization of the ownership of shares).

81. *Shareholders*, ISA, http://www.isa.co/en/our-company/Pages/about-us/our-shareholders.aspx [https://perma.cc/8MZN-WQSZ] (last visited Mar. 16, 2018).

82. *Corporate Presentation: March 2016*, ISA 3 (2018), http://www.isa.co/en/press/Documents/our-company/corporate-presentation/corporatepresentation_v10junio2016_EN.pdf [https://perma.cc/HD6E-9G6D].

83. Dec. 4482/06, 15 diciembre 2006, 46.483 DIARIO OFICIAL [D.O.] (Colom.); EMPRESAS PÚBLICAS DE MEDELLÍN E.S.P., PROGRAMA DE ENAJENACIÓN DE LAS ACCIONES QUE EMPRESAS PÚBLICAS DE MEDELLÍN E.S.P. POSEE EN ISAGEN S.A. E.S.P. 39 (2016), https://www.bvc.com.co/recursos/emisores/Prospectos/Acciones/Cuadernillo_Venta_ISAGEN-EPM_2016.pdf [https://perma.cc/EJM8-Z2RY].

84. Oscar Medina & Christine Jenkins Tanzi, *Canada's Brookfield Buys Colombia's Isagen for $2 Billion*, BLOOMBERG, Jan. 13, 2016, https://www.bloomberg.com/news/articles/2016-01-13/canada-s-brookfield-buys-colombia-s-isagen-stake-for-2-billion [https://perma.cc/4C6D-5PXQ].

IV. POLICY CHANNELING AND MITIGATION STRATEGIES IN COLOMBIA

Given that Colombia's listed, mixed-ownership SOEs have consisted only of energy production and management companies, policy channeling in the country has primarily taken the form of energy subsidization.[85] To this end, the Colombian government has used all listed mixed-ownership SOEs to subsidize gasoline, diesel, and electricity.[86]

The Colombian Ministry for Mining and Energy (MME) and Regulatory Commission of Energy and Gas (CREG) regulate Colombia's biofuel prices.[87] Since Colombia began subsidizing petroleum in 1983, it has devised a variety of subsidization techniques.[88] From 1983 to 1996, the Colombian state paid Ecopetrol an explicit subsidy to artificially deflate fuel prices.[89] The MME subsequently reformulated the subsidies, making them implicit subsidies whereby Ecopetrol paid them and the government reimbursed Ecopetrol by reducing the dividends it received from the company.[90] With this subsidy structure, the MME could effectively prevent the subsidy from appearing in the national budget as a fiscal cost, making it more politically sustainable.[91]

Colombia has made halting efforts to reduce, and ultimately eliminate, petroleum subsidies since 1998.[92] The elimination of subsidies has long been politically unpopular, particularly because the subsidies have been *de facto* regressive, almost solely benefitting high- and middle-income individuals (who hold most of the political influence in the country).[93] When the Colombian state first issued Ecopetrol shares to private investors, it again reevaluated its fuel subsidy schemes.[94] Ecopetrol's IPO coincided with a global spike in oil prices and significant appreciation of the

---

85. WORLD BANK, COLOMBIA: RECENT ECONOMIC DEVELOPMENTS IN INFRASTRUCTURE (REDI): BALANCING SOCIAL AND PRODUCTIVE NEEDS FOR INFRASTRUCTURE 17-23 (Vivien Foster ed., 2004), http://documents.worldbank.org/curated/en/315721468770067432/pdf/303790CO.pdf [https://perma.cc/A2F9-4KPR].

86. *Id.*

87. LADY A. GÓMEZ, USDA FOREIGN AGRIC. SERV., COLOMBIA: BIOFUELS ANNUAL REPORT 2016 3 (Michael Conlon ed., 2016), https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Biofuels%20Annual_Bogota_Colombia_8-12-2016.pdf [https://perma.cc/5TTY-4RE5].

88. Helena García Romero & Laura Calderón Etter, *The Political Economy Of Fuel Subsidies in Colombia* 6 (OECD, Working Paper No.61, 2013).

89. *Id.*

90. *Id.* at 7.

91. *Id.*

92. *Id.* at 6.

93. *Id.*

94. *Id.* at 7.

Colombian peso.[95] Simultaneously, Colombia's fuel subsidies grew to untenable levels, reaching a peak of 1.6 percent of GDP in 2005.[96] These factors, combined with pressure from new private investors, led the Colombian state to institute a program to effectively curb its policy channeling through Ecopetrol by reducing the amount of fuel subsidies extracted directly from Ecopetrol's profits.[97]

To this effect, Colombia created the Fuel Price Stabilization Fund (FEPC) as a self-funding mechanism that mitigates volatility in international oil prices.[98] The FEPC was conceived as a price-stabilization fund to smooth oil prices by subsidizing the difference between export parity price and a 60-day moving average.[99] It was created with the explicit purpose of facilitating the elimination of previous price subsidies.[100] However, the FEPC proved an ineffective device to mitigate the impact of Colombia's subsidy-focused policy channeling. First, its creation presented a new form of policy channeling, as the necessary resources to create it were taken from Ecopetrol.[101] Indeed, when international oil prices decreased in 2008, the MME kept prices high and continued to funnel excess Ecopetrol profits into the FEPC.[102] Second, due to consistently rising international oil prices, the FEPC has been unable to effectively carry out its mission.[103] By November 2016, the FEPC had a deficit of 5.4 billion Colombian pesos (approx. USD 1.9 million),[104] up from a deficit of USD 1.2 billion in 2011.[105]

---

95. *Id.* at 7-8.

96. *Id.* at 7.

97. *Id.*

98. *Id.* at 8.

99. OECD, OECD COMPANION TO THE INVENTORY OF SUPPORT MEASURES FOR FOSSIL FUELS 2018 15 (2018).

100. Gabriel Di Bella et al., *Energy Subsidies in Latin America and the Caribbean: Stocktaking and Policy Challenges* 50 (IMF, Working Paper No.15/30, 2015).

101. L. 1151/69, 25 julio 2007, 46.700 DIARIO OFICIAL [D.O.] (Colom.).

102. *Ecopetrol S.A. Prospectus*, SEC 6 (Sept. 3, 2009), https://www.sec.gov/Archives/edgar/data/1444406/000114420409047056/v159727_424b5.htm [https://perma.cc/BK8Y-J6UA].

103. García Romero & Etter, *supra* note 88, at 8.

104. *Ahorro para Estabilizar Precio de Combustibles, una Olla sin Fondo*, EL TIEMPO (Nov. 9, 2016, 2:56 PM), http://www.eltiempo.com/economia/sectores/deficit-del-fondo-de-estabilizacion-de-precios-de-los-combustibles-47661 [https://perma.cc/9TZK-4X5K]; Comunicado de Prensa No. 190, Contraloría General de la República (Nov. 9, 2016), https://www.contraloria.gov.co/contraloria/sala-de-prensa/boletines-de-prensa/-/asset_publisher/Jl4Sa8JTmjbW/content/un-deficit-que-crece-y-eventualmente-tendria-que-pagarse-con-recursos-del-presupuesto-general-de-la-nacion-estudio-de-la-contraloria-revela-hueco-fisc?inheritRedirect=false [https://perma.cc/WP5M-NMW8].

105. Di Bella et al., *supra* note 100, at 50.

To maintain a positive balance sheet, the FEPC relies on the assumption that global oil prices will fall below a predetermined benchmark price at least one-half of the time.[106] The fund funnels excess profit from Ecopetrol when global prices are low and pays out subsidies to the company when global prices are high.[107] This, however, has proven an ineffective strategy that has led to Ecopetrol sustaining the FEPC's finances as global oil prices continued to increase in the years following its formation.[108] To reduce the FEPC's deficit, the Colombian state decreased fuel subsidies from 0.4 percent of GDP in 2011 to 0.1 percent of GDP in 2013.[109]

Electricity subsidies in Colombia have drawn less criticism because Colombia's electricity market has higher private-sector participation than the country's petroleum sector.[110] While state-owned ISA controls most of Colombia's electricity transmission network, the two largest private distributors of electricity in Colombia still account for over half of the market.[111] Moreover, the country's electrical energy production was largely privatized after the state's aforementioned sale of its stake in Isagen.

Subsidies of electricity in Colombia have taken a different form because they are progressive and seek to benefit low-income Colombians.[112] In the mid-1990s, the Colombian government created the Solidarity Fund for Subsidies and Income Redistribution (FSSRI), similar to the FEPC, to cover electricity subsidies to low-income users.[113] Through this fund, Colombians in low-income strata are provided discounted electricity paid for by a 20 percent surcharge added to electricity costs for those in the highest income brackets.[114] The FSSRI has a small deficit that is covered by federal funding, and not profits from ISA.[115] Due to this cross-subsidy structure that does not draw from ISA assets, electricity

---

106. García Romero & Etter, *supra* note 88, at 8.

107. *Ecopetrol S.A. Prospectus*, *supra* note 102, at 6.

108. Ómar G. Ahumada Rojas, *Subsidiar la Gasolina le Está Pegando Más Duro a Ecopetrol*, EL TIEMPO, June 6, 2017, http://www.eltiempo.com/economia/sectores/debate-por-propuesta-de-liberar-precios-de-la-gasolina-96336 [https://perma.cc/2FN6-YPL4].

109. Di Bella et al., *supra* note 100, at 50.

110. *Id.* at 16 n.13 (stating that "almost 90 percent of households benefit from cross-subsidization").

111. *Id.* at 51.

112. *Id.* at 16.

113. Solidarity Fund for Subsidies and Income Redistribution – FSSRI, MINISTERIO DE MINAS Y ENERGIA, https://www.minminas.gov.co/web/ingles/fssri (last visited Mar. 17, 2018).

114. Di Bella et al., *supra* note 100, at 51.

115. *Id.*

subsidies in Colombia have not amounted to policy channeling.[116]

Isagen, which was formerly state-owned, is now an entirely private company.[117] It does not receive any subsidies from the Colombian government.[118] It is, however, still required under Colombian law to participate in a cross-subsidy program, wherein it "collects and transfers 20% of the energy consumption of industrial clients as subsidies to residential clients in [lower socio-economic groups]."[119]

V. PERUVIAN MIXED-OWNERSHIP SOES

Peru's management of SOEs follows a centralized model run by the National Fund for the Financing of Public Sector Companies (FONAFE),[120] a state-owned holding company created in 1999.[121] FONAFE is a public law legal entity organized under the Ministry of Economy and Finance; it is tasked with regulating and fomenting Peru's state-owned entrepreneurial activity.[122] The fund owns shares in 34 companies,[123] with holdings in energy, finance, mining, sanitation, infrastructure and transport, health, media, logistics, and manufacturing.[124]

Of these companies, 12 are listed on the Lima Stock Exchange (BVL), which are six times as many as Colombia.[125] Despite being listed on the

---

116. *Id.* at 16.

117. Medina & Jenkins Tanzi, *supra* note 84.

118. ISAGEN, 2017 MANAGEMENT REPORT 98 (2017).

119. *Id.*

120. WORLD BANK GROUP, *supra* note 28, at 61.

121. *Id.* at 88.

122. Alfredo Bullard, *Peru*, *in* LATIN AMERICAN INVESTMENT PROTECTIONS: COMPARATIVE PERSPECTIVES ON LAWS, TREATIES, AND DISPUTES FOR INVESTORS, STATES, AND COUNSEL 485, 491 (Jonathan C. Hamilton, Ómar E. García-Bolívar & Hernando Otero eds., 2012).

123. *Empresas de la Corporación*, CORPORACIÓN FONAFE, http://www.fonafe.gob.pe/portal?accion=empresas&t=1&o=01&m=3[https://perma.cc/9NK7-WE7D] (last visited Mar. 17, 2018).

124. As categorized by FONAFE, the companies it owns shares in are: Adinelsa, Egasa, Egemsa, Egesur, Electro Oriente S.A., Electro Puno S.A.A., Electro Sur Este S.A.A., Electro Ucayali S.A., Electronoroeste S.A., Electronorte S.A., Electroperú S.A., Electrosur S.A., Hidrandina, San Gabán, and SEAL (Electricity); Banco Agropecuario, Banco de la Nación, Cofide, and Mivivienda S.A. (Finance); Activos Mineros S.A.C. and Perupetro S.A. (Hydrocarbons and Remediation); Sedapal (Santitation); Corpac S.A., Enapu S.A., Sima Iquitos S.R.Ltda., and Sima Perú S.A. (Infrastructure and Transport); ESSALUD, ESVICSAC, Editora Perú S.A., Enaco S.A., FAME S.A.C., SILSA, and Serpost S.A. (Others). *Id.*

125. *See Empresas con Valores Listados*, BOLSA DE VALORES DE LIMA, http://www.bvl.com.pe/mercempresas.html [https://perma.cc/9N4Z-HYHG] (last visited Mar. 17, 2018) (showing that these 12 companies are: Egesur, Electro Puno S.A.A., Electro Sur Este

BVL, many of Peru's listed SOEs have marginal or no private investment.[126] Moreover, some of Peru's listed mixed-ownership SOEs have not enabled individual private investors to purchase shares and have only allowed for a development fund or pension fund to acquire a stake.[127] Unlike Colombia, Peru also has six listed SOEs with 100 percent state ownership:[128] Electrosur,[129] Electroperú, Egesur,[130] San Gabán,[131] Mivivienda,[132] and Sedapal.[133] However, 14.29 percent of Electroperú is owned by the Peruvian state through FONAFE and 85.71 is owned by private investors through the state-owned Consolidated Pension Reserve Fund (FCR).[134] Considering the interests of those invested in the FCR as private investment, three Peruvian SOEs (all electricity companies) have significant private investment: Hidrandina, Electroperú, and SEAL.[135]

Hidrandina was founded in 1983 as a wholly state-owned enterprise.[136] It distributes and sells electricity to over 400,000 Peruvians living in the La Libertad, Ancash, and Cajamarca regions.[137] Hidrandina has tried to

---

S.A.A., Electroperú S.A., Electrosur S.A., Hidrandina, San Gabán, SEAL, Banco de la Nación, Cofide, Mivivienda S.A., and Sedapal); El Banco de la Nación, a state-owned bank, has listed bonds but not stock on the Lima Stock Exchange. As such, it is governed by Peruvian public law and is excluded from this analysis. *Banco de la Nación (Peru) Makes its First Bond Placement*, LEADERS LEAGUE (Dec. 6, 2016), http://www.leadersleague.com/en/news/banco-de-la-nacion-peru-makes-its-first-bond-placement [https://perma.cc/6LY5-DSRD].

126. *See, e.g.*, ELECTRO PUNO, MEMORIA ANUAL 2016 9 (2016)(displaying how the private investment in the company Electro Puno S.A.A. constitutes a mere 0.39 percent); *see also* ELECTRO SUR ESTE, MEMORIA ANUAL 2016 12 (2016)(showing how the private investment holdings in the company Electro Sur Este are only 0.36 percent).

127. *See, e.g.*, COPORACIÓN FINANCIERA DE DESARROLLO S.A. (COFIDE), EVALUACIÓN PRESUPUESTAL Y FINANCIERA – AL IV TRIMESTRE 2017 1 (2017).

128. RICHARD FREDERICK, OECD, THE GOVERNANCE OF MIXED-OWNERSHIP ENTERPRISES IN LATIN AMERICA: DISCUSSION PAPER 5 (Daniel Blume ed., 2012).

129. ELECTROSUR S.A., MEMORIA ANUAL PROYECTO 2016 12 (2016).

130. EGESUR: EMPRESA DE GENERACIÓN ELÉCRICA DEL SUR S.A., MEMORIA INSTITUCIONAL 2016 11 (2016).

131. EMPRESA DE GENERACIÓN ELÉCTRICA SAN GABÁN S.A., MEMORIA ANUAL 2016 6 (2016).

132. FONDO MIVIVIENDA, EVALUACIÓN PRESUPUESTAL Y FINANCIERA: MES DE ENERO 2018 1 (2018).

133. SEDAPAL, EVALUACIÓN PRESUPUESTAL Y FINANCIERA: MES DE ENERO 2018 1 (2018).

134. ELECTROPERÚ, MEMORIA ANUAL AÑO 2016 5 (2016).

135. *Id.*; HIDRANDINA, PROYECTO MEMORIA ANUAL 2016 7 (2016); SOCIEDAD ELÉCTRICA DEL SUR OESTE S.A. (SEAL), EVALUACIÓN PRESUPUESTAL Y FINANCIERA – AL IV TRIMESTRE 2017 1 (2017).

136. *Nosotros*, HIDRANDINA, http://www.distriluz.com.pe/hidrandina/index.php/nosotros [https://perma.cc/7GPP-XQH3] (last visited Feb. 20, 2019).

137. *Id.*

privatize, albeit unsuccessfully, since 1998 when it was listed on the Lima Stock Exchange (BVL).[138] In 1998, the Peruvian State sold a 30 percent stake in the company to a private investment company.[139] The company, however, failed to raise sufficient funding for the acquisition and ultimately negotiated a deal with FONAFE to return its stake in 2001.[140] Currently, Hidrandina is 95.18 percent owned by FONAFE and 4.82 percent owned by private investors.[141] All current private investors own a class of shares originally issued in 1998, which then represented 5.3 percent of the company's capital.[142]

Founded in 1905 as an entirely state-owned entity, SEAL (*Sociedad Eléctrica del Sur Oeste S.A.*) engages in activities related to the public provision of electricity in Peru's Arequipa region.[143] The company principally distributes and sells electrical energy while also generating electricity in remote areas of the region.[144] SEAL was initially listed on the BVL in 2003.[145] 88.72 percent of SEAL belongs to FONAFE and 11.28 percent is held by private investors.[146] Of the 11.28 percent of the company held by minority shareholders, 3.61 percent is held by those who own less than 1 percent of the company, and 7.67 percent is held by those owning between 1 and 5 percent.[147]

Considering stakeholders in the Peruvian Consolidated Pension Fund (FCR) as private, minority shareholders, Electroperú has, by far, the highest private investment rate of any mixed-ownership SOE in Peru (85.71 percent).[148] The FCR is an institutional investor that manages a portfolio on behalf of its participants.[149] By its investment policies, the

138. HIDRANDINA S.A., NOTAS A LOS ESTADOS FINANCIEROS AL 30 DE SEPTIEMBRE DE 2012 1 (2012); *Peru's Privatization Plan Falters, Misses $500 Million Target by Half*, WALL ST. J. (Jan. 3, 2002), https://www.wsj.com/articles/SB1010094973885126840 [https://perma.cc/S2TY-VLMT].

139. HIDRANDINA, *supra* note 136.

140. *Hidrandina*, PUBLIC SERVICES INTERNATIONAL RESEARCH UNIT, http://www.psiru.org/companies/hidrandina.html [https://perma.cc/6W9R-EKYY] (last visited Mar. 17, 2018).

141. HIDRANDINA, *supra* note 136.

142. *Id.*

143. *SEAL*, CORPORACIÓN FONAFE, https://www.fonafe.gob.pe/empresasdelacorporacion/seal [https://perma.cc/FLC9-VFMM] (last visited Mar. 17, 2018).

144. *Id.*

145. *Sociedad Eléctrica del Sur Oeste S.A. (SEAL)*, BOLSA DE VALORES DE LIMA, http://www.bvl.com.pe/inf_corporativa70355_U0VBTERDMQ.html [https://perma.cc/S4YT-2WDL] (last visited Feb. 20, 2019).

146. SOCIEDAD ELÉCTRICA DEL SUR OESTE S.A. (SEAL), *supra* note 135.

147. BOLSA DE VALORES DE LIMA, *supra* note 145.

148. Although the FCR owns 85.71 percent of Electroperú, FCR's shares in the company are managed by FONAFE. *See* ELECTROPERÚ, *infra* note 152.

149. Política de Inversión Financiera del FCR 2017 4 (2017), https://www.onp.gob.pe/se

FCR is obligated to provide its participants a rate of return higher than the prevailing interest rate, which was 5.03 percent as of 2017.[150] To this aim, the fund's primary goals are (1) growth; (2) ensuring financing of the pension system; (3) capital protection; (4) security; and (5) transparency.[151] This growth requirement, and these goals, present significant risk of policy channeling as they come into conflict with policy aims of the Peruvian state.

Electroperú's primary business objective is to generate, transmit, and sell the electricity produced by its hydroelectric and thermal power plants.[152] The company was created by statute in 1972 as an entirely state-owned operation subject to public law.[153] In 1981, its legal status was converted to a state-owned company subject to private law.[154] Since September 2006, 10 percent of Electroperú's shares have been listed on the Lima Stock Exchange, all of which are currently owned by the FCR, a state-owned pension fund.[155]

Electroperú's private investors own shares of the company through the FCR, whose Electroperú shares are managed by FONAFE.[156] FONAFE retains 100 percent of the voting rights.[157] As such, minority shareholders have very limited rights within the corporation. Despite this ownership structure, the threat of policy channeling remains because FONAFE has greater incentives to pursue policy-oriented objectives, and the FCR aims to maximize its shareholders' returns.

VI. POLICY CHANNELING AND MITIGATION STRATEGIES IN PERU

Given Peru's centralized model for SOE management, Peru's efforts to mitigate policy channeling are largely conducted through FONAFE.[158]

---

ccion/centro_de_documentos_PTE/DocumentosFCR/Pol%C3%ADtica%20de%20Inversi%C3%B3n%20Financiera%20del%20FCR%202017.pdf [https://perma.cc/MH6K-4SS].

150. *Id.* at 19.

151. *Id.* at 9.

152. *¿Quiénes Somos?*, ELECTROPERÚ, http://www.electroperu.com.pe/ElectroWebPublica/PaginaExterna.aspx?id=1&modo=submenu&idioma=ESPANOL [https://perma.cc/E3EA-Y7EX] (last visited Mar. 17, 2018).

153. *Nuestra Historia*, ELECTROPERÚ, http://www.electroperu.com.pe/ElectroWebPublica/PaginaExterna.aspx?id=8&modo=submenu&idioma=ESPANOL [https://perma.cc/L7EJ-CY2L] (last visited Mar. 17, 2018).

154. *Id.*; Dec. 41, 4 Mar. 1981 (Peru) (stating that the reason for this conversion was to allow Electroperú to act more quickly and with more independence).

155. ELECTROPERÚ, *supra* note 134, at 5.

156. *Id.* at 33.

157. FREDERICK, *supra* note 128.

158. WORLD BANK GROUP, *supra* note 28, at 62.

FONAFE has established the Framework Code of Good Corporate Governance of SOEs, which requires each SOE to formulate its own governance standards based on FONAFE's structure.[159] It also has broad authority to manage companies within its portfolio.[160] For example, FONAFE appoints all board members for its majority-owned companies,[161] approves their consolidated budgets, and manages their resources as a right stemming from majority ownership.[162]

Similar to Colombia, the three Peruvian listed SOEs with meaningful private investment are all within the energy sector. As such, the risk of policy channeling is in the form of energy subsidies. SOEs contribute a significant proportion of Peru's electricity, with Electroperú generating 20.7 percent, Hidrandina distributing 11.49 percent, and SEAL distributing 5.77 percent in 2016.[163] Like Colombia, Peru has a cross-subsidy program for electricity, which is run through the Electricity Social Compensation Fund (FOSE).[164] The FOSE was created in 2001 through Law No. 27510,[165] establishing a program through which users consuming less than 100 kWh per month receive discounted rates subsidized by higher rates paid by users of more than 100 kWh.[166]

Since its creation, the FOSE has been expanded to benefit more Peruvians, with particular attention to those living in rural areas.[167] Additionally, the FOSE encourages private investment in electricity by providing subsidies to cover certain equipment and operational costs for those investing in rural electrification.[168]

FOSE is financed entirely through regularly updated surcharges paid by large electricity users based on a percentage of their sales projections.[169] As such, it does not represent any net cost to the Peruvian state or to Peruvian SOEs and the interests of private investors in Peruvian mixed-

---

159. *Id.*

160. *Id.*

161. WORLD BANK GROUP, *supra* note 28, at 173.

162. WORLD BANK, *supra* note 61, at 114.

163. MINISTERIO DE ENERGÍA Y MINAS, CAPÍTULO 9: PARTICIPACIÓN DE LAS EMPRESAS ESTATALES Y PRIVADAS EN EL MERCADO ELÉCTRICO 3-7 (2016).

164. IBP, INC., PERU: ENERGY POLICY, LAWS AND REGULATIONS HANDBOOK, VOLUME 1: STRATEGIC INFORMATION AND BASIC LAWS 63 (2015).

165. L. 27510, 28 agosto 2001, DIARIO OFICIAL EL PERUANO [D.O.] (Peru).

166. IBP, INC., *supra* note 164.

167. L. 28307, 28 julio 2004, DIARIO OFICIAL EL PERUANO [D.O.] (Peru); L. 30319, 22 abril 2015, DIARIO OFICIAL EL PERUANO [D.O.] (Peru).

168. WORLD BANK GROUP, THE ELECTRICAL SOCIAL COMPENSATION FUND (FOSE) – PERU, https://ppp.worldbank.org/public-private-partnership/library/electrical-social-compensation-fund-fose-peru [https://perma.cc/MAC6-MM78] (last visited Mar. 17, 2018).

169. L. 27510, *supra* note 165, art.2.

ownership SOEs are not harmed.[170]

VII. COMPARISONS: STRUCTURE, FINANCES, AND PRIVATIZATION EFFORTS

Colombia and Peru diverge in their management of listed SOEs and policy channeling along three primary axes: management centralization, the financial structure of energy subsidies, and tolerance for private minority involvement in SOEs.

Colombia manages its SOEs through a largely decentralized model in which sectoral ministries (notably the Ministry for Mining and Energy) exercise the most influence.[171] Notwithstanding such ministry involvement, Colombia's National Planning Department (DNP) oversees the physical operations of the country's SOEs. The DNP evaluates all SOE investments that involve federal money, maintains SOE financial records, and monitors SOE performance.[172] Colombian SOEs are free to develop their own financial and performance objectives, though these objectives must align with the country's National Development Plan.[173] However, because this plan provides very broad guidelines, SOEs are largely able to establish their own corporate strategies with little governmental interference.[174]

In contrast, Peru's SOE management is highly centralized around the FONAFE.[175] FONAFE retains tight control over many aspects of the governance of Peruvian SOEs, including mixed-ownership companies. Though the Organization of Economic Co-operation and Development (OECD) has noted a trend among its members to increasingly centralize SOE management, it "accepts that there is no particular ownership structure that fits the needs of all countries."[176]

Policy channeling in Colombia, and the potential for the practice in Peru, primarily takes the form of energy subsidization: in Colombia this encompasses gas, diesel, and electricity subsidies while in Peru it is limited to electricity subsidies.[177] As such, electricity subsidies in both countries

---

170. *Id.*

171. DANIEL BLUME, OECD, OWNERSHIP OVERSIGHT AND BOARD PRACTICES FOR LATIN AMERICAN STATE-OWNED ENTERPRISES 3 (2012).

172. WORLD BANK, *supra* note 61, at 98.

173. *Id.* at 99.

174. *Id.*

175. BLUME, *supra* note 171.

176. *Id.* at 4.

177. Peruvian state-owned petroleum companies do not have meaningful private investment. WORLD BANK, *supra* note 85, at 17-23; WORLD BANK GROUP, *supra* note 168.

largely benefit low-income populations. They are relatively simple to administer and are given to residents based on the average income of the region in which they live (Colombia)[178] or their level of electricity usage (Peru).[179] Moreover, because both countries have structured electricity subsidies as cross-subsidies paid for by consumers that are either wealthier or consume more electricity, they do not amount to significant policy channeling.[180] It is noteworthy, however, that Peru has structured its electricity subsidies to be fully self-sustaining whereas Colombia's subsidy program runs a small deficit and relies on federal funding.[181]

Given the greater amount of capital needed to sustain them, Colombia's gas and diesel subsidies present a more significant issue; this is despite reforms to fund them, at least superficially, through the FEPC and not directly from Ecopetrol profits.[182] However, in a recent statement, the Deputy Comptroller of the Ministry of Mines and Energy stated that, in practice, Ecopetrol continues to sustain the FEPC's finances through a separate account from which the government withdraws funds.[183] It appears then, at least in part, that Colombia's efforts to mitigate this policy channeling are mere window dressing.

Colombia has also shown a higher tolerance for private involvement in its SOEs than Peru, and Colombian mixed-ownership SOEs provide more equitable treatment to minority shareholders than those in Peru.[184] As Colombia has sought to attract private investment, it has publicly demonstrated its commitment to minority shareholder protection.[185] For example, in 2007 Ecopetrol issued a "Declaration of the Nation in its Capacity as Majority Shareholder" to concretize its protection of minority shareholders with regards to dividends, decision-making processes, and information access.[186] The company also has bylaws which allow minority shareholders to participate and vote in the Shareholders General Meeting, receive dividends, have timely access to the company's public information, request calls for extraordinary meetings, and ask for authorization to carry

---

178. Di Bella et al., *supra* note 100, at 51.

179. L. 27510, *supra* note 165.

180. Di Bella et al., *supra* note 100, at 50; IBP, INC., *supra* note 164, at 63.

181. Di Bella et al., *supra* note 100, at 51.

182. MARÍA CATALINA ESCOBAR, ECOPETROL S.A., ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(D) OF THE SECURITIES EXCHANGE ACT OF 1934 54 (2015).

183. Ahumada Rojas, *supra* note 108.

184. *See* PENFOLD, ONETO & RODRÍGUEZ GUZMÁN, *supra* note 43, at 55-58 (scoring SOEs as follows: Ecopetrol: 10; ISA: 10; Isagen: 10; Electroperú: 5).

185. OECD, *supra* note 48, at 60.

186. MAURICIO CÁRDENAS SANTAMARÍA, ECOPETROL, DECLARACIÓN DE LA NACIÓN EN SU CALIDAD DE ACCIONISTA MAYORITARIO DE ECOPOETROL S.A. (2018).

out specialized audits and to prepare proposals related to the company's good corporate governance.[187]

Similarly, Peru has administrative laws that require State-owned Enterprises with minority shareholder participation to establish internal policies to ensure the fair treatment of shareholders, particularly regarding voting rights and access to company information.[188] Additionally, FONAFE has an internal policy outlining the rights of minority shareholders in its companies, which are limited.[189] However, these protections are weaker than those that Colombia provides and do not apply to private investments through pension funds like the FCR.[190]

Though Peru has more listed SOEs than Colombia, the majority of Peru's listed SOEs are 100 percent state-owned versus the mixed-ownership structure more commonly seen in Colombia.[191] Moreover, of Peru's few mixed-ownership SOEs, the majority have insignificant private ownership.[192] For the handful of listed mixed-ownership SOEs having significant private stakeholders, the Peruvian state has retained the majority of shareholder rights and has been reluctant to allow minority shareholders voting rights, limiting them by allowing private investment through pension funds.[193] In contrast, Colombia has actively pursued the issuance of SOE shares to private investors, including successfully listing securities on stock exchanges in the United States, Canada, and Germany—all the while taking steps to protect minority shareholder rights (or give the appearance thereof).[194]

---

187. *Bylaws of Ecopetrol S.A.*, *art.10*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/Archives/edgar/data/1444406/000114420418021353/tv489450_ex1-1.htm [https://perma.cc/32BH-59QC].

188. WORLD BANK, *supra* note 61, at 24.

189. *See* Santiago Chaher, OECD, BOARD PRACTICES AND FINANCING FOR LATIN AMERICAN STATE-OWNED ENTERPRISES 33 (Daniel Blume ed., 2015) (stating that "minority shareholders are consulted about recapitalization decisions"); *see also* WORLD BANK GROUP, CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES: A TOOLKIT 173 (2014) (stating that "Peru's FONAFE . . . appoints all board members for companies in its portfolio").

190. *See* FREDERICK, *supra* note 128, at 5 (discussing how 78% of Electro Peru is owned by a pension fund, but the state still retains 100% of the voting rights).

191. *See* CORPORACIÓN FONAFE, *supra* note 123 (describing the Peruvian Companies that are state-owned).

192. *Id.*

193. *See, e.g.*, FREDERICK, *supra* note 128 (noting, for example, that 78% of Electroperú is owned through the state-owned pension scheme and that this constitutes all of the company's private ownership).

194. *ECHA:GR (ECOPETROL SA)*, BLOOMBERG MARKETS, https://www.bloomberg.com/quote/ECHA:GR [https://perma.cc/Z66V-R2BN] (last visited Mar. 17, 2018) (displaying Ecopetrol's share price on a German stock exchange); *see also Ecopetrol S.A. (EC)*, YAHOO! FINANCE, https://finance.yahoo.com/quote/Ec?ltr=1 [https://perma.cc/2P57-VPD5]

VIII. REASONS FOR REFORM

As Peru and Colombia seek to expand their economies, both nations should prioritize the reform of mixed-ownership SOEs and the mitigation of policy channeling. Within Latin America, Peru and Colombia (along with Brazil) are leaders in reporting the best overall SOE corporate governance practices.[195] Both countries, however, should adjust their corporate governance strategies to best protect minority shareholders in mixed-ownership SOEs and thereby encourage investment.

Corporate governance is a critical factor in emerging market investment decisions, and good corporate governance is key to attracting foreign capital.[196] A recent International Finance Corporation survey found that——out of 29 respondent emerging market investment firms——all reported that "governance was part of their pre-investment due diligence on a target firm."[197] Additionally, the survey highlighted that emerging markets investors believe that, in countries where corporate governance standards are relatively weak, strong firm-level governance can make up the difference.[198] Most importantly, the survey found that investors are willing to pay a premium to invest in emerging market firms with better corporate governance.[199] To this aim, as Peru and Colombia look to inject more private capital into SOEs, governance improvements must take precedence.

In addition, improving corporate governance regimes may grant countries access to multinational organizations that provide an array of political and economic benefits. Notably, both Peru and Colombia have cited a desire to accede to the OECD as a driving force behind some corporate governance reforms.[200]

(last visited Mar. 17, 2018) (showing Ecopetrol's share price on the NYSE); *see also Ecopetrol S.A. informa que Aplicará para Deslistarse Voluntariamente de la Bolsa de Valores de Toronto*, *supra* note 74 (protecting minority shareholders' rights while efficiently clearing shares issued and sold).

195. *See* PENFOLD, ONETO & RODRÍGUEZ GUZMÁN, *supra* note 43, at 37 (discussing reporting practices and trends among SOEs).

196. VIKRAMADITYA KHANNA & ROMAN ZYLA, SURVEY SAYS . . . CORPORATE GOVERNANCE MATTERS TO INVESTORS IN EMERGING MARKET COMPANIES 1 (2017).

197. *Id.* at 6.

198. *Id.* at 9.

199. *Id.* at 6 (noting that "more than half of the investors surveyed said that they would be willing to pay at least 10 percent more for a better-governed firm, compared to a similar firm in the same emerging market that lacks strong governance. While 38 percent responded that they would pay at least 20 percent more for shares in such a company, some few suggested that would pay even more—closer to a 40 percent premium.")

200. Ulric Rindebro, *Peru Eyes OECD Corporate Governance Standards*, BNAMERICAS

With membership in an organization like the OECD comes economic, reputational, and political benefits. In anticipating benefits that Colombia and Peru may receive after being offered OECD membership, it is helpful to assess the experiences of the only other two current Latin American OECD members: Mexico and Chile.[201] Mexico joined the OECD in 1994 and Chile became a member in 2010.[202] After joining the organization, both Mexico and Chile received a significant increase in foreign direct investment.[203] Additionally, both countries showed an improved investor perception as measured by interest rates on their respective sovereign debt.[204]

Apart from the resultant benefits of OECD membership, the accession process itself provides benefits. First, it provides countries the opportunity for close inspection from a third party, aiding them in charting development and reform pathways.[205] Second, it provides politicians with domestic political cover for pushing reforms.[206] Third, the accession process cements a political commitment to OECD values, which promotes

(Jan. 17, 2018), http://www.bnamericas.com/en/news/banking/peru-eyes-oecd-corporate-governance-standards [https://perma.cc/XMD9-ZSUT] (emphasizing that "Peru wants to learn from OECD's corporate governance expertise with the aim of incorporating such standards into local regulations and rais[ing] its standing in the international investor community"); OECD, CORPORATE GOVERNANCE IN COLOMBIA 3-4 (2017), http://dx.doi.org/10.1787/9789264281134-en [https://perma.cc/5LC5-RDN3].

201. *See OECD Strengthens Engagement with Partner Countries During Annual Ministerial Meeting*, OECD (June 1, 2018), http://www.oecd.org/countries/lithuania/oecd-strengthens-engagement-with-partner-countries-during-annual-ministerial-meeting.htm [https://perma.cc/P8PN-RVQR] (noting that Mexico and Chile are the only two member countries from Latin America at present, but Colombia has been invited to join, membership talks with Costa Rica are ongoing, and Argentina, Brazil, and Peru have all submitted membership requests).

202. *Colombia's Accession to the OECD: Expected Benefits in Light of the Mexican and Chilean Experiences*, SEEKING ALPHA (Jul. 26, 2016), https://seekingalpha.com/article/3991674-colombias-accession-oecd-expected-benefits-light-mexican-chileanexperiences?page=2 [https://perma.cc/6LFH-F8U5].

203. *See id.* (noting that while there is correlation between a country's accession to the OECD and an increase in foreign direct investment, causation has not been proven; Mexico joined OECD in the same year that it became a member of the North American Free Trade Agreement (NAFTA) and Chile experienced a commodity boom in the same year it joined the OECD).

204. *See id.* (stating that "[f]or Mexico, we observe a sustained decrease before and after induction, interrupted by a spike which can be attributed to the 1994 economic collapse. In the case of Chile, again we observe a decrease in average interest rates interrupted by a spike corresponding to the 2008 global crisis.").

205. *Id.*

206. *Id.*

a country's reputation among international emerging market investors.[207] There is also significant prestige linked to "[b]ecoming a member of the so-called rich countries' club."[208] Given Colombia and Peru's historic political and economic volatility, this commitment to the OECD, domestic actors, and the global economic community is particularly impactful.

After years of discussion and reform, Colombia was invited to join the OECD in May 2018.[209] The nation will officially become the organization's newest member once its parliament ratifies the OECD entry instruments and formally delivers them to the national government.[210] Notably, in the OECD's announcement of this membership invitation, it underscored "major reforms . . . [of the] corporate governance of state-owned enterprises" as a critical component of the accession process.[211]

While not as far along in the process, Peru has also engaged with the OECD in an OECD Country Program to institute reforms necessary to begin accession talks.[212] Notably, the OECD recognizes that "SOEs are generally under state ownership at least in part to address public policy objectives."[213] To curb the impact of this policy channeling, the OECD recommends that SOEs provide adequate disclosure to private investors as well as regular reports on stakeholder relations with special attention to labor, creditors, and other affected communities.[214]

---

207. *Id.*

208. Gabriela Lecaro Calle, *The Question of Latin America and OECD Membership*, GLOBAL RISK INSIGHTS (Aug. 6, 2016), https://globalriskinsights.com/2016/08/oecd-membership-question-not/ [https://perma.cc/J569-6ND5].

209. *OECD Countries Agree to Invite Colombia as 37th Member*, OECD (May 25, 2018), http://www.oecd.org/newsroom/oecd-countries-agree-to-invite-colombia-as-37th-member.htm [https://perma.cc/37TG-KZJ6].

210. *Colombia's Santos Signs OECD Entry Document*, AGENCIA EFE (May 30, 2018), https://www.efe.com/efe/english/world/colombia-s-santos-signs-oecd-entry-document/50000262-3633039 [https://perma.cc/CZ4M-ECQL.

211. *See supra* note 209 (stating that "[a]s part of its accession process, Colombia has been subject to in-depth reviews by 23 OECD Committees and has introduced major reforms to align its legislation, policies and practices to OECD standards, including on labour issues, the reform of its justice system, corporate governance of state-owned enterprises, anti-bribery, trade as well as new national policies on industrial chemicals policy and waste management.").

212. *A Mutually Beneficial Relationship*, OECD, http://www.oecd.org/latin-america/countries/peru/ [https://perma.cc/R6B8-JJR5] (last visited Mar. 17, 2018); *see also* Alonso Morán de Romaña, *Productivity Provides the Key to Peru's Bid for OECD Membership*, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE LATIN AMERICA AND CARIBBEAN CENTRE (Jan. 25, 2018), http://blogs.lse.ac.uk/latamcaribbean/2018/01/25/productivity-provides-the-key-to-perus-bid-for-oecd-membership/ [https://perma.cc/6LYP-UKBM](discussing the challenges that Peru must overcome to be admitted to the OECD).

213. BLUME, *supra* nota 171, at 13.

214. OECD, OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED

IX. PROPOSED REFORMS ON THE PATH TO DEVELOPMENT

As Peru and Colombia devise strategies to limit policy channeling and reform the corporate governance of their respective mixed-ownership SOEs, they must look both to international guidelines and to each other as examples.

To guide emerging markets as they devise and reform corporate governance standards, the OECD issued Guidelines on the Corporate Governance of State-Owned Enterprises ("Guidelines") in 2015.[215] The Guidelines provide a broad set of "recommendations to governments on how to ensure that SOEs operate efficiently, transparently and in an accountable manner."[216] Section IV of the Guidelines, "Equitable treatment of shareholders and other investors", is particularly well-suited to address the issues stemming from policy channeling in Peru and Colombia.[217]

As an overarching principle, Section IV of the Guidelines recommends that governments "ensure that all shareholders are treated equitably," proposing a high degree of transparency and communication with minority shareholders.[218] Furthermore, the Guidelines advise allowing minority shareholders to participate in corporate decisions and emphasize that "[w]here SOEs are required to pursue public policy objectives, adequate information about these should be available to non-state shareholders at all times."[219]

In this endeavor, Colombia has succeeded more than Peru. Indeed, in a 2015 study by the Development Bank of Latin America, Ecopetrol, ISA, and Isagen all received perfect marks for the equitable treatment of minority shareholders, while no Peruvian SOE scored above 5 (of 10).[220]

Additionally (and perhaps because of this), Colombia has been more successful than Peru in attracting private investment in its SOEs.[221] To attract more private investment in its SOEs, Peru should guarantee minority

---

ENTERPRISES 23 (2015).

215. *Id.* at 11 (stating that "[t]he Guidelines aim to: (i) professionalise the state as an owner; (ii) make SOEs operate with similar efficiency, transparency and accountability as good practice private enterprises; and (iii) ensure that competition between SOEs and private enterprises, where such occurs, is conducted on a level playing field").

216. *Id.* at 7.

217. *Id.* at 22.

218. *Id.*

219. *Id.*

220. *See* PENFOLD, ONETO & RODRÍGUEZ GUZMÁN, *supra* note 43, at 55-58 (comparing SOEs across different countries and industries).

221. *See, e.g.*, *Our Shareholders*, ISA, http://www.isa.co/en/our-company/Pages/about-us/our-shareholders.aspx [https://perma.cc/CM4X-7Y6B] (last visited Mar. 16, 2018) (discussing the ownership structure of ISA).

shareholders more rights. For example, FONAFE currently retains the right to appoint all board members for companies in its portfolio.[222] It has also been reluctant to issue significant numbers of shares on stock exchanges or allow shares in its SOEs to be freely traded. By maintaining tight control of its SOEs, and thus limiting incoming private investment, Peru limits its ability to develop economically.

Simultaneously, however, to protect and attract minority investments Colombia should make the politically difficult decision to allow petroleum prices to vary more according to market conditions. Moreover, Colombia should ensure that any subsidy program it institutes is self-sustaining and financially separate from SOE revenue. Doing so would allow it to curb, or eliminate, policy channeling through Ecopetrol and attract additional funding from private investors.

As Peru and Colombia continue to privatize their respective SOEs, both countries look to the OECD for direction. They should, additionally, look to each other and adopt specific practices that have proven effective in minimizing policy channeling and attracting private investment.

Though both Peru and Colombia are regional leaders in the corporate governance of SOEs, both countries have additional steps ahead of them to continue to grow economically and attract private investment. By entirely separating the state's ownership function from its public policy objectives and providing minority shareholders with protected rights, both countries can further utilize mixed-ownership SOEs to drive growth.

222. WORLD BANK GROUP, *supra* note 28, at 173.