REPORT ON LEGAL SECURITY AND PROTECTION FOR INVESTMENT IN LATIN AMERICA

—A Specific consideration of the regulated energy and telecommunications sectors—

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1. EXECUTIVE SUMMARY

Many of the major institutional reforms launched over the last few years in different countries of America and Europe, have directed their efforts towards the creation of transparent and reliable institutions to ensure greater protection and legal security for national and international investment.

In an ever more globalised and competitive context, the trust of investors depends in large measure on the quality and strength of the institutions offering adequate regulatory mechanisms for their protection and guarantee.

Investors' trust allows for the financing of important telecommunications projects necessary for citizens' welfare, reduction of poverty and generation of more equality of opportunities. And, at the same time, the necessary guarantees are required to protect small, medium and large investors who direct family savings, pension funds and resources towards these projects, which ensure the most fundamental social rights, by means of a fully interconnected international stock market.

For this reason, in 1995, the Organization for Economic Cooperation and Development (hereinafter referred to as "**OECD**") published the first international declaration of regulatory standards by means of the *Council Recommendation for Improvement in the Quality of Government Regulation* for member countries. Its objective was to examine the importance and necessity of reforms in the regulated sectors of member countries. Reforms that ultimately seek to rebuild legitimacy and citizens' trust in the Institutions.

The OECD defends the drawing up of public policies based on empirical knowledge and in analysis of data that make it easier for citizens to evaluate the efficiency and appropriateness of their institutions. In this context, in 2012, the OECD published the conclusions of an important preliminary work of reflection in the field of regulatory policy and governance. Practical conclusions designed to assess and improve the quality of regulatory systems and institutions.

The recommendations of the OECD Council on Regulatory Policy and Governance are the first comprehensive international statement on regulatory policy since the onset of the

global economic crisis. In this document the OECD put forward a set of important recommendations on the principles and mechanisms which are needed to improve the competitiveness of public institutions. Improvements which need to move toward the highest standards in the design, implementation and revision of their regulatory frameworks, to strengthen the capacity and quality of public power relating to the regulation of the most strategic sectors with regards to economic and social progress.

There are multiple areas for improvement of the regulatory institutions. Among these are clarity, transparency and open participation through public consultation processes in the prior design of the different alternatives of regulation; review, assessment and periodic updating of standards and regulatory institutions; in-depth analysis of the impact of regulatory strategies; accountability mechanisms; publication of studies regarding the performance of the regulation applied, highlighting, in his case, shortcomings of the system and modification requirements; the possibility of questioning the legality of regulatory decisions in accordance with the principles of due process and access to national and international mechanisms of justice, including those aimed at preventing any form of expropriation without just cause and without prior payment of corresponding, fair price in favour of the investors.

In addition, amongst the distinct areas for improvement of regulatory institutions, particular attention is given because of its prominence, to the section dedicated to **independent regulatory authorities**. The OECD Working Group deems it necessary to establish a body in each country which is responsible for regulatory overseeing as a whole, in accordance with the general legal framework which sets out the regulatory lines. An authority that actively monitors the procedures and objectives of the States' regulatory policy. In all events, this body must have one essential feature of the utmost importance: it must be an independent authority, backing effective of guarantees of neutrality and autonomy in the face of undue interference of a political nature.

The independent regulation and supervision authority, in order to be as such, must be endowed with separate legal status which specifies, at least, its composition and the guarantees of stability for those who make up its bodies and functions, the precise instruments of regulation and supervision, the method of decision-making and resources or claims for review that are possible within their framework. Also, it should include special mechanisms to guarantee the necessary quality control of regulatory projects and their review, evaluation and ongoing updating.

The report of the OECD repeatedly draws attention to the importance of generating public trust through these independent regulatory authorities, whose impartiality minimizes regulatory risk for national or international investors. The creation a regulatory entity which

is independent of governments and of those stakeholders it regulates, may instil greater trust in and credibility regarding the justice, fairness and correction of the decisions by the regulator. This is particularly relevant when technical decisions have significant financial and market implications and they are required to maintain the necessary distance with regard to the political process, electoral contests and populist temptations which affect all democracies however mature they may be, as well as any suspicion of undue interference.

The recommendations of the OECD indicate that it should be considered that the conditions exist to create or strengthen independent regulatory authorities in three situations, which are present in several of the countries analysed, as we will confirm throughout this Report. These three situations that make it necessary to enhance the independence of regulation and supervision bodies of the regulated sectors are as follows:

- When there is a need for functional independence or competitive neutrality in order to preserve public trust;
- If both the government and private bodies are regulated under the same framework and therefore competitive neutrality is required; and
- When the decisions by regulatory bodies may have significant economic effects on the parties regulated and it is necessary to protect the body's impartiality.

This general framework has inspired many of the reforms of the regulatory system in the Latin American countries which have assumed the task of strengthening the transparency and efficiency of their markets and increasing encouragement and protection of foreign investment, as state policy.

This report provides an outline summary regarding the subject in some of the Latin American countries which are recipients of international capital, paying special attention to two of the most dynamic and representative sectors, which are energy and telecommunications. Sectors in which these countries have taken the decision to create a *stock* of fixed capital - a generator of resource flows in the medium and long term - through stable immobilization of resources that come from surplus savings at a regional and international level. Sensitive sectors in which the solidity of public institutions of governance to ensure the correct functioning of transactions is at stake; the creation of clear, stable and properly implemented frameworks; the existence of effective remedies for the resolution of disputes, and the solidity of the tangible assurances in the face of confiscation, seizure or expropriation of any nature.

These strategic or regulated sectors, in particular energy and telecommunications, are therefore an excellent test of the correct functioning of economic, social and political rights

in all the region's contexts of governance.

In relation to every country surveyed, three aspects have been studied, with special emphasis on the energy and telecommunications sectors:

- Their incorporation into the multilateral free trade system and protection of investments, property and investment guarantee mechanisms and international mediation and conflict resolution;

- The national regulation and supervision institutions for the energy and telecommunications markets. It should be pointed out that repeated deficiencies in the configuration and performance of regulatory and supervisory institutions in recent years have led to the situation that many Latin American countries have witnessed a process of assessment and restructuring of their regulatory and supervisory institutions, and

- Some significant cases which reflect the perception of the legal security and protection of foreign investment and allow observation of the current performance of governance in the regulated sectors.

In relation to the second of the aspects to be dealt with, it should be noted that when we analyse the instances of regulation and supervision we are dealing with systems which are heterogeneous, pragmatic and in constant development which, in general terms, operate (or intend to do so) with levels of organizational, functional and financial autonomy superior to those which the vast majority of the other administrative entities may count on.

In some cases, the selection of members of governing bodies is carried out through a public, transparent and competitive process with extensive ongoing scrutiny, in which the Government and the Parliament participate, in accordance with strict selection protocols previously established. In addition, the directors remove themselves from the discretionary system of free appointment and removal and are covered for a pre-established fixed period, which determines the minimum duration of the mandate. This binding term for the Government, from an organizational point of view, constitutes the most important feature which determines its autonomous relations in the face of undue interference by Government.

As a corollary to the above, that is to say of the existence of a predetermined period of mandate for senior managers of the entities of regulation and supervision, the second of the characteristics that most deeply determines or affects the relations between the

Government and these institutions is that the President or Head of Government cannot remove members at their discretion, but must always refer to duly justified legal cause. In many cases, however, the law does not reflect some of the characteristics mentioned above and therefore, the level of dependence of regulatory and supervision agencies in the face of undue interference by the government is significantly greater, limiting the neutrality and technical autonomy of the sectoral agencies.

From a functional perspective, the exercise of its regulatory and supervisory powers, escapes from the traditional hierarchical and guardianship powers which the Government exercises in their relations with the Administration. For this purpose, the respective Parliaments issue regulations of legal scope that limit the effectiveness of presidential instructions and powers which derive from their nature of supreme administrative authority.

Finally, many of these institutions are equipped with a high level of financial autonomy in the exercising of their powers. Autonomy derived from a double mechanism: on the one hand, the existence of taxes imposed on the regulated stakeholders, who allow the direct funding of a large part of their activities and, on the other hand, the political power in some cases to draw up and submit their own budgets to Parliament.

Before going further into the synthesis corresponding to each of the selected countries, there are three additional considerations:

- The benefits of improved conditions of stability, security and protection of international investment are not limited only to the protection of foreign investors in the region, but are in particular a stimulus to current and future processes of regional integration and the undertaking of projects needed for further progress in the growth, development and competitiveness of Latin American countries.

- Latin American countries are not the only ones who are faced with the challenge of permanently improving the institutions which offer legal security and protection of the investment. On the contrary, it is a challenge shared by the great majority of countries which, in distinct continents, are making efforts to be more competitive and sustainable in their development. This is the driving force that has also inspired many of the reforms that Europe and the United States have recently implemented, in order to regain citizens' confidence in their institutions and to better protect their rights and fundamental freedoms.

  We should not forget the importance of the strengthening of the regulatory authorities through a real *learning curve* which leads them to defend independence, professionalism and good performance as essential values in a prosperous society.

In this process, it is important not only autonomy in relation to political authorities, but also in particular with the stakeholders involved in the processes of production and exchange, that is to say that is a priority to develop a culture of avoidance of the *capture of regulators by the regulated*, with the consequent transparency in *lobbying activities* and relations with different pressure groups, which are themselves legitimate and even necessary.

It is important to highlight some of the major considerations and proposals regarding systems of protection of foreign investment in Latin America. In particular, in several of the countries receiving significant investments from Spain and which are, directly or indirectly, linked or influenced by the Pacific Alliance integration strategy. Amongst them are: **Argentina, Bolivia, Colombia, Chile, Costa Rica, Mexico** and **Peru**.

ARGENTINA

Population	43.42 million	2015
GDP	$583.2 billion	2015
GDP growth	2.4%	2015

Source: World Bank
http://www.bancomundial.org/es/country/argentina

With regard to **Argentina**, we make a hopeful and positive assessment of the recent change of political orientation, which seems to be addressed at correcting the unfortunate decline experienced by the country in the field of legal security regarding foreign investment. The most well-known cases of conflict in strategic projects indicate the need to continue this reform process. These reforms must also be aimed at overcoming the perception of the country as having an economy in which business is highly complex.

We suggest the importance of strengthening mechanisms designed to indicate assumptions and procedures specifically designed to limit the possible cessation of the members of the governing bodies of the regulatory authorities, especially in the telecommunications sector ENACOM, always when the absence of precise causes to which the Government must adhere supposes an evident weakness of the institution in the face of any undue pressure on the part of the National Executive. This is one of the most decisive reforms to enhance the Argentinian system of protection of foreign investment.

Nevertheless, we insist that the generally autonomous nature of its regulatory and supervisory institutions, especially those of the energy sector (ENRE and ENARGAS), and the political change of direction that the new Government represents, allows us to affirm one of the main conclusions of this Report, which is the return of Argentina to its traditional position as an attractive and safe country for international investment.

BOLIVIA

Population	10.72 million	2015
GDP	$33.00 billion	2015
GDP growth	4.8%	2015
Inflation	4.1%	2015

Source: World Bank
http://www.bancomundial.org/es/country/bolivia

Bolivia, as is well known, stands out for the already long process of output in the field of international capital movement, with the consequent reduction in rates of renewed investment and the progressive withdrawal of foreign operators in its strategic sectors, not accompanied by the creation of its own productive structure, which has passed into the hands of the state as a consequence of operations of nationalization.

The legal framework for protection of foreign investment in Bolivia has been seriously

affected as a result of an intensive nationalization policy. In recent years, more than 20 companies funded by foreign capital have been subject to this practice, in particular those dedicated to the generation and transmission of electricity, hydrocarbons and telecommunications. Unfortunately, analysis of the most relevant cases (Empresa Transportador de Electricidad TDE, Empresa Eléctrica Guaracachi S.A., Rurelec PLC, Repsol YPF and Entel S.A., among others) strongly confirm this situation

Likewise, the lack of minimally independent regulatory authorities is a widespread feature within the country's system of regulation and supervision. Only a change of political orientation will be able to reverse the deep-rooted process of deterioration in the country's production, which has set off alarms regarding economic indicators.

This is possibly an example, along with other political regimes of the region, of the uncertainty and concern generated by some governments of populist orientation. Governments which often, to varying degrees of intensity, adopt measures for electioneering purposes and of an expropriative nature, which pose a real or potential threat to legal certainty and the protection of investment.

COLOMBIA

Population	48.23 million	2015
GDP	$292.1 billion	2015
GDP growth	3.1%	2015
Inflation	5.0%	2015

Source: World Bank
http://www.bancomundial.org/es/country/colombia

Colombia is a very important, attractive country for foreign investment. The forecast for 2017 is that Colombia will be the Latin American market in which Spanish investment will increase the most, over Chile, Peru and Mexico. For this

reason, some of the recent relevant facts which affect perceptions regarding legal security and protection of foreign investment in the country will be analysed in more detail.

The geo strategic location of the country together with the favourable progress of historical factors of internal destabilization, have made it a key country in the region as a whole.

However, as the OECD itself has noted (Colombia is in the process of incorporation); there is an urgent need for regulatory reform to give true independence and autonomy to the regulatory and supervision authorities, particularly in the areas of energy and mines and telecommunications.

We propose an abundant clarification of the map of regulatory instances in which there are overlaps, confusions regarding authority and lack of coordination that lead, on many occasions, to affecting the legitimate expectations of the investor in the face of the existence of criteria that are not always consistent on the part of the various regulatory and supervisory bodies.

Likewise, it is very important to move forward in the configuration of a more independent supervisory system. Not only through the generalization of the system of appointment of supervisors for a pre-established period of time but also more importantly, the consecration of assessed causes and transparent procedures designed to protect supervisors and the supervised from undue political pressures, from outside their role as part of a technical overseeing body.

The consolidation of Colombia as a chosen destination of foreign investment requires the clearing up of any uncertainty about the interference of criteria other than the strictly regulatory in decision making of profound economic and reputational impact for regulated sectors. The existence of a system of free appointment and removal of the highest authority overseeing public services in Colombia, makes it a body with little technical neutrality and autonomy from the government in the exercising of its powers. The fragility of this system of supervision, overcome by many countries in the area, extends an inevitable and unnecessary mantle of doubt regarding the neutrality of its actions in the face of electoral pressure. This may be the case in the supervision of the Colombian electric sector, of the recent intervention of Electrificadora del Caribe (Electricaribe SA), by the Superintendency of Public Domiciliary Services. An intervention which, in a pre-electoral context, highly politicised and with a grave risk of expropriation, is generating deep unease among investors in the sensitive Colombian energy market sector. Likewise, these uncertainties affect, amongst others, small and medium shareholders, as this strongly regulated sector is one of the more conservative and low risk options for personal

savings investment.

The fragility of the supervision system in the face of electoral pressures inside and outside the Colombian Caribbean generates a great deal of uncertainty. To this is added, as an important factor for the understanding of the situation, a case that has become the subject of heated political debate in the region. On February 21, 2017 and for the first time in the institutional history of Colombia, the central government intervened formally at the highest level, in the government of a province. This intervention took place in this region, precisely as a result of flagrant acts of corruption, high politicization of its institutions and mismanagement of its powers.

This is a clear example of the need to undertake urgent reforms and that Colombia needs to consolidate a more competitive business model. A system of sectoral regulation and supervision which is less vulnerable and more robust to inevitable interference from outside of regulatory policy by electoral interests.

This concern adds to those affecting international companies investing in the mining and telecommunications sectors, in which a surprising increase has also been recorded in cases of international arbitration (Glencore PLC, Cosigo Resources, America Móvil, Telefonica, AngloGold Ashanti, etc.), and which show the need for further reforms that the country seems to have postponed matters regarding the structure and operation of the different regulatory and supervisory agencies.

Concern over this setback to the country in the perception of stability of foreign investment also affects small and medium shareholders, as these sectors in an international market with fully interconnected values, as already noted, are one of the alternatives for conservative investment and low risk for household savings, pension funds or resources to ensure the most basic social rights, and also require the protection of institutions.
Therefore, one of the main conclusions of this report is the severe setback experienced by the country in relation to the perception of legal certainty offered to foreign investment.

CHILE

Population	17.95 million	2015
GDP	$240.8 billion	2015
GDP growth	2.3%	2015
Inflation	4.3%	2015

Source: World Bank
http://www.bancomundial.org/es/country/chile

It references to **Chile**; the Report can do little more than confirm its leading position as the region and international benchmark for good behaviour in promoting investment.

The recent strengthening of national spending strategies has generated social unrest and fiscal imbalances, but has not damaged the correct and well-established regulatory structure. These projects, which have included important transnational companies such as Global Energy Partners, Abengoa or Albemarle, among others, show that companies facing financial difficulties, very quickly found new foreign partners to contribute international capital to these important projects. These cases reinforce the perception of legal security and protection of foreign investment in the country. The projects analysed in the most significant regulated sectors confirm that settlement and in principle dispel any concerns.

This does not however prevent the emphasising of the importance of reopening the debate, as has been done recently, regarding the advisability of reforming some of its regulatory and supervisory bodies, like the telecommunications regulator and supervisor, given its limited autonomy from the National Executive.

COSTA RICA

Population	4.808 million	2015
GDP	$54.14 billion	2015
GDP growth	3.7%	2015
Inflation	0.8%	2015

Source: World Bank
http://www.bancomundial.org/es/country/costarica

Costa Rica is possibly one of the most internationally recognized success stories as far as our Report is concerned. Costa Rica, together with Colombia, makes up the small group of Latin American countries in the process of joining the OECD and has been fully incorporated into the bilateral and multilateral investment protection network. As a logical consequence, it has experienced exponential growth in the attracting of foreign capital. It is established in raising abundant capital and has a variety projects in regulated sectors, some of which are outlined in this Report, like Gas Natural Fenosa, América Móvil and Telefónica, amongst others.

The legal framework for the protection of foreign investment in Costa Rica has allowed it to increase its successfulness as an attractive country for foreign investment.

By 2015, direct foreign investment represented US $ 3,094 million. An important part of this investment is directed at the energy, telecommunications and technology sectors.

In contrast to this, we detected important components of bureaucratization, political instability, lack of independence and little technical expertise of regulatory authorities, as they have been highlighted by the serious criticism of the system that public control bodies have made of the country. It should be recalled that in June 2014, SUTEL was reported for using outdated data from 2009 to calculate the imposition of new economic control measures on the market and the Administrative Court and the Treasury ordered them to update their market research.

All this means it is advisable to keep up the effort regarding policy and regulatory organization reforms already undertaken in a country that has turned its openness to foreign investment into real State policy.

MEXICO

Population	127.0 million	2015
GDP	$1.144 trillion	2015
GDP growth	2.5%	2015
Inflation	2.7%	2015

Source: World Bank
http://www.bancomundial.org/es/country/mexico

Mexico is undoubtedly a country with a strong tradition of receiving foreign investments. This trend has been reinforced by the recent constitutional and legal reforms enabling the opening up to competition of sectors hitherto monopolized vertically by the State, namely energy, as well as communication although to a lesser extent.

To this may be added a backdrop of autonomous regulatory authorities with clear mechanisms to move in the direction proposed by the OECD, to which Organization it belongs. Mechanisms which are manifested in the management system of the various regulatory bodies and sector supervision; in the appointment of commissioners, terms of mandate and the existence of assessed and precise causes to proceed, if necessary, with cessation based solely on the legally established assumptions.

Likewise, these regulatory and supervisory bodies also have, in general terms, well-defined powers and are transparent in their operations, which contribute to attracting an increasing flow of capital to the country.

Cases related to the investments of multinational companies such as AT&T or investment funds such as Black River in the Altos Hornos de México S.A.B. of C.V have been studied

by way of example. among others.

However, one of the case studies shows some grey areas in conflict resolution, namely regarding the Mareña Renovables project. Shortcomings which that have had a detrimental effect on investments by Mitsubishi Corporation and Dutch Pension Investment Group, and which invite further advances in the continuous improvement of a system that has become the benchmark for all regulatory analysis of sectoral regulatory institutions of Latin America.

PERU

Population	31.38 million	2015
GDP	$189.1 billion	2015
GDP growth	3.3%	2015
Inflation	3.6%	2015

Source: World Bank http://www.bancomundial.org/es/country/peru

Lastly **Peru** is a good example of improvement in all aspects of legal security for foreign investment, regulatory quality and institutional strengthening.

Regulatory design for independence of regulatory authorities has characteristics which also respond, in general terms, to the lines suggested by the OECD. Members of the various boards of the regulatory and supervisory agencies have pre-established periods of mandate, as well as causes and specific procedures to determine their eventual cessation or removal, once legally established causes have been verified.

Similarly, there is a clear delineation of powers conferred on these agencies and how they may exercise them by means of the full participation of the sectors concerned and the undertaking of the necessary assessments of the quality and impact of regulatory standards. Additionally, this country has an adequate system for dealing with disputes and guarantees against bailouts or interventions. These are factors of good performance which

stand out clearly in this country in recent years.

We have carefully analysed important cases of foreign investment in the country, with the participation of very significant companies like Engie, IC POWER, ENEL, Electric Interconnection SA and SA Transelca.

And from these examples, we have found that, despite the failures of regulatory performance manifested in reform of the system of responsibilities for transmission and distribution of electric generators, there have also been developed prudent mechanisms of conflict resolution through design *a posteriori* of a reasonable transitional regime.

As can be seen throughout the report, one of the conclusions drawn in this report is that Peru, Mexico and Argentina, are countries that have strengthened or regained their perception as a safe destination for foreign investment, thanks to the greater independence of their agencies, sector regulation and supervision, and the perception of greater political stability and legal certainty for foreign investment in the region.

Also, another of the report's findings is summarized in the severe setback experienced to Colombia's image and its perception as a destination that offers political stability and legal certainty for foreign investment. A backwards step, in relation to a country of the importance and significance of Colombia, makes it even more necessary to make progress on many of the proposals made by the OECD in order to strengthen the soundness of the institutions in this new and decisive historical stage for country.

Similarly, we must be very attentive to the progress of the reforms implemented in Costa Rica, proposals for strengthening the system of regulation and supervision in Chile, and any changes that are recorded in Bolivia.

Finally, it should be highlighted that this report has attempted to provide an overview of the current situation of the institutions in some of the most representative Latin American countries, with the intention of assessing levels of protection of foreign investments, especially in sectors regarded as being regulated. This study is therefore not intended to be exhaustive in its geographical scope or concerning potentially relevant economic activities for foreign investment. However, it would be wise to assume that the representation of countries and sectors is correct, not so much as to provide conclusive data and fully binding conclusions, as to convey some useful guidance for decision making and, where appropriate, as a basis for a more detailed and focused analysis of a specific country or area of production. As a base, we have used consideration of the current OECD guidelines on the matter, to then proceed with the study of the regulatory and institutional of each of the selected countries, with a brief background and some outlines of the

prospective horizon in the immediate future. The study of each country includes an account of the most prominent cases of both success and failure, to demonstrate the current performance of governance.

To summarise, we hope that at least in part the content of the report and proposals satisfy the needs of those who require contextualized knowledge of the situation. Such knowledge requires, as we have demonstrated, understanding of the international framework of reference for the protection of foreign investments, the present state of the institutional framework of each country and its effective materialization in concrete experiences.

2. PRIOR CONSIDERATIONS

According to the World Bank, an up to 84% difference in levels of development, growth and welfare among countries depends on the implementation of a knowledge based economy[1].

If we consider that the quality, solidity and stability of legal institutions are one of the most important constituent elements in the knowledge economy, it is easy to understand the significance for the development and welfare of a society, that permanent progress its institutions implies.

Optimization of the efficiency of public administrations, in an inexorably globalized and competitive institutional context, also contributes to limited capital resources (economic, social and human) among others, deciding to place their trust in one country or another. This trust allows the financing of technological, educational or energy infrastructure projects necessary for citizens' welfare, reduction of poverty and generation of greater equality of opportunity.

By this, and already in the year 1995, the Organization for Economic Cooperation and Development (hereinafter "**OECD**") published the first international declaration of regulatory standards through the *Recommendation of the Council to improve the quality of governmental regulation* for member countries. Its objective was to examine the importance and necessity of reforms in the regulated sectors of member countries. Reforms that ultimately seek to rebuild legitimacy and citizens' trust in the institutions.

2.1. The OECD recommendations as a starting point

The Organisation for Economic Co-operation and Development (OECD) is an international, intergovernmental organization based in Paris, which is made up of

[1] **The World Bank.** *Knowledge Assessment Methodology (KAM).*2012. The quality of their legal and economic institutions, information and communications technology, innovation and human capital formation are the four foundations of society and the knowledge economy. Four pillars that support each other and explain the up to 84% difference in growth and development between regions and countries.

35 democratic countries, strongly committed to a market economy[2].

The organization was created in 1960 to provide continuity and to consolidate the work done by the former European Economic Cooperation Organization, established to channel the implementation of aid under the Marshall Plan.

The OECD's objectives are, in essence, to contribute to economic growth and employment, increasing standards of living in member countries, while maintaining financial stability and contributing to the development of the world economy.

Its work focuses on the analysis of international and national markets and circumstances, offering recommendations for achieving the above objectives. Its activities also encompass social, environmental, educational, health, and development of aid issues etc.

The work conducted by the OECD is made public in reports and recommendations which are useful to the Public Administrations and Governments of Member States, as well as a large number of non-members States all over the world who follow the work of this Agency with interest, even collaborating with some of its Working Groups.

As has been pointed out by some authors, "*the OECD advocates the formulation of policies based on empirical knowledge and solid data*. *On the occasion of the meeting of the Public Governance of the OECD at ministerial level, held in Venice in November 2010 (OECD, 2011a), comprehensive information was compiled to provide an overview of the initiatives and policies adopted by both member and non members countries of the OECD. The exchange of experiences at that meeting allowed for the identification of areas of common concern among participating countries, including the promoting of principles such as accountability and transparency provided*"[3].

These same authors note that "*a key factor to restoring trust in government is the*

[2] The OECD consists of 35 member countries, who are as follows: Germany, Australia, Austria, Belgium, Canada, Chile, Korea, Denmark, Spain, United States, Estonia, Finland, France, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Mexico, Norway, New Zealand, Netherlands, Poland, Portugal, United Kingdom, Czech Republic, Sweden, Switzerland and Turkey.

[3] **Conde, C. Gutierrez, MP:** "*The OECD experience in the implementing of policies of Open Government. The challenge of the implementation stage*". CLAD Reform and Democracy magazine, issue 58.February 2014.

bringing into line of public sectors with modern information management practices, by means of which citizens can find government services in just one click. Policy instruments to facilitate sustainable reforms in the public sector have a greater effect, thanks to better information and government accountability".

In the scope of the aforementioned functions, in 2012 the OECD published the findings of an important previous work of reflection on regulatory policy and governance carried out by the Committee for Regulatory Policy of the International organisation[4].

As stated in the document, "*this new Recommendation on Regulatory Policy and Governance is the result of thorough evaluations of best practices that have been identified by the Regulatory Policy Committee over a decade of research in OECD countries. It represents maturity of thinking and learning from experience in this complex area of public policy. The recommendation lays down a systemic governance framework that may lead to continuous improvement in the quality of regulations. It provides advice to governments on the development of institutions and the implementation of regulatory management tools. It also presents practical measures or benchmarks that countries may use to assess their ability to develop and implement quality regulations*".

The recommendation of the OECD Council on Regulatory Policy and Governance provides the first comprehensive international regulatory policy statement since the economic crisis began.

The work cited[5] a set of important recommendations (addressed to the Member States and in general to all those individuals and entities interested in these dynamics) aimed at strengthening the capacity and quality of state powers in the regulation of the most strategic sectors for progress economic and social. As it stated in its preliminary document "*the purpose is to help countries build better governance systems and implement public policies at national and regional levels, which lead towards sustainable economic and social development*". In Spain, by way of example, these guidelines were used for the drafting of the Royal Decree of July 3, 2009 (BOE of the 18), which regulates *the Report on the analysis of regulatory impact* necessary for the processing of regulatory provisions, with a

[4]The Regulatory Policy Committee was established in 2009 to advise member and non-members countries to create and strengthen capacity in the interests of quality and regulatory reform.
[5]Spanish version available at http://www.oecd.org/gov/regulatory-policy/Recommendation%20with%20cover%20SP.pdf.

Methodological Guide[6].

As the Secretary of the Organization indicated in the report, the Recommendation on Policy and Regulatory Governance is the first comprehensive international declaration on regulatory policy since the financial crisis of 2008, offering governments clear and timely guidance on the principles, mechanisms and institutions needed to improve the design, implementation and review of their regulatory frameworks, with emphasis on moving towards higher standards.

2.2. Specific recommendations

In summary, the recommendations made in the cited OECD document are:

Committing to an express policy of **regulatory** quality that is to say, a policy of regulation with clear objectives and frameworks in service of **public interest**. This involves maintaining a regulatory management system that includes the assessment of impact, *ex ante* and *ex post,* of the regulations as fundamental stakeholders in the decision-making process based on evidence. Another of the vectors considered essential is the promotion of **commerce**, **competition** and **innovation**.

Considered to be similarly fundamental are **transparency** and **participation** in the regulatory processes thus ensuring that the results are in line, to the greatest possible extent, with objectives of public interest. Governments must ensure that regulations are straightforward and clear and that all stakeholders may understand their rights and obligations with ease. Governments should include their strategy on risk and regulation in a public declaration that is the foundation of regulatory reform. They must develop and regularly update guidelines on methodologies for assessment, management and communication of risk with regard to the use of regulations to achieve public and environmental protection.

In this regard, governments should cooperate with stakeholders in reviewing

[6] Available at the following Ministry of Finance and Public Administration (Ministry of Public Administration)link :http://www.sefp.minhafp.gob.es/dms/es/web/areas/modernizacion-procedimientos/impacto_normativo/guia-metodologica-ain-1264084813.pdf.

existing regulations and developing new ones. They must also actively involve all relevant parties in the process of formulating the regulations, and design consultation procedures to maximize the quality and effectiveness of the information obtained, referring to all aspects of the analysis of impact assessment and making use of such evaluation as part of the consultation process. It is also necessary to create a system that makes available to the public, as far as possible, all relevant material regarding regulatory records, including analyses of livelihood, and the reasons for regulatory decisions and the relevant data.

Moreover, it is advisable to set up institutions to actively **supervise** procedures and objectives of regulatory policy and support and develop them. In this regard, the OECD also considers it desirable to create systems of **Assessment of Regulatory Impact**, whose results would be integrate in the publication of periodic reports on the performance of applied regulations, highlighting system defects and modification requirements, where appropriate.

As the OECD explicitly states in its Recommendations, "*ex ante assessment policies must contemplate alternative ways of including public policy objectives, including regulatory and non-regulatory options, to identify and select the most appropriate instrument or combination of instruments to achieve policy goals. The option of not acting and starting point scenario should always be taken into considered. In most cases, the appraisal should identify strategies that are likely to yield the greatest net benefit to society, which includes complementary approaches such as the combination of regulations, education and voluntary standards*".

But evaluation is also necessary *ex post* in order to ensure that the regulations are effective and efficient. As the experts of Working Group of the OECD have indicated, in some circumstances formal procedures of *ex post* impact analysis processes may be more effective than *ex ante* analysis to inform the ongoing policy debate. To do this, they put forward the example of regulations that have been developed under pressure to implement as a quick response. In all events, it is important not lose to sight that "*it may be difficult to target limited public policy to revise an existing regulation; likewise, it is necessary to systematically programme reviews to ensure that regulations are conducted ex post the assessment*".

The possibility should not be forgotten in these review procedures that the public may make recommendations to modify the existing regulations. In this regard, the OECD is very clear in stating that:" *Citizens and businesses which are subject to the decisions of public authorities must have immediate access to systems to question the exercise of that authority. This is especially important when it comes*

to sanctions in regulatory matters, that is to say, those imposed by an authority under due to a regulation".

The aforementioned access should be accompanied by the legal right to appeal decisions made by regulatory bodies, covering procedural fairness and due process, and must include the possibility of challenging the legality of any statutory provision on which decisions of regulatory bodies are based.

The OECD Recommendation also advocates that appropriate regulatory policies be adopted taking into account the different regional state levels, that is to say the supranational, national and sub national **levels of government**, so that each policy has the capacity to identify the specific characteristics of the needs of each area. To do this, it will be necessary "to *design appropriate coordination mechanisms to develop regulatory policies and practices at all levels of government, including, where appropriate, by means of measures that achieve harmonization or through the use of mutual recognition agreements*". Or in some cases, "*to develop tools to diagnose problems affecting regulations which occur transversely between the branches of government (including supranational organizations) to identify and reform redundant regulations*".

The Recommendations take into account the need to "*Promote the exchange of information and of transparency mechanisms between levels of government to overcome information asymmetries and promote complementarity between regulations, to disseminate innovative regulatory practices which are implemented at local level, including making effective use of comparative analysis between different jurisdictions. To facilitate local variations and experiment with the focus of the regulations when this may benefit the country*."

2.3. Independent regulatory authorities

A special section is dedicated to **independent regulatory authorities**. The Working Group of the OECD considers it necessary to establish a body which is responsible for regulatory overseeing. Since the objective is to identify and promote quality in regulation, this body must be able to ensure that supervision covers government policy as a whole, so it must be in sufficiently close proximity to it. There is no doubt that given the international character of the OECD and the countries that comprise it (as well as those who are invited to follow these recommendations), the development and implementation of this body must be adapted to the institutional and governmental situation of each State but always

with one fundamental characteristic: it must be an independent regulatory authority free from political influence, which actively monitors the procedures and objectives of the regulatory policy of States.

In order for this to be so, the independent regulatory authority must be endowed with a legal status in which is specified, as a minimum, its composition, functions, and method of decision making as well as the appeals and claims for review that it may consider. Thus, the OECD report recommends that the amongst the functions assigned to this independent authority should be included that of achieving quality control of regulatory projects by means of a review process of impact assessment that allows for the rejection of projects whose evaluation is unfavourable or whose impact is inadequate. This assessment should take into consideration direct and indirect costs of regulation, whether borne by businesses, citizens and governments, but also should be orientated to take into account the qualitative (and difficult to estimate) impact that regulatory measures may produce in equity, fairness and redistribution.

Likewise with the aim of achieving more effective regulation, this authority will be granted the function of promoting the use of regulatory measures in the field of public policy, and of coordinating both the *ex post* assessment policies as well as evaluation *ex ante* of assessment methodology to avoid any bias in the results of these evaluations, which would undermine the independence.

The report warns of the importance of creating public trust by means of these independent regulatory authorities. The OCDE indicates that by creating an independent regulatory entity, government and those governing may promote greater trust that decisions are fair and impartial.

The Report goes on to say, "*This is advisable when the decisions of the regulatory body have significant financial and market implications and are required to maintain a distance from the political process to reduce regulatory risk for investments*".

Again, the importance of this independence should exist even when the relationship of the regulatory body must be very close to the government and regulated stakeholders, since only then will it be able to conduct regulatory impact assessments on legislative projects or other regulations, its main function.

In order to ensure the integration of regulatory bodies in the regulatory system, it is recommended that governments have a public register of all government entities with powers to exercise functions of regulation. As discussed in the report, "*such*

registration must detail the objectives established by law for each regulatory authority and a list of regulatory instruments it administers".

The Recommendations indicate that the conditions to create independent regulatory authorities in the following situations should be taken into consideration:

- "*When there is a need for functional independence or competitive neutrality in order to preserve public trust;*
- *If both the government and private bodies are regulated under the same framework and therefore competitive neutrality is required; and*
- *When decisions by regulatory agencies may have significant economic impact on the regulated parties and are necessary to protect the impartiality of the entity*".

Therefore, it emphasizes that this independent body should promote a character of: **public trust**, **competitive neutrality** and **impartiality**. The task of assessment and monitoring of regulatory reforms and legislation takes on greatest importance when it comes to analysing the effects these have on "*financial and market implications of importance*".

A final relevant aspect in relation to the implementation of independent regulatory authorities monitoring is that it is recommended that they themselves should also be evaluated and monitored periodically. How the supervisor is supervisor should encompass the impact of their actions, examining the assessments made and the consequences which have occurred, and in relation to *ex ante* assessments which have resulted in improvements through amendments to bills or new regulations, or *ex post* assessments of standards in the market. If there is no assessment of the Authority it will not be possible to generate trust in their independence. It will be necessary, says the OECD report, that to guarantee the right incentives *"mechanisms of accountability in the public sector clearly define how the regulatory body will carry out its responsibilities with the necessary expertise and with integrity, honesty and objectivity*". An additional way to undertake such periodic reviews of the monitoring activity of independent regulatory authorities which is recommended is the objective publication of its proceedings.

In the final analysis, and as the OECD indicates, companies require policy and regulatory institutions to address the interconnected nature of sectors and economies. These fair, transparent and clear regulatory frameworks also serve as a fundamental *sine qua* non condition to deal effectively with environmental and equity challenges in a company.

In the words of the Secretary General of the OECD, the OECD Recommendations provide governments with "*clear and timely guidance on the principles, mechanisms and institutions needed to improve the design, implementation and review of their regulatory frameworks*". The purpose is to help countries build better governance systems and to implement public policies at national and regional level that will lead to sustainable economic and social development.

3. ANALYSIS OF LEGAL SECURITY AND THE PROTECTION OF INVESTMENTS IN SOME LATIN AMERICA COUNTRIES

Next some of the different characteristics that define the institutions that will be included in framework of legal security and investment protection in Latin America will be expounded, with particular attention to the regulatory and supervisory authorities. Likewise, the regulatory measures which can be taken to meet the goals and recommendations of the OECD mode in an efficient manner will be set out. In summary, this means establishing parameters that allow that a regulatory framework is conducive to transparent and efficient markets as well as the best stimulus and protection for foreign investment.

This report provides a summary and schematic view regarding the issue in some Latin American countries which are recipients of international capital. Countries which, in their majority and in order to provide greater efficiency and sector stability, have undertaken recent structural reforms in the regulatory and supervisory organizations in the energy and telecommunications sectors.

There are three aspects to be addressed in each of the selected countries:

- Their incorporation into the multilateral free trade system and protection of investments, guarantee schemes and property investment as well as international bodies of mediation and conflict resolution;

- The institutions of regulation and supervision of energy and telecommunications markets. It should be noted that repeated deficiencies in the setup and performance of institutions of regulation and supervision in recent years have led to many Latin American countries witnessing a process of assessment and

restructuring of institutions of regulation and supervision of the energy and telecommunications markets;

- Some significant cases which reflect the perception of legal security and protection of foreign investment.

With regards to the second aspect to be considered, it should be noted that when analysing instances of regulation and supervision we are faced with systems which are heterogeneous, pragmatic and constantly evolving, which generally operate (or try to) with levels of organic, functional and financial autonomy greater than those which the vast majority of other administrative units have.

In some cases, the selection of the members of their governing bodies is carried out by an open, public, competitive procedure of extensive scrutiny, in which the Government and Parliament take part, in accordance with previously established, strict selection procedures. Similarly, its executives withdraw from the discretionary appointment and removal system and are protected by a pre-established period, which determines the minimum term of office. This binding term constitutes for the Government, from an organizational point of view, the most important characteristic that determines its autonomous relationship to undue interference in government.

As a corollary to the above, that is to say, to the existence of pre-established mandate periods for senior management in institutions of regulation and supervision, the second of the characteristics that most profoundly determines or affects the relations between the government and these institutions is that the President or Head of Government cannot remove board members at their discretion, except if there is a duly substantiated legal cause. However, in many cases the law does not reflect some of the features mentioned and therefore, the level of dependence on regulatory agencies and supervision in the face of undue government interference is significantly higher, limiting the neutrality and technical autonomy of the sectoral agencies.

From a functional perspective, the exercise of broad regulatory and supervisory powers leaves behind the traditional hierarchy of authority and protection that the Government exercises in its normal relations with the Administration. For this purpose, the respective Parliaments emit statutory regulations that limit the effectiveness of presidential instructions and powers derived from their status as supreme administrative authority.

Finally, many of these institutions are endowed with a high level of financial autonomy in the exercise of their powers. An autonomy which is derived from a dual mechanism: On the one hand, the existence of taxes imposed on regulated sectors, allowing direct funding

of most of their activities; on the other hand, in some cases, the political powers to draw up and present their own budgets before Parliament.

Before starting this analysis by country, three additional stakeholders should be taken into consideration:

• The benefits of improved conditions of stability, security and protection of international investment are not limited to the protection of foreign investors in the region, but are a particular stimulus to current and future procedures of regional integration and the undertaking of projects required for advancement in growth, development and competitiveness in Latin American countries;

• Latin American countries are not the only ones who face the challenge of continuously improving institutions that provide legal security and investment protection. On the contrary, it is a challenge shared by the vast majority of countries in other continents, which are making efforts to be more competitive and sustainable in their development. This is an effort that also inspires many of the reforms that Europe[7] and the United States[8] have recently implemented, in order to

[7] **Craig, P.P.** *UK, US and Global Administrative Law:Foundations and Challenges.* Cambridge University Press. 2015; **Busuioc, M., Groenleer, M. & Trondal, J.** (Coords.) *The agency phenomenon in the European Union.Emergence, institutionalization and everyday decision-making.* Manchester University Press.2012; **Baldwin, R., Cave, M. & Lodge, M.** (Coords.) *Understanding Regulation.Oxford University Press.* 2012; **Verhoest, K. Van Thiel, S, Bouckaert, G. & Laegreid, P.** (Edit.) *Government Agencies.Practices lessons from an 30 country clubs.* European Cooperation in Science and Technology.London.2012; **Rittberger, B. & Wonka, A.***Agency Governance in the EU. J.of European Public Policy*. 2010; **Cordova-Novion, C.& Jacobzone, S.** *Strengthening the Institutional Setting for Regulatory Reform:The Experience from OECD Countries.* OECD Working Papers on Public Governance no.19.OECD.2011; **Martino, M. & Gilardi, F.** *The policy-making structure of European Regulatory Netwoks and the domestic adoption of standards.*Journal of European Public Policy, 18 (6), 2011; **Thatcher, M.** *The creation of European regulatory agencies and Its limits: a comparative analysis of European delegation.*Journal of European Public Policy 18: 6. 2011.

[8] **Conti-Brown, P.** *The Power and Independence of the Federal Reserve.* Princeton University Press, pp. 2016; **Breger, M. & Edles, G.** *Independent Agencies in the United States. Law, structure and politics.* Oxford University Press 2015; **Barnett, H**. *Constitutional & Administrative Law.* Taylor & Francis Ltd.11th.Ed.2015; **Blick, A.** *Beyond Magna Carta. A Constitution for the United Kingdom.*Oxford. Hart Publishing. 2015; **Powell, W.G.** *Thinking about the Presidency: The Primacy of Power.* Princeton University Press.2015; Jowell**, J; Oliver, D. & O'Cinneide, C. The** *Changing Constitution.* 8th.Ed.Oxford University Press. 2015; **Arlidge, A. & Judge, I.** Uncovered *Magna Carta.* Oxford.Hard Publishing. 2014; **Bradley, A.** *Constitutional and Administrative Law.*Pearson.2014; **O'Connell, A.J.** *Bureaucracy at the Boundary, 162* U. Pennsylvania L. Rev.

regain citizens' trust in their institutions and better protect their rights and fundamental freedoms.

• We must not forget the importance of strengthening regulatory authorities through a genuine *learning curve* which brings them to defend their independence, professionalism and good performance, as indispensable values in a prosperous society. In this process, not only autonomy in relation to political authorities is of importance, but also and very importantly with the stakeholders themselves involved in production procedures and exchange. That is to say those which are a priority for the establishment *of a culture of avoidance of capture of the regulator by the regulated*, with the resulting transparency *lobbying* activities and in relationships with different groups of lobbyists, of a legitimate nature and even necessary.

2014; **Datla, K. & Revesz, R.L.** *Deconstructing Independent Agencies (Executive Agencies And)*.99 Cornell L. Rev. 2013. **Edwads, G.C. & Wayne, S.J.** *Presidential Leadership: Politics and Policy Making.* Belmont CA.Wadsworth Pub. 2013; **Lewis, DE & Selin, J.L.** *Sourcebook of the United States Executive Agencies.* Administrative Conference of the United States.Vanderbilt University.2013; **Nou, J.** *Agency Self-Insulation under Presidential Review*.126 Harv.L. Rev. 2013; **Vermeule, A.F.** *Conventions of Independence Agency.*113 Colum.L. Rev. 2013; **Barth, J., Caprio, G. & Ross, L** *Guardians of Finance .Making Regulators Work for Us.MIT. 2012;* **Bradley, K.** *The Design of Agency Interactions.*111 Colum.L. Rev. 2011; **Bader, H.** *Free Enterprise Fund v.PCAOB: Narrow separation-of-powers ruling the Supreme Court Illustrates That is not pro-business.*Cato Supreme Ct.Rev. 2009-2010; **Barkow, R.E.** *Insulating Agencies: Avoiding Capture Through Institutional Design.* 89 Tex.L. Rev. 2010; **Bressman, L.S. & Thompson, R.B.** *The Future of Independence Agency.* Vand.L. Rev. 2010; **Barron, DJ** *From Takeover to Merger: Reforming Administrative Law in an Age of Politization Agency.*77 George Washington Law Review 1095. 2008; **Beecher, J.A.** *The Prudent Regulator: Politics, Independence, Ethics and the Public Interest.* Energy L.J. 29 2008.

3.1. ARGENTINA

ARGENTINA

Population	43.42 million	2015
GDP	$583.2 billion	2015
GDP growth	2.4%	2015

Source: World Bank
http://www.bancomundial.org/es/country/argentina

3.1.1. Incorporation of the country to the multilateral free trade and investment protection system

Recent reforms in Argentina to revive economic growth have focused, among other areas, on strengthening the institutions for the protection and safeguarding of foreign investment[9].

[9] **Casal, D.** *Inversiones: el acuerdo de inversión como instrumento de protección.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº.9. Buenos Aires. 2016; **Bianchi, A. B. y Sacristán, E. B.** *Para una efectiva protección de las inversiones en energía, hidrocarburos y minería en la Argentina.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº.9. Buenos Aires. 2016; **Lucero, L.E.** *Reflexiones en torno a la acción de gobierno respecto de la industria minera a partir de diciembre de 2015.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº. 9. Buenos Aires. 2016; **Márquez, G.** *El régimen hidrocarburífero a la luz del federalismo argentino.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería Nº.10. Buenos Aires. 2016; **Nielsen Enemark, C.A.** *La naturaleza jurídica de la Compañía Administradora del Mercado Mayorista Eléctrico S.A. (CAMMESA).* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº.10. Buenos Aires. 2016; **Viña, G.A.** *Hacia un control de YPF y de la industria hidrocarburífera.* Revista Argentina de Derecho de la Energía, Hidrocarburos

In Argentina respect for foreign investment is based on the constitutional guarantee of the right of property enshrined in Article 19 of the Constitution. The Argentine legal system also recognizes, through the recently amended Foreign Investment Law Number 21,382, the same rights and obligations that the Constitution and the law establish for domestic investors.

Likewise, the new Civil and Commercial Code and the reform of the Companies Act which entered into force 2016 covers aspects which, in substance and in mechanisms of resolving disputes, facilitate the application of the principles of international trade law.

Argentina is fully integrated into international conventions and agreements related to guarantees, promotion and protection of foreign investment, return on dividends and capital, protection in case of direct or indirect expropriation and mechanisms for mediation and international arbitration for conflict resolution. The country has signed many

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y Minería. Nº.10. Buenos Aires. 2016; **Alexandrov, S. A. y Durán, M. C.** *El Tratado de la Carta de Energía: un modelo exitoso de acuerdo multilateral para la protección de inversiones.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº.5. Buenos Aires. 2015; **Chambouleyron, A.** *Beneficios extraordinarios para compensar el alto riesgo de invertir en la Argentina.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Buenos Aires. Nº.5. 2015; **De la Riva, Ignacio.** *Poderes de regulación nacionales y provinciales bajo el nuevo régimen de hidrocarburos.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº.5. Buenos Aires. 2015; **Fresco, F. & Pereira, E.G.** *Latin American Upstream Oil & Gas. A Practical Guide to the Law and Regulation*. Globe Law and Business. 2015; **García Mira, S. J. y Freyre, S.** *Federalismo, Constitución y nueva Ley de Hidrocarburos.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº.5. 2015; **Cicero, N. K.** *La politización de la regulación y sus consecuencias en el federalismo regulatorio (Cámara Federal de Apelaciones de Córdoba, Sala "A", Empresa Provincial de Energía (EPEC) c/ Compañía Administradora del Mercado Mayorista Eléctrico S.A. (CAMMESA) y otro - Amparo ley 16986, 10 de diciembre de 2013).* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº.2. Buenos Aires. 2014; **Massimo, L.F.** *El sistema de gas natural en la República Argentina. Regulación, emergencia y situación actual.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº. 2. Buenos Aires. 2014; **Zaballa, H. y Arbeleche, S. D.** *Evolución de la intervención estatal en la legislación minera argentina.* Revista Argentina de Derecho de la Energía, Hidrocarburos y Minería. Nº.2. Buenos Aires. 2014; **Jordana, J.; Levi-Faur, D. & Fernández i Marín, X.** *The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion.*Comparative Political Studies October 2011; **Moreno Castillo, L.F.** *¿Cómo aborda el derecho comparado latinoamericano la interconexión internacional y el comercio internacional de energía? Caso Argentina, Colombia y México. Reflexiones sobre la integración energética.* Universidad Externado de Colombia. Bogotá D.C. 2006; **Jordana, J. y Levi-Faur, D.** *¿Hacia un Estado Regulador Latinoamericano? La difusión de agencias reguladoras autónomas por países y sectores.* CIDOB. Barcelona. 2005.

international treaties amongst which are included those adopted by the Hague Conference on Private International Law, the United Nations Convention on the Recognition and Enforcement of Foreign arbitration awards of 1958 (New York Convention), the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965 (ICSID)[10], the United Nations Convention on Contracts for the International Sale of Goods of 1980, the Inter-American Convention on International Commercial Arbitration of 1975 and the Mercosur Agreement on International Commercial Arbitration of 1988, amongst others.

Similarly, the conventions and international agreements with most of the member countries of the OECD confer on investments from third party countries conditions which are equally favourable as those accorded to domestic investment and which guarantee respect for the principle of equality of conditions in conformity with the most favoured nation clause[11].

In addition to the agreements already mentioned, Argentina actively participates in other multilateral organizations to strengthen free trade and protection of foreign investment. These include:

- World Trade Organisation (WTO).
- Latin American Economic System (SELA).
- Latin American Integration Association (ALADI).
- Economic Commission for Latin America (ECLAC).
- The Group of 24 (G-24).
- The United Nations Organization (UN).
- The Organization of American States (OAS).
- Union of South American Nations (UNASUR).
- Southern Common Market (MERCOSUR).

The decision to invest in a foreign country is mainly determined by the trustworthiness transmitted by the country in question, and even depends as well on the region where it is located. The relevant aspects for the investor to assess the risk of a country for investment are economic, financial, political, historical and sociological.

One of the most important to consider when making investments and assessing the

[10] Argentina is one of the ICSID countries with the most demands. It has 9 closed cases with final awards issued and 16 closed cases with signed agreements. It also has 8 pending cases suspended awaiting the parties to reach an agreement and finally 17 cases pending for a final award or an annulment judgement.

[11] http://www.sice.oas.org/ctyindex/ARG/ARGBITs_s.asp

degree of protection of an investment in a particular country, is the Project undertaken by the World Bank, called *"Doing Business"*, which provides an objective evaluation of business regulations and their application in 190 economies and in some selected cities at a sub national level.

Specifically, in the Report *Doing Business in Argentina*[12], in relation to protection of minority investors, protection of these investors regarding conflict of interest is measured by means of a set of indicators, as well as by the rights of shareholders in governance of one company through another. The data comes from a questionnaire completed by lawyers specializing in corporate and securities law and is based on the laws of market values, laws on commercial companies and civil procedure codes. The classification of economies, in terms of the strength of their protection of minority investors is determined by ordering the economies according to their scores, which are the simple average of the index of regulation of conflicts of interest and the index of governance of shareholders.

Currently, Argentina is 116th of 190 that make up the ranking. Over the last year it has improved its position. However, it is perceived as a country where doing business is very complex.

Similarly, large consulting firms like EY, PwC, KPMG and large multinationals like Baker and Mckenzie, Marval, O'Farrell and Mairal and even the Ministry of Argentina, have undertaken their own reports on *Doing Business* in this region, as well as guides for investors.

The content of these reports the main conclusion to be drawn is that with the new government of Argentina, presided over by Mauricio Macri, the economy is **more orientated towards the markets and the promotion of investment**. Thus, for example, in December of last year, the Forum of Business and Investment was inaugurated in the capital with the aim of seeking relationships with potential investors. In addition, in order to generate confidence in the markets and attract investors, the government has implemented various measures to reverse prevailing programmes of a populist nature, like the cancellation of restrictions on buying dollars and taxes on a range of exports, the freeing of the foreign exchange market, payment of a multimillion dollar debt to bondholders, rising of the prices of public services and undertaking of tens of thousands of redundancies in the public sector, in order to reduce the fiscal deficit which exceeded 6% of gross domestic product (GDP). However, it also expects a sharp drop in profits and reinvestments based companies, awaiting the lifting of exchange controls to be transferred abroad.

[12] http://espanol.doingbusiness.org/data/exploreeconomies/argentina

3.1.2. Institutional framework for regulation and supervision of regulated Energy and Telecommunications markets

3.1.2.1. Electricity, gas and liquid fuels sectors

The Argentine regulatory framework has divided the powers of decision-making and implementation amongst several entities:**(i)** Firstly, the National Executive through **Ministry of Energy and Mining and the Ministry of Energy**[13], which has the power to establish general policies and rules governing the sector; **(ii)** secondly, the **National Electricity Regulatory Board** (ENRE)[14] and the **National Gas Regulatory Board** (ENARGAS)[15]whose main functions are the regulation and supervision of electricity and gas markets, which we will look at finally, **(iii)** the **Administrative Company for the Wholesale Energy Market** (CAMMESA)[16], whose main functions are coordinating dispatch operations or participation in certain power purchase contracts.

• **The National Electricity Regulatory Board** (hereinafter "ENRE**"**) is defined, in accordance with Law 24,065 1993 and Regulatory Decrees 2,073/61 and 1,398/92, as an autonomous body responsible for regulating electricity activities and control that generators, transporters and distributors of the sector comply with obligations established in the regulatory framework and the corresponding concession contracts.

It is managed and administered by a management board made up of five members, one of whom will be its President, another as Vice-President and the others as spokesmen. They will be selected from people with technical and professional experience in the field and designated by the Executive, two of them on the

[13] https://www.minem.gob.ar
[14] http://www.enre.gov.ar
[15] http://www.enargas.gov.ar/
[16] A Limited Company whose capital is distributed equally among the entities representing the generators, distributors, transporters and important electricity users. Available at http://portalweb.cammesa.com/default.aspx

recommendation of the Federal Council of Electricity Energy. Their terms will last five years and may be renewed indefinitely. They will cease their mandates in turn throughout the year. They may only be removed from office with just cause issued by the Executive. However, the law does not establish absolute grounds to which the government must adhere for their removal.

It corresponds to the Ministry of Electric Power to establish the profile for each member of the management body. They will also conduct a selection process and determine which are the most suitable and therefore eligible candidates, among those selected in the prior procedure.

The selection procedure mentioned above will start with an open call which must be published in national newspapers, in accordance with the rules established by the regime of the Board of Executive Positions, approved by Decree 994 of May 27, of 1991.

The experience of those selected will be evaluated by analysis of their respective *curriculum vitae* and by personal interviews conducted by experts, with the aim of determining those who meet the minimum requirements established for the position. The result of this assessment will be presented to a Selection Committee made up of representatives who, by their nature, ensure fairness and independence of judgement in their decisions. Thus, a minimum number of candidates, as established by the Secretariat, will be selected for each position to be filled, and will be named as "*eligible candidate*s".

If there is no eligible candidate to cover a given position, the procedure detailed above will be repeated just for that position. The procedure will also be repeated if the Ministry of Electric Power considers it necessary, so that there is only one eligible candidate. This circumstance shall not preclude the continuation of the procedure for appointing the remaining members of the ENRE management body.

The Ministry for Electric Power and Federal Council for Electric Power will propose to the National Executive, the salary that corresponds to members of the management body from among the eligible candidates.

Members of the ENRE management body must dedicate themselves exclusively to the position and must at all times respect the regime of incompatibilities established by law for public officials.

Prior to the appointment or removal of a member of the management board, the

Executive Branch must communicate the reasons for this decision to a committee of the National Congress, which consists of sixteen members, the Presidents and Vice-Presidents of the Commissions chosen by both Houses to ensure equal representation of senators and deputies. The Commission may issue a verdict within thirty days of receiving the proceedings. When this has been issued, or after the deadline set for it, the National Executive will be authorized to issue the respective act.

The Management Board will form a quorum with the presence of three members, one of whom will be the President or his substitute, and its decisions will be taken by simple majority. The President or his substitute, will cast their vote in case of a tie.

ENRE must take the necessary measures to meet the objectives of national policy regarding the supply, transmission and distribution of electricity. To meet theses they must promote competitiveness in production, transport and distribution, encourage investment to ensure long-term supply and competitive markets wherever possible; promote open access, non-discriminatory and widespread use of transport services and energy distribution; regulate transport and distribution activities ensuring fair and reasonable rates; encourage and ensure the efficiency of supply and demand through adequate charges, and adequately protect the rights of users.

ENRE has regulatory powers that allow it to develop rules of general application, as well as powers of control, sanction, resolution of disputes that arise between users and distributors and between stakeholders in the wholesale electricity market.

It also has equity made up of assets that have been transferred since its inception for the exercise of its powers as well as the necessary budgetary resources allocated in the Budget Law.

• **The National Gas Regulatory Board** (hereinafter "**ENARGAS**") is an independent agency created by the 1992 Law 24,076, for the purpose of **regulating and monitoring** the public gas service.

In accordance with Article 53 and the following of its founding legislation, ENARGAS is managed and administered by a Board of five members, one of whom is the President, another the Vice Presidents and the others spokesmen. All Board members are elected for terms of five years, indefinitely renewable. There

are no causes for removal established, and they may be dismissed from their positions by decision passed by the Executive Committee.

Their appointment corresponds to the National Executive Committee (two of them are proposed by the Governors of the Provinces). As happens in the process of selecting the directors of the National Electricity Regulatory Body (ENRE), in the process of choosing the members of the Board of ENARGAS a two-House Commission of the Congress of the Nation also participates. In the same way, the Commission has thirty days to approve or disapprove the proposed candidates. Board members are selected from experienced professionals in the field and are subject to the incompatibilities established by law for civil servants.

The Board forms a quorum with the presence of three of its members, one of whom must be the President or his substitute, and its resolutions are adopted by a simple majority. The President, or whoever replaces him, has the casting vote to settle ties in decision-making.

Among the objectives of regulation and supervision legally assigned to ENARGAS, to be highlighted, among others, are the following**: (i)** adequately protect the rights of consumers; **(ii)** promote competitive markets of supply and demand of natural gas, and encourage investments to ensure long-term supply; **(iii)** aim to improve operations, reliability, equality, free access, non-discriminatory and widespread use of the services and facilities of transportation and distribution of natural gas; **(iv)** regulate the activities of transportation and distribution of natural gas, ensuring that the rates that apply to services are fair and reasonable; **(v)** encourage efficiency in transport, storage, distribution and use of natural gas; **(vi)** encourage the rational use of natural gas, ensuring adequate protection of the environment; **(vii)** strive to ensure that the price of natural gas supply to industry is equivalent to those in effect internationally in countries with a similar endowment of resources and conditions; **(viii)** advise users regarding the rights and obligations laid down in the regulations for the sector, and **(ix)** perform work of mediation and conflict resolution among operators.

To ensure compliance with its objectives, the Law gives powers to ENARGAS to dictate sectoral regulations necessary to ensure the provision of safe, continuous and efficient service. The Law also assigned it the powers to carry out inspection, control and supervision over the entities responsible for the service and, if necessary, establish the penalties resulting from infringement of sectoral policy framework. It also has powers to resolve, prior to judicial petition, disputes between subjects of the industry, under Article 66 of the Law 24,076.

3.1.2.2. Telecommunications sector

On December 16, 2014, the Argentinian Congress passed a new telecommunications law under the name of "*Argentina Digital*", Law 27,078 (hereinafter "**ICT Law**") which amended the previous Law 19,798 (the old Telecommunications Act) and Decree 764/2000.

Following the publication of the ICT law, the old law only applies to matters not included in this. Thus, in the same vein, January 4, 2016 a decree of necessity and urgency 267/2015 was issued:

- It partially amended the ICT Law and Audiovisual Communications Act 26,522 (hereinafter the "**ACS law**");
- It created a new regulatory and control authority called the **National Agency of Communications** (**ENACOM**), to replace the previous authorities (AFTIC and AFSCA), and
- It created a special committee for the purpose of drafting a new unified and updated Act to replace the Law on ICT and ACS Law.

The aim of the Act is to declare ICT development and regulation of information technology and communications (ICT) and associated resources to be an activity of public interest, establishing and ensuring total internet neutrality. The aim is to guarantee the human right to communication, providing access to information and communication to all residents of Argentina under equitable social and geographical conditions.

• **The National Communications Board** (hereinafter "ENACOM**"**) is a newly created Agency by Decree 267 2015. This institution constitutes an autonomous and decentralized body which operates under the Ministry of Communications of the Nation, and aims to regulate and direct the process of technological convergence and create stable market conditions to ensure access for all Argentinians to Internet services, landlines and mobile telephones, radio, post and television services.

The management and administration of ENACOM will be exercised by a management board made up of a Chairman, three Directors, appointed by the

National Executive and three directors nominated by the two-House Commission on the Promotion and Monitoring of Audiovisual Communication Technologies Telecommunications and digitization, who will be selected by this at the proposal of the parliamentary blocs, one corresponding to the majority or minority group, one to the second minority and one to the third parliamentary minority.

The members of the management board are appointed for periods of four years and may be reappointed for an additional period. However, they may be terminated at any time by the Government, without the need for due cause.

Among the functions attributed to ENACOM are the following:**(i)** implement a homogeneous and adequate regulatory framework for the development of the industry, resulting in the benefit of users and consumers, so that they may access a greater diversity of services at a lower price; **(ii)** to facilitate the defence of competition against any form of market distortion, benefiting consumers and avoiding distortions in competition, such as the selective enforcement of sanctions, the granting of discretionary licenses and any mechanism for arbitrary awards and sanctions or other distortion practices; **(iii)** protect the general welfare and conditions of equality in the access of the population to quality services, contributing to eliminating the digital divide; **(iv)**to maintain a public policy of rapid and effective action in order to develop the sector, adapting the regulations to the requirements of the sector and society and collaborating in the reorganization of the communications market; **(v)** to ensure the greatest possible freedom of the press, pluralism and access to information, to promote the development of new information and communication technologies, and to move towards convergence between the different technologies available, ensuring legal security for promoting investment in infrastructure; **(vi)** to maintain and ensure the proper functioning of the different stakeholders in the communications sector, adapting periodically the rules of concentration for the impact of technologies and the emergence of new stakeholders or situations.

It also corresponds to ENACOM to collaborate and advise on the design of public broadcasting, telecommunications and digital technologies policy. It will also be responsible for proposing guidelines for the preparation of the bidding terms and conditions for calls for tender or direct award of licenses.

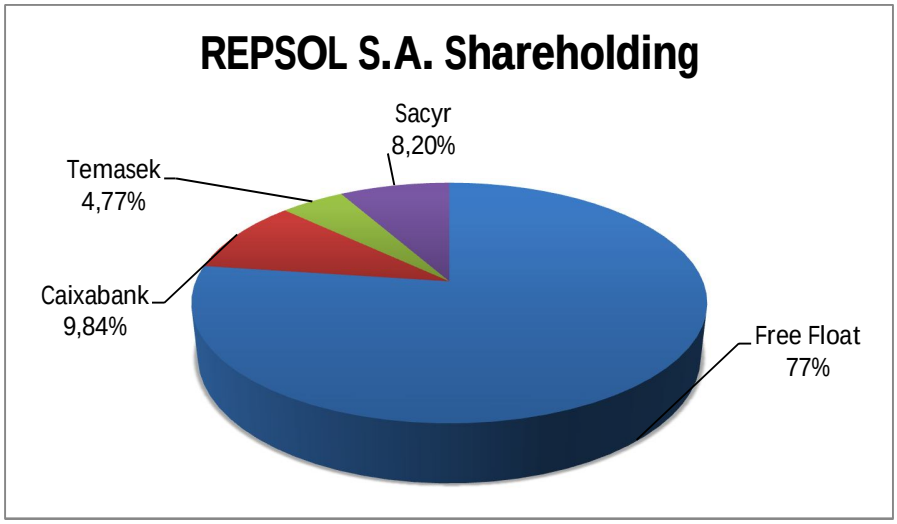
The entity must also submit an annual report to the two-House Commission on the Promotion and Monitoring of Audiovisual Communication, Technologies of Telecommunications and Digitalization regarding the state of law enforcement and the development of broadcasting and Information Technology and Communications

in the country.

3.1.3. Some relevant cases that reflect the perception of legal security and protection of foreign investment

Repsol YPF

One of the most important cases affecting the international perception of legal security and the protection of foreign investment in Argentina is the expropriation of Repsol YPF, in the wake of Law 26,741 on Hydrocarbons Sovereignty, which declared it public utility and expropriated 51% of the capital of YPF SA and Repsol YPF Gas S.A. in 2012.



Source: https://www.repsol.com/es_es/corporacion/accionistas-inversores/la-accion-de-

repsol/distribucion-acionarial/

The measure adopted was following the pronouncement of the Argentine government that Repsol was in a situation of undue reduction of investment and production of YPF in order to cause an artificial increase in prices and increase profits, causing a trade deficit in the sector and jeopardizing the country's energy sovereignty. Moreover, the discriminatory nature of the measure was reflected in the fact that it only affected Repsol as a YPF shareholder, and not domestic shareholders who disposed of 25% of the shares of the company.

The expropriation of 51% of the capital of YPF was declared a public utility.51% of that capital was allocated to the central State and 49% was distributed among the 10 provinces that make up the Federal Organization of Hydrocarbon Producing States.

Both the process and compensation were governed by Expropriation Act 21,499, in force since 1977. Such compensation only took into consideration the objective value of the property and damages which were direct and immediate consequence of expropriation.

With this Law, YPF became controlled by the state, but remained a public company, so sought new private investors for its exploration and exploitation of resources and, in particular, the vast reserves of non-conventional hydrocarbons discovered by Repsol the year prior to expropriation in the Vaca Muerta field in the province of Neuquen.

However, Argentina's international reputation was seriously affected by what was regarded as an illegitimate usurpation of shares.

Finally, faced with serious difficulties in obtaining national capital that would allow the exploitation of the Vaca Muerta field, the government eased the requirements for international investors and enacted a new investment regime in the hydrocarbon sector. This made it possible for the US multinational Chevron to begin the exploitation of the field, on very favourable terms.

Enron Corporation and Ponderosa Assets, L.P.

On February 26, 2001 Enron Corporation began arbitration proceedings before the ICSID against the Republic of Argentina, for violation of the Treaty of Reciprocal Protection of Investments signed between Argentina and the United States on November 14, 1991.The claim by the plaintiff was linked to shareholding in the Transportadora de Gas del Sur, S.A. (hereinafter "**TGS**"), the licensee of natural gas transportation system which operated southern gas pipelines.

Initially, the demand referred to the intention of some provinces of Argentina to levy a tax on the operations of TGS, the applicants considering that this contravened the Treaty. However, in 2003, the plaintiffs filed a new request for arbitration for other violations, such as the ban by TGS of adjusting their rates according to the United States producer price index ("PPI") in accordance with its license and regulatory framework, and the violations produced from the enactment of the Emergency Law Economic 25,561 which, among other things, completely cancelled the PPI tariff adjustments and the right to calculate tariffs in US dollars under the regulatory framework.

Finally, the court decided to continue the process only with respect to the additional application in which the plaintiffs alleged that the following provisions of the Treaty had been violated:**(i)** the prohibition of expropriation; **(ii)** the principle of fair and equitable treatment; **(iii)** the principle of non-arbitrariness or discrimination; **(iv)** the umbrella clause[17], and **(v)** the principle of full protection and security.

As in the cases of CMS, Azurix, LG&E and Siemens, the Court held that the measures adopted by Argentina, from the enactment of Law 25,561, involved the infringement of the principle of fair and equitable treatment. In addition, the Court understood that these measures also involved the violation of the umbrella clause

[17] The provision of the Treaty between the United States of America and the Republic of Argentina on the Promotion and Reciprocal Protection of Investment, signed on November 14, 1991, in force since October 20, 1994 (TBI) establishes that each Party must observe commitments they have entered into with respect to investments (Article II(2)(c) of the TBI).

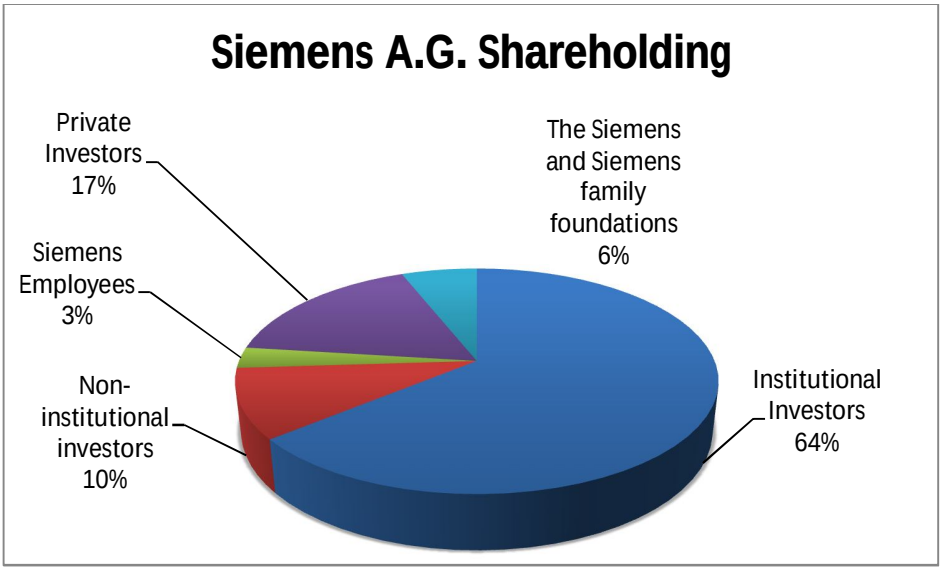
under the Treaty. However, the Court rejected the appeal regarding the violation of other standards of protection under the Treaty.

Argentina's defence, based on the state of emergency and necessity, was rejected by the Court, which did not consider that this met the requirements of both domestic law and international law. Thus, the judgement in the case "LG&E against Argentina" remains the only precedent in which the existence is admitted, for some months, of a state of emergency which exonerated Argentina for the damage caused to the investor for a period of time. Finally, the Court sentenced Argentina to pay the plaintiffs compensation of the "real market value" of the investment and damages arising from the non-application of the tariff adjustment based on the PPI.

Siemens

SIEMENS

On April 21, 2008, Argentina requested the annulment of the ICSID arbitration award, which condemned it to pay Siemens 217 million dollars. The conflict lay in the lawsuit filed by Siemens following the termination of a contract for the drawing up of national identity documents in which 255 million was requested in lost profits and 183.9 million in investments. The award ordered the Argentine State to pay 217 million dollars for expropriation due to contractual termination.



Source:
http://www.siemens.com/investor/en/siemens_share/shareholder_structure.htm

Argentina, meanwhile, justified the termination on a breach of conditions by Siemens and its "disappointing and inadequate" contractual performance. In addition, it said it had always recognized the right to compensation in case of termination of the contract and in any case required the cooperation of the applicant to carry out the assessment, which meant knowing Siemens costs. The award ordered the State to pay 217 million dollars for expropriation by contractual termination; however, the lack of clarity in the calculation of the figure led to one of the adjudicators declaring his dissenting opinion, as the court should have appointed an independent expert in the financial evaluation, in order to ensure appropriate compensation for Siemens.

There were two opposing positions: on one hand, Argentina invoked the "proportionality test", arguing that states should possess a degree of deference to determine what is an important matter of public interest, and what kind of interference with foreign investment is guaranteed in view of this interest. On the other hand, Siemens invoked the "effects test", consisting of an analysis focused exclusively on the impact of government measures on the investor, without considering the public interest or the motive behind the measures.

Meanwhile, the ICSID tribunal said that the rules of international investment treaties protect "legitimate expectations" and the legal security of foreign investors, and they had been affected by the forced contract renegotiation initiated by the Argentine government.

This case is a clear example that international investment law cannot be considered independently from the rest of international law, or domestic public policies of states, or the facts that originate the contract.

3.2. BOLIVIA

BOLIVIA

Population	10.72 million	2015
GDP	$33.00 billion	2015
GDP growth	4.8%	2015
Inflation	4.1%	2015

Source: World Bank
http://www.bancomundial.org/es/country/bolivia

3.2.1. Incorporation of the country to the multilateral free trade and investment protection systems

Bolivia has for many years formed part of the international conventions and agreements that guarantee free trade, investment protection and confer on third-country investments conditions equally favourable to those accorded to domestic investments.

In recent years, however, the legal free trade framework of protection and guarantees for the legal security of foreign investment in the country has undergone major changes[18], due to the 2009 reform of the Constitution of Bolivia. Article 359 of the Constitution of Bolivia ordered the nationalization of all hydrocarbon fields in the country, and provides that the State is the sole authority for marketing[19].

[18] **Espinoza Vásquez, L.M.** *Períodos regulatorios en Bolivia (Análisis causales para Electricidad y Telecomunicaciones).* Perspectivas. Universidad Católica Boliviana San Pablo. Cochabamba. 2015;**Farfán, M.E.** *¿Funciona o no el régimen regulatorio en la Legislación Boliviana?* Revista Jurídica Derecho. La Paz. 2015; **Díaz Valdivia, C.A. y Aliaga Lordemann, J.** *Análisis de la relación entre calidad institucional, recursos naturales y crecimiento económico.*LAJED nº14. 2010; **Vargas Suárez, R**. *La nacionalización de los hidrocarburos bolivianos en la presidencia de Evo Morales.* Latinoamérica. Revista de Estudios Latinoamericanos. Nº.49. México. 2009; **McGuigan, C.** *Los beneficios de la inversión extranjera. ¿Cuáles fueron sus resultados en el sector petrolero y gas en Bolivia?* Centro de Estudios para el Desarrollo Laboral y Agrario. La Paz. 2007.

[19] Article 359 of the Constitution of Bolivia. " I. Hydrocarbons, whatever state they are in or how they are found, are inalienable and imprescriptible property of the Bolivian people. The State, on behalf

Also, since the enactment of said constitutional reform of 2009, Bolivia has entered a period of renegotiation and denunciation of international agreements and free trade agreements and foreign investment protection which was in force until then in the Bolivian legal system.

In accordance with the Ninth Transitional Provision and Article 366 of the Constitution of Bolivia[20], many international agreements have already been denounced, among which are those that establish dispute settlement systems between the Bolivian and foreign governments through mechanisms mediation or international arbitration investors. Amongst these is the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (ICSID), which, from 2010, is no longer part of the legal system.

Moreover, within the constitutional framework mentioned, the Investment Law 516 of 2014 establishes a new legal and institutional system for the promotion of investments, in order to contribute to growth and economic and social development.

This law establishes different investment categories, among which are those referred to as preferred investments. These investments correspond to those considered to be of strategic interest to the country by the Ministry of Development Planning, within the legally designated margins. The investments included in this category enjoy specific incentives deemed appropriate in each particular case.

Some of the sectors considered as preferred investment are related to the production sectors of hydrocarbons, mining, energy, transport, tourism, agricultural industry and

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of the Bolivian people, holds the ownership of all hydrocarbon production in the country and is solely authorized to market them. All of the income received from the marketing of hydrocarbons will be property of the state. II. No contract, agreement or arrangement, direct or indirect, express or implied, may totally or partially violate the provisions of this Article. In the case of breach, the contracts shall be automatically void and those who have agreed, signed, approved or executed them will be guilty of treason ".

[20] Ninth Transitional Provision. Constitution of Bolivia. "International treaties prior to the Constitution that contradict it will not be upheld in the domestic legal system, in the range of law. Within four years from the election of the new Executive, it will denounces and, if necessary, renegotiate the international treaties that are contrary to the Constitution"; Article 366 of the Constitution of Bolivia. "All foreign companies operating in the hydrocarbon production chain and on behalf of the State shall be subject to the sovereignty of the State, dependent on the laws and state authorities. No foreign court case or jurisdiction will be recognized and exceptional circumstances of any international arbitration may not be invoked nor recourse to diplomatic claims".

textile sectors which contribute to generating added value, innovation, technology and human capital. However, the law is categorical in stating that will always prioritize, on equal terms, the proposals of the national investor.

Also, this Investment Law provides that foreign investors, subject to fulfilment of tax obligations, may transfer abroad foreign currency, freely convertible through the banking system, the capital from the total or partial liquidation of companies in which registered foreign investments have been made or sale of shares or rights acquired by reason of foreign investment; net profits generated from registered foreign investment; revenue resulting from the settlement of disputes, and payments to suppliers or creditors domiciled outside the country directly linked to the investment under current legislation and applicable.

3.2.2. Institutional framework for regulation and supervision of regulated Energy and Telecommunications markets

3.2.2.1. Electricity, gas and liquid fuels sectors

• The **Authority of Audit and Social Control of Electricity** (hereinafter "**AE**") is a public institution of a technical nature, endowed with legal character and its own assets and administrative, technical and financial, independence under the Ministry of Hydrocarbons and Energy.

The AE is headed by an Executive Director, of free appointment and removal, appointed by the President of the State from among renowned professionals and subject to the disqualifications and incompatibilities indicated in Article 8 of Supreme Decree 71 of 2009, which creates the Authority of Audit and Social Control of the Multinational State of Bolivia.

The Executive Director is accompanied by an Advisory Council which undertakes a work of great importance in the exercising of the powers granted to the entity. Specifically, the Advisory Council may propose and project recommendations for regulation, supervision, control and audit in the sector to the Executive Director. At the same time, the Advisory Council has the power to oversee the correct

performance of the Executive Director. This Advisory Council is composed of the Ministry of Hydrocarbons and Energy, Deputy Energy Minister of Electricity and Alternative Energies, Vice Minister of Energy Development and two representatives of social organizations or users[21].

The AE is the highest authority of regulation and supervision in the Bolivian electricity sector. It has the legal powers to control and monitor full compliance with industry regulations issued within the framework of the Constitution of the State and the Electricity Law.

In exercising its competencies, it has the following powers: **(i)** increase energy capacity installed through the granting of rights of generation and transmission rights; **(ii)** approve investments to improve the capacity of generation, transmission and distribution of energy; **(iii)** establish and control prices, tariffs and investments in the sector; **(iv)** control the operation and quality of electricity supply; **(v)** promote efficiency, sustainability, safety and reliability of electricity supply; **(vi)** offences and penalties apply to electricity companies to default in its obligations or legal provisions; **(vii)** protect the rights of consumers and, finally, **(viii)** present before the Minister of Hydrocarbons and Energy any legal reforms necessary for the continuous improvement of the national energy system.

In performing its duties, the EC should act in coordination with other authorities of audit and social control, especially the Authority for the Audit and Social Control of Companies (AEMP).

Financially, the operation of the AE depends on taxes from sectoral regulation, as well as the amounts designated in the General Budget.

For the purposes of preparing its budgets, the AE must develop its own Annual Operational Plan (POA) and a draft institutional budget according to their objectives and goals regarding short-term development. It must also estimate the effective collection and programme expenditures for institutional budgets, including physical and financial programming investment projects to fulfil the objectives, goals and results of management.

The Ministry of Development Planning, prior to appraisal, proposes the public

[21] http://enlace.comunicacion.gob.bo/index.php/category/ministerio-de-hidrocarburos-y-energia/
http://www.ae.gob.bo/aewebmobile/main
http://www.autoridadempresas.gob.bo

investment budgets for subsequent submission to the Ministry of Economy and Public Finance, which evaluates, aggregates and consolidates the institutional budgets in order to prepare the General State Budget.

3.2.2.2. Telecommunications sector

• The **Authority of Audit and Social Control of Telecommunications and Transport** (hereinafter "**ATT**") is a public institution of a technical nature, endowed with legal nature and its own assets, with administrative, technical and financial, independence, under the Ministry of Public Works, Services and Housing. The ATT is headed by an Executive Director, of free appointment and removal, appointed by the President of the State from among renowned professionals and subject to the disqualifications and incompatibilities indicated in Article 8 of Supreme Decree 71 of 2009, which creates the Authorities of Audit and Social Control of the Multinational State of Bolivia.

As with the other authorities of audit and social control, the Executive Director is accompanied by an Advisory Council, which plans and proposes recommendations for regulation, supervision, control and sectoral supervision to the Executive Director of the ATT and monitors the correct performance Executive Director. This Advisory Council is made up of the Minister of Public Works, Services and Housing Deputy Minister of Telecommunications, the Deputy Minister of Transport and two representatives of users or social organizations[22].

The ATT is the highest authority of regulation and supervision in the Bolivian telecommunications sector. It has the legal powers to control and monitor full compliance with industry regulations laid down within the framework of the Constitution of the State and the Electricity Law.

In exercising its competencies, it has the following powers:**(i)** regulate and monitor the provision of services and activities of entities and sector operators; **(ii)** promote competition and efficiency in activities of telecommunications; **(iii)** investigate and sanction possible monopolistic, oligopolistic, anti-competitive and discriminatory behaviour in businesses and institutions operating in the sector; **(iv)** grant, modify

[22] http://www.comunicacion.gob.bo
http://www.autoridadempresas.gob.bo
https://att.gob.bo

and renew the authorization certificates and dispose forfeiture or revocation thereof; **(v)** impose administrative facilitation necessary for the provision of telecommunications services; **(vi)** approve and publish prices and tariffs; **(vii)** corrective measures or sanctions against misconduct by companies or entities in the sector and, where necessary, intervene in companies when attended reasons therefore; **(viii)** address, mediate or resolve disputes between operators and between them and society, related to providing service and eventually propose necessary reforms to the legal system through the Ministry of Public Works, Services and Housing.

In performing its duties, the EC should act in coordination with other authorities of audit and social control, especially the Authority of Audit and Social Control of Companies (AEMP).

Financially, the operation of the AE depends on taxes from sectoral regulation, as well as amounts designated in the General Budget.

For the purposes of preparing their budgets, EC should develop their own Annual Operational Plan (POA) and the draft institutional budget according to their objectives and goals of short-term development. It must also estimate the effective collection and programme expenditures for institutional budgets, including physical and financial programming investment projects to fulfil the objectives, goals and results of management.

The Ministry of Development Planning, prior to evaluation, proposes the public investment budgets for subsequent submission to the Ministry of Economy and Public Finance which evaluates, aggregates and consolidates the institutional budgets in order to prepare the General State Budget.

3.2.3. Some relevant cases that reflect the perception of legal security and protection of foreign investment

The legal framework for protection of foreign investment in Bolivia has been seriously affected as a result of an intense policy of nationalization.

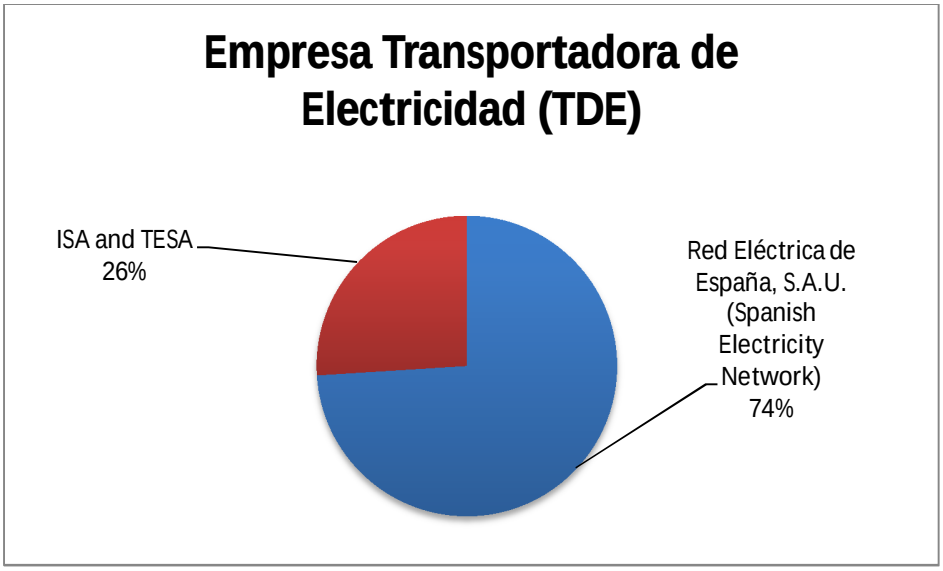
In recent years, more than twenty foreign capital companies have been subject to this practice. Especially those dedicated to the generation and transmission of electricity,

oil and telecommunications.

Possibly, this is an example, along with other political regimes in the region, of the uncertainty and concern generated by some governments of populist orientation which, with varying degrees of intensity, frequently adopt electioneering measures of an expropriatory nature, which pose a real or potential threat to legal security and investment protection.

Empresa Transportadora de Electricidad (TDE)

In 2012, the Supreme Presidential Decree 1214 came into force which ordered the nationalization of the Empresa Transportadora de Electricidad (TDE), a subsidiary of Red Eléctrica de España S.A.U., which owns 74% of the electricity transmission lines throughout the country. The ownership and management was taken over by the National Electricity Company ENDE.



Source:
http://www.ende.bo/empresas/corporacion/ende-transmision

Article 2 of that Supreme Decree ordered the nationalization of all the shares of the company Red Eléctrica Internacional S.A.

The company TDE had a presence in the Bolivian provinces of La Paz, Cochabamba, Santa Cruz, Sucre, Oruro and Potosi, with an area of 732 km of 230 kw, 839 km of 115 kw and 390 km of 69 kw.

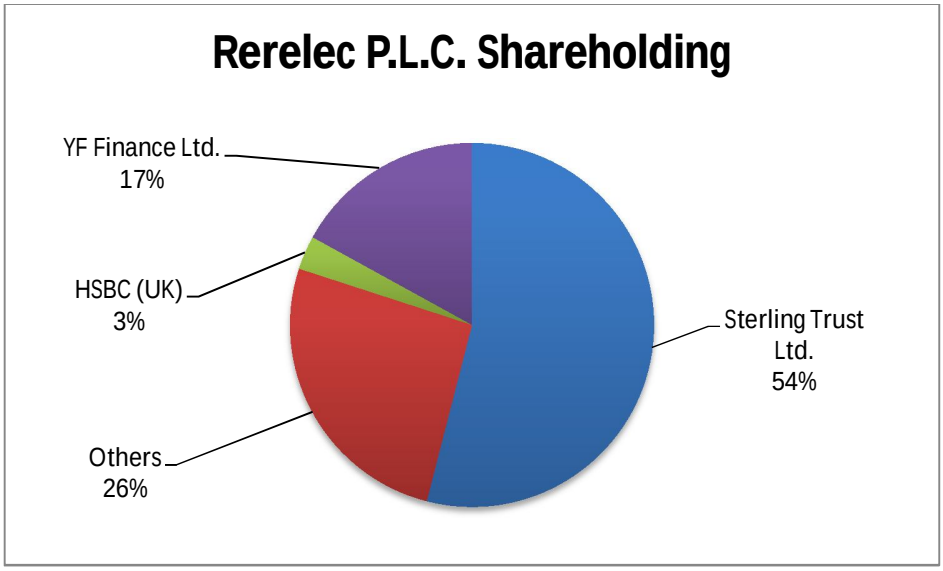
The Bolivian government justified the measure saying the company had not undertaken the necessary investments in the system over their 17 years of service management.

Empresa Eléctrica S.A. — Rurelec PLC

Many companies in the sector have been affected by similar interventions nationalization, including the British company Rurelec, principal shareholder of Empresa Eléctrica Guaracachi S.A.

On September 9, 2009, Supreme Decree 289 ordered the transfer of shares managed by the Pension Fund Administrators to the National Electricity Company ENDE. From that decree onwards, the National Company acquired ownership of 49.82%; Guaracachi America Inc. conserved 50.01% and other minority shareholders 0.17%.

Subsequently, on May 1, 2010, pursuant to Supreme Decree 493, the Bolivian government nationalized the full share package in the possession of Guaracachi America Inc., owned by the British company, Rurelec. These shares became property of the National Electricity Company (ENDE), giving it 99.83% of the shares. Empresa Eléctrica Guaracachi S.A. today is a state company, a subsidiary of ENDE Corporation.



Source:
http://www.rurelec.com/es/inversores/informacion-para-accionistas

Repsol

Previously, the Spanish firm Repsol YPF was seriously damaged by the Presidential Decree of 2006, which ordered the nationalization and full takeover of the hydrocarbon industry, including gas pipeline systems, oil pipelines and refineries.

By means of Supreme Decree 28,701, the Bolivian government ordered the definitive nationalization of the hydrocarbon resources of the country. That decree ordered that several companies operating currently in Bolivia had the obligation to

deliver all oil production to the already state owned YPFB, so that the latter could assume the marketing within the country or export to third markets.

Entel S.A.

Similarly, the telecommunications sector has experienced similar actions. Among them, that recorded in 2008, when the President of Bolivia, through Supreme Decree 29544, ordered the nationalization of the telecommunications company ENTEL, until then property Telecom Italia.

The shareholding of Telecom Italia dates from November 27, 1995, the date on which it acquired, through ETI-STET International, 50% of the shares in ENTEL and management of the Company.

Additionally, that same year, the Telecommunications Act 1632 of July 5, 1995, ENTEL had granted a monopoly for six years on national and international long distance telephone services. For this reason, among others, ENTEL occupied a leading position regarding its competitors at the time of expropriation.

On May 1, 2008, ENTEL was nationalized by Supreme Decree 29,544. The Bolivian government is now the owner of 97% of the shares of the Company.

3.3. COLOMBIA

COLOMBIA

Population	48.23 million	2015
GDP	$292.1 billion	2015
GDP growth	3.1%	2015
Inflation	5.0%	2015

Source: World Bank
http://www.bancomundial.org/es/country/colombia

3.3.1. Incorporation of the country to the multilateral free trade and investment protection systems

In 2013, the Secretary General of the OECD, Mr Angel Gurria, formally announced[23] the beginning of the process of incorporation of Colombia to the organization.

An essential part of the process of incorporating Colombia into the OCDE is improving legal security and protection of foreign investment[24].

[23] https://www.oecd.org/centrodemexico/laocde/colombia-y-la-ocde.htm

[24] **Fresco, F. & Pereira, E.G.** *Latin American Upstream Oil & Gas. A Practical Guide to the Law and Regulation*. Globe Law and Business. 2015; **Matías Camargo, S. R.** *La regulación económica de los servicios públicos domiciliarios en Colombia.* Revista Diálogos de Saberes. Universidad Libre de Colombia. Bogotá D.C. 2015; **Pacheco, R.** *La Autoridad Nacional de Televisión, ¿una agencia estatal independiente?* Revista Digital de Derecho Administrativo. Nº.13. Bogotá D.C. 2015; **Sarria**

Olcos, C. *¿Las agencias son unidades administrativas especiales?* Revista Digital de Derecho Administrativo. Nº.13. Bogotá D.C. 2015; **Aguilar Abaunza, D. y Montoya Pardo, M.F.** Panorama de las energías renovables en América Latina: El caso de Colombia, Chile y Perú. En: La regulación de las energías renovables ante el cambio climático. Aranzadi. 2014; **Campanelli Espíndola, M.J.** *La construcción de un concepto llamado regulación. Derecho de la regulación, los servicios públicos y la integración regional.* Revista Digital de Derecho Administrativo. Nº.12. Bogotá D.C. 2014; **De la Torre Vargas, D.** *Fallos del mercado y regulación económica en los servicios públicos domiciliarios. Aproximaciones a una disciplina poco entendida por los juristas.* Revista Digital de Derecho Administrativo. Nº.12. Bogotá D.C. 2014; **Espitia Becerra, M.C.** *El servicio público de las telecomunicaciones: un reto para la regulación económica OCDE. Estudio de la OCDE sobre políticas y regulación de telecomunicaciones en Colombia.* Revista Digital de Derecho Administrativo. Nº.12. Bogotá D.C. 2014; **López de Armas, K.M. y Amado Amado, C.***Principio de eficacia constitucional de la función de vigilancia y control de la Superintendencia de Industria y Comercio en materia de telefonía móvil celular.* Revista de Derecho, Comunicaciones y Nuevas Tecnologías No. 12, Julio - Diciembre de 2014. Universidad de los Andes. Bogotá D.C. 2014; **Montero Pascual, J.J.** *La actividad jurídica de regulación.* Revista Digital de Derecho Administrativo. Nº.12. Bogotá D.C. 2014; **Montoya Pardo, M.F.** *Regulation of unconventional reservoirs in Colombia. The law of energy underground. Understanding new developments in subsurface production, transmission, and storage*. Oxford University Press. UK. 2014; **OECD.** *Estudio de la OCDE sobre políticas y regulación de telecomunicaciones en Colombia,* OECD Publishing. 2014; **Perdomo, C.** *Control judicial de la regulación económica en clave de los actos administrativos proferidos por la Comisión de Regulación de Comunicaciones (CRC).* Revista Digital de Derecho Administrativo. Nº.12. Bogotá D.C. 2014; **Carvajal Sánchez, B.** *¿Cómo asegurar la calidad regulatoria?* Revista Digital de Derecho Administrativo. Nº.9. Bogotá D.C. 2013; **Ducon Parra, S.** *Caso de la Comisión Nacional de Televisión – CNTV. Tensiones y visiones de una agencia regulatoria "independiente".* Universidad de los Andes. Bogotá D.C. 2013; **Fernández Rojas, G.** *Administraciones independientes de regulación y supervisión. Avances y reformas.* En: "Derecho público y reformas institucionales: estudios para la reforma de la administración pública y de justicia". Academia Colombiana de Jurisprudencia. Bogotá D.C. 2013; **Montoya Pardo, M.F.** Integration between energy law and competition law. Energy law. Amsterdam. 2013; **Pimiento Echeverri, J.A.** *La regulación. Análisis a partir de las funciones de la Comisión de Regulación de Comunicaciones.* Revista Digital de Derecho Administrativo. Nº.9. Bogotá D.C. 2013; **Moreno Castillo, L.F.** Regulación del mercado de energía eléctrica en América Latina. Universidad Externado de Colombia. Bogotá D.C. 2012; **Urueña, R.** *The rise of the constitutional state in Colombia: The case of wáter governance.Regulation & Governance* 6 (3). 2012; **CEPAL/SEGIB.** *Espacios iberoamericanos. Hacia una nueva arquitectura del Estado para el desarrollo.* 2011. **Cordova-Novion, C. & Jacobzone S.** *Strengthening the Institutional Setting for Regulatory Reform: The Experience from OECD Countries.* OECD Working Papers on Public Governance nº19. OECD. 2011; **Jordana, J.; Levi-Faur, D. and Fernández i Marín, X.** *The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion.* Comparative Political Studies October 2011 44: 1343-1369. 2011; **Moreno Castillo L.F.** Hacia una buena inspección, vigilancia y control de los servicios públicos domiciliarios. Universidad Externado de Colombia. Bogotá D.C. 2011; **Bernal, P.I.** *Liberalización y regulación. Balance europeo y tendencias colombianas.* Revista

Regarding foreign investment in Colombia, it must be emphasized that respect for foreign investment is based on the full constitutional guarantee of the right to property and the principle of respect for freedom and private initiative enshrined in Articles 58 and 333 of Political Constitution of Colombia[25].

In this matter the principles of equal treatment of domestic and foreign investment, universality[26], automatic nature[27] and stability reign[28].In addition, the national judicial authorities and international mediation and arbitration institutions are competent to resolve any disputes that may arise to ensure the rights of the foreign investor.

Such is the case of the new regulatory framework established by Law 1715 of 2014, which promotes the use of non-conventional energy sources and is part of a state policy to boost the implementation of wind and solar energy sources, through a broad

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digital de Derecho Administrativo, nº3. Universidad Externado de Colombia. Bogotá D.C. 2010; **Gil Botero, E.** *La valoración jurídica de las manifestaciones normativas de las comisiones de regulación: sus límites entre la función administrativa que les es propia y las funciones legislativa y judicial.* Revista Digital de Derecho Administrativo. Nº.3. Bogotá D.C. 2010; **Restrepo-Medina, M.A.** Redefinición normativa de la regulación y el control de la actividad económica en el caso colombiano. Revista Vniversitas Núm. 121. Pontificia Universidad Javeriana. Bogotá D.C. 2010; **Castaño Parra, D.** *La función de regulación como mecanismo de intervención del Estado en la economía en materia de servicios públicos. Comentarios a la sentencia T-058 de 2009.* Revista Derecho del Estado Nº.23. Bogotá D.C. 2009; **Fernández Rojas, U.** *La confianza inversionista como causa general de la contratación internacional.* Revista de la Academia Colombiana de Jurisprudencia. Nº342. Bogotá D.C. 2009; **Hernández Arroyo, F.** *La independencia de las agencias reguladoras en México. El caso de los sectores energético y de telecomunicaciones.* Gestión y Política Pública. Vol. XVI. Nº1. Bogotá D.C. 2007; **Villegas Carrasquilla, L.** Reflexiones sobre la consolidación del Estado Regulador. En: "15 años de la regulación de telecomunicaciones en Colombia". CRT. Bogotá D.C. 2007; **Moreno Castillo, L.F.** *¿Cómo aborda el derecho comparado latinoamericano la interconexión internacional y el comercio internacional de energía? Caso Argentina, Colombia y México. Reflexiones sobre la integración energética.* Universidad Externado de Colombia. Bogotá D.C. 2006.

[25] Article 333 of the Political Constitution of 1991."Economic activity and private initiative are free, within the limits of the common good. For their exercise, no one may demand prior permits or requirements without authorization by law. Free competition is a right of all those with responsibilities involved.

[26] Foreign investment is allowed in all sectors of the economy, except specified exceptions.

[27] As a general rule, foreign capital investment in Colombia does not require prior authorization.

[28] The conditions for reimbursement of investment and for the remission of profits associated with this that were in effect on the date of registration of foreign investment may not be amended so as to adversely affect the investor.

programme of tariff incentives, tax breaks and financing funds.

As in the member countries of the OECD, investment is allowed in all sectors of the economy except those directly related to national defence and security, as well as processing, disposal and disposal of toxic, hazardous or radioactive waste not produced in the country.

As a general rule, there is no limit to the percentage of foreign investment, with a few exceptions[29], and no prior authorization is required from any national authority except for the mining and hydrocarbons and the insurance and financial sectors, which require, in certain cases, prior authorization or endorsement by the competent authorities.

Colombia is fully integrated into international conventions and agreements guarantee foreign investment, dividends and return of capital, as well as mechanisms for mediation and international arbitration for dispute resolution. Some of the trade agreements to strengthen free trade and protection of foreign investment are:

- United States-Colombia Free Trade Agreement.
- Trade Agreement with the European Union.
- Agreement between Colombia and Spain for the promotion and reciprocal protection of investments.
- Pacific Alliance (Chile, Colombia, Mexico and Peru).
- Andean Sub regional Integration Agreement ("Cartagena Agreement").
- Partial Agreement on trade and economic and technical cooperation between Colombia and the Caribbean Community (CARICOM).
- Economic Complementation Agreement 59 (ECA 59), Andean Community - MERCOSUR.

Likewise, Colombia belongs to multiple international cooperation organizations which are essential in terms of momentum for free trade and protection of foreign investment. These include:

- International Centre for Settlement of Investment Disputes (ICSID).
- The United Nations Organization (UN).
- World Trade Organisation (WTO).
- The Organization of American States (OAS).

[29] Investment in television services may not exceed 40% of the total share capital of the supplier of the service.

- Andean Community (CAN).
- Latin American Economic System (SELA).
- Association of Caribbean States (ACS).
- Latin American Integration Association (ALADI).
- Economic Commission for Latin America (ECLAC).
- The Group of 24 (G-24).
- Andean Development Corporation (CAF).

3.3.2. Institutional framework for regulation and supervision of regulated Energy and Telecommunications markets

A key part of the process of incorporating Columbia into the OECD lies in improving legal security and the protection of foreign investment and strengthening its institutional framework.

Colombia has a regulatory and institutional structure of specialized regulatory agencies for the energy and telecommunications markets, as well as specific organisms to develop the functions of monitoring, surveillance and control of regulated markets.

The regulatory bodies have, strictly speaking, experienced significant progress, orientated towards greater stability, transparency and autonomy to institutions of regulation. This has allowed the current debate about regulatory institutions focus on the possible need to limit the spread of regulatory systems. Such is the current debate on the regulatory system of the energy and telecommunications sectors, with the aim of moving towards unique and convergent regulators to overcome the difficulties caused by the distribution of these entities.

In Colombia, there are multiple telecommunications regulatory authorities. Currently the Communications Regulatory Commission (CRC) and the National Television Authority (ANTV) coexist with distinct regulatory roles for communications services and audiovisual services. Simultaneously the National Spectrum Agency (ANE) is also involved, with the role of monitoring matters of radio electric spectrum. Therefore, and in line with the recommendations of the OECD, it is necessary to carry out an in-depth analysis of the desirability of all these entities becoming a single, converged regulator for all communications and audiovisual services. This would allow greater capacity for manoeuvre at regulatory level and thus adapt the country to the irrepressible changes

in the communications sector. Many multinational companies with a presence and investments in the sector, for example DirecTV of the AT&T group, have expressed concern about the absence of a converged regulator, noting that this reform is essential to ensure future investments.

In the regulation of the mining and energy sector a similar problem arises regarding excessive regional interference by national environmental authorities in exploration and mining, even if it was approved by the mining authority granting concessions to foreign companies for such activities. In this sense, it may also be appropriate to advance the creation of converged regulators in this area, or at least mechanisms that allow them to act in a more coordinated manner.

Moreover, and in relation to supervisory, monitoring and control agencies, the country has focused attention on the need to facilitate certain advances that will give them more stability, transparency and autonomy, in order to avoid undue interference that could be exercised over them by political powers or regulated sectors.

Regarding the monitoring systems of sensitive regulated sectors, in its National Development Plan[30]approved by Congress in Law 1450 of 2011, the Government of Colombia itself made an explicit call regarding the need to provide a higher level of independence to multiple agencies responsible for supervision, monitoring and control of regulated markets.

Decree 1817/2015 of September 15, cautiously advances in establishing periods of four years for executive positions in three of the ten entities that make up the group of agencies responsible for supervision, monitoring and control of regulated markets in Colombia. It is unclear to what extent this reform limits the President's powers of removal, or if it is necessary to prove good cause for this, or facilitate a public, transparent procedure for their cessation.

In all events, limiting this reform to some of the agencies responsible for supervision, monitoring and control of regulated markets, means that highly sensitive regulated sectors have remained outside it. This includes sensitive sectors, including, household utilities of electricity and gas.

[30] National Development Plan 2010-2014. Pages 79, 80, 81, 83, 143, 147, 199, 292, 299, 301, 489.Department of National Planning.Bogota D.C.Colombia.Available in electronic version at the following address: https://www.dnp.gov.co/Plan-Nacional-de-Desarrollo/PND-2010-2014/Paginas/Plan-Nacional-De-2010-2014.aspx

3.3.2.1. Electricity, gas and liquid fuels sectors

• The **Regulatory Commission for Energy and Gas** (hereinafter "CREG**"**) is a Special Administrative Unit, created by Law 142 of 1994 with administrative, technical and financial autonomy, with no legal nature under the Ministry of Mines and Energy. The CREG is made by the Minister of Mines and Energy, who presides over it, the Minister of Finance, the Director of the National Planning Department and eight Commissioned experts appointed by the President, for periods of four years. There are no regulated mechanisms or established causes for removal. Likewise, the Superintendent of Public Domiciliary Services and Superintendent of Industry and Commerce may attend without voting[31].

The CREG is the agency responsible for regulating electricity, gas and liquid fuel public services, in accordance with technical criteria, objectives and general scope, within the framework established by law.

Law 142 of 1994 assigned the CREG the following functions, amongst others: **(i)** Regular exercise of the activities of the energy and fuel gas, to ensure the availability of efficient energy supply, promoting competition in the sector of mines and energy and proposing the adoption of the necessary measures to prevent abuses of dominant positions and aim towards the gradual liberalization of markets to competition. The CREG may adopt rules of behaviour, depending on the position of the firms in the market; **(ii)** Regulate monopolies in the provision of public services, when competition is not possible and, in other cases, promote competition among those who provide public services; **(iii)** Issue specific regulations for the generation and joint generation of electricity and the efficient use of energy and gas fuel by consumers; **(iv)** Establish rules of operation for the planning and coordination of the operation of the national interconnected system, and to regulate the operation of the wholesale power market and gas fuel; **(v)** Establish the prices for sale of electricity and gas fuel; **(vi)** Determine, in accordance with the law, that the regulated regime or probation or there is no place to free fixing of rates; **(vii)** Define the criteria for efficiency and develop indicators and systems to assess the technical and administrative management of public services enterprises; **(viii)** Establish the quality standards that must be followed by public services companies in the provision of the Service; **(ix)** Draw up a draft law to submit for the consideration of the government, and recommend the adoption of the regulatory decrees necessary; **(xi)** define in which events it is necessary for the

[31] http://www.creg.gov.co

execution of works, installation and operation to promote competition or prevent harm to third parties; **(xii)** Order the liquidation of official monopoly of enterprises in the field of public services; **(xiii)** Prevent pacts which are contrary to free competition; **(xiv)** Establish the mechanisms necessary to prevent concentration of share ownership; **(xv)** Indicate, in accordance with the law, general criteria on abuse of dominant positions; **(xvi)** To establish the general requirements to which companies are subject to public services to use existing networks and access to public networks interconnection; **(xvii)**, at the request of either of the parties, conflicts which arise between companies and which does not correspond to decide to other administrative authorities. The resolution adopted shall be subject to judicial review of legality, and **(xviii)** The Superintendent will be required to advance investigations and impose the sanctions within its powers when they have evidence that someone has violated the rules of this law.

This institution publishes an annual action plan which includes regulatory projects to be developed and the terms established for their execution. In the development of the regulatory agenda, strategic plans and action plans, as well as in the study of regulatory control projects, prior to approval the CREG will initiate stages of hearings and public consultation procedures for any interested sector. Similarly, according to the magnitude of the project and its impact, it will organize round tables, public hearings and forums for their adequate dissemination.

Regulatory Commissions in Colombia have a legal duty to publish the general measures that they seek to implement in their respective sectors. Decree 2,696 of 2004 defines minimum standards to ensure the dissemination and participation in activities of the Regulation Commission. In Article 9, this standard provides the duty to make public on its website, no less than thirty days in advance of the date of issue, all draft resolutions of a general nature intended to be adopted, except those on tariff formulas, in which case another procedure will be followed[32].

When drafts of non-price related general regulations are published, they will include at least the following aspects: **(i)** The text of the draft resolution; **(ii)** The explicit invitation to stakeholders, users, the Superintendent of Public Services for all subjects and the Superintendence of Industry and Commerce in regard to the prevention and control of restrictive business practices of competition, provide comments or suggestions to the proposal disclosed; **(iii)** The identification of the administrative unit and persons who may requested information about the project,

[32] Provision under Articles 124 to 127 of Law 142 of 1994, regulated in Article 11 of Decree 2696 of 2004.

and to get comments and/or suggestions, indicating contact details; **(iv)** The term for the receipt of comments and/or suggestions shall not be less than ten working days from the date on which it made public the draft regulation; **(v)** Technical supports.

Finally, regulators are under a legal obligation to analyse and answer all comments submitted in a timely manner and to justify whether or not are included in the administrative act containing the final regulatory measures.

The CREG also has powers to resolve conflicts arising between companies in the sector, due to contracts or easements that may exist between them.

The CREG has no power to impose penalties and any legal or budgetary initiative must be channelled through the national government.

Its funding comes primarily from national budgets and does not have allocation of its own resources acquired through the tax system.

• **The National Mining Agency** (hereinafter "**ANM**") is a state entity of a special nature, created by Decree 4,134 of 2011, of legal nature, with its own assets and administrative, technical and financial autonomy under the Ministry of Mines and Energy[33].

The ANM is governed by a Board of Governors and its President. The Board is made up of the Minister of Mines, the Minister of Finance, the Director of the National Planning Department, the Director of the Colombian Geological Service, the Director of the Unit of Mining and Energy Planning and two representatives appointed by the President of the Republic. For its part, the presidency of the ANM is a political position of free appointment and removal at the full discretion of the President of the Republic. There are no regulated mechanisms or established causes for removal.

It corresponds to this entity to manage the mineral resources of the State through development, promotion, granting of rights, monitoring and control of exploration and mining according to technical, transparent and objective criteria.

It is also empowered to support the Ministry in resolving conflicts arising from the

[33] https://www.anm.gov.co

granting of concessions for the extraction of subsoil resources. The ANM can also impose sanctions on mine owners for breaches of mining safety standards.

Annually, the ANM publishes an operational plan and, similarly, every four years establishes its strategic recommendations.

To finance the ANM, the law has established the payment of taxes by holders of exploration or mining rights, as surface rent for each concession assigned, in addition to any allocation approved for that purpose in the General Budget law of the Nation.

• The **Agency of Public Domiciliary Services** (hereinafter "**SSPD**") is a decentralized entity created by Law 142 of 1994, technical and legal in nature, with administrative and patrimonial autonomy. The organization is headed by a superintendent appointed by the President of the Republic. Being an official of free appointment and removal, their stability and permanence in office is a fully discretionary decision depending on the decision of the President[34].The law expressly states the specific requirements for applicants for this position[35].

This institution is competent to exercise the functions of inspection, supervision and control over the entities and companies providing public services, among them, energy and gas services.

By law, the persons providing public services shall be subject to the control and supervision of the Superintendence, in accordance with Law 142 of 1994 and Article 87 of Law 1753, 2015.

Among the range of the powers of the SSPD are the following: **(i)** Monitor and control compliance of laws and administrative acts to which they are subject who provide public services, and sanction any violations, as long as this function does not fall within the competence of other authority; **(ii)** Evaluate the financial management, technical and administrative management of the enterprises of public services, in accordance with the indicators defined by the Commissions; publish their assessments; and provide, in a timely manner, all the information available to

[34] http://www.superservicios.gov.co

[35] Decree 1083 of 2015.Article 2.2.34.1.2.(Amended by Decree 1817 of 2015)."Professional Degree and Master's Degree or PhD in an area related to the position and a minimum of ten (10) years of professional experience related to the duties of the office".

those who wish to make independent evaluations; **(iii)** agree with the company's management programs to conform to the indicators that have been defined the regulatory commissions, and to impose sanctions for non-compliance; **(iv)** Monitor and control compliance of contracts between utility companies and users; **(v)** Ensure that the budgetary subsidies to the Nation, the departments and municipalities to lower-income people, are used in the form provided for in the relevant; **(vi)** Request documents, including accounting; and practice the visits, inspections and tests that are necessary for the performance of their other functions; **(vii)** Maintain an updated register of entities that provide public services; **(viii)** Verify that the works, equipment, and procedures of the companies Comply with the technical requirements that have addressed the ministries.

Annually, the SSPD publishes accounts and levels of customer satisfaction with distinct public services.

It is also assigned broad legal powers to sanction entities responsible for providing public services when they do not respect the standards of regulation established for the sector.

In addition to budgetary allocations established in the general budgets, public service providers must pay the SSPD a special annual contribution towards the running of the organization. The SSPD receives resources through sanctions imposed on supervised entities.

Finally, it should be noted that together with the regulatory and supervisory entities mentioned, the energy sector is subject to the discretion of the National Agency of Environmental Licenses (ANLA) and the Autonomous Regional Corporations, responsible for certifying the environmental effects of different activities of generation and transmission of energy.

3.3.2.2. Telecommunications sector

• The **Commission for Communications Regulation** (hereinafter "**CRC**") is a Special Administrative Unit, created by Law 1341 of 2009, with administrative, technical and heritage independence, not a legal entity, under the auspices of the Ministry of Information Technologies and Communications. The CRC is made up of five members. Two of them are the Minister of Information and Communications

Technology and the Director of National Planning Department, freely appointed and removable by the President of the Government. There are also three commissioners, appointed by the President of the Government for periods of four years, with no regulated mechanisms or established causes removal. The law expressly states the specific requirements for applicants for this position[36].Its regime of incompatibilities and disqualifications corresponds to those established in the general rules governing the civil service, as well as certain additional limitations arising from the exercise of sectoral competencies.[37]

It should be noted that the OECD, in its 2014 report entitled *"OECD study of telecommunications policy and regulation in Colombia"*[38], draws attention to the lack of independence of the CRC in the face of the government. Among its main recommendations, it points out that the direct participation of the Ministry of Information Technology and Telecommunications and other government departments in the Commission (such as the National Planning Department) not be allowed and to extend to five or six years periods the appointment of the three commissioners elected for a fixed term.

The CRC is the body responsible for promoting competition, preventing abuse of dominant positions and regulating markets for networks and communications services. Communications services regulated by the CRC are telephone (landlines and mobile) and Internet services. With regard to the television service, it has specific powers assigned by law[39] and regulatory functions shared with the National Television Authority.

In order to ensure greater transparency, participation and evaluation of its activities in the exercise of its powers CRC publishes an annual regulatory agenda. This allows the institution to have broad regulatory mechanisms for consultation and participation prior to strengthen its credibility and prestige within the regulated sector.

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[36] Law 1341 of 2009.Article 20."They should be lawyers, telecommunications or electronic engineers or economists. In all events, at least one commissioner must be an engineer. Commissioners must be Columbian nationals, over 30, with a professional degree and a related Master's degree or PhD and a minimum of eight (8) years related experience in professional practice".

[37] https://www.crcom.gov.co/es/pagina/inicio

[38] OECD. *OECD study on telecommunications policy and regulation in Colombia*.2014.

[39] Powers granted by Law 1507 of 2012, by which provide for the distribution of powers between state entities regarding television and other provisions.

The CRC, in accordance with OECD recommendations, has begun to incorporate RIA methodology (*Regulatory Impact Assessment*)[40], which will allow essential evaluation of the positive and negative effects of the regulatory measures proposed, the existing regulatory conditions and even non-intervention options.

This entity also has some very specific sanctioning authority under the law. However, as a general rule, in this sector the sanctioning function is exercised by the authorities of surveillance and control of it.

The CRC also has powers to resolve conflicts arising between telecom operators related to interconnected networks and services.

Any legislative or budgetary initiative is channelled through the national government. That is to say, it has no power to draw up, present or defend its budgets before the legislative bodies.

Finally, in 2009, a special contribution was created for by users of the regulated sector, which may never exceed 0.1% of their gross income, for the provision of communications networks and services sector.

• The **National Television Authority** (hereinafter "ANTV**"**) is a national agency of a special nature, created by Law 1507 of 2012, a legal entity, with administrative, patrimonial, budgetary and technical autonomy. It is responsible for the regulatory function of the television service, both free view and pay to view (in coordination with the aforementioned CRC and the National Spectrum Agency ANE), as well as for the monitoring and control of these types of service[41].

ANTV is headed by a director of free appointment and removal, elected by its Board of Directors, which consists of five members: the Minister for Information Technologies and Communications, a representative appointed by the President, a

[40] Ex-ante process of analysis of the possible impacts that will rule after enactment. It is based on a decision making process that permits a first step in identifying the problem to be addressed and the purpose of the related policy. Accordingly, a range of options should be considered to achieve the goal (including no action or option *status quo*). Finally, an analysis of the likely economic, social and environmental impact of these options must be performed in order to determine which option is the most favourable for the economy and society.

[41] http://www.antv.gov.co

representative of the regional governors, a representative of the universities and a representative of civil society. The members of the Board are appointed for periods of four years. There are no regulated mechanisms or established causes to proceed with their removal. Existing general rules governing the civil service in terms of incompatibilities and disqualifications and special ones related to the particular appointment apply. Its regime of incompatibilities and disqualifications corresponds to that established in the general rules governing the civil service.

Although legally the entity has functional independence, there are criticisms in the sector about the lack of autonomy of the ANTV against the influence exerted by some sectors in the carrying out of its authority to issue regulations.

The ANTV is assigned the legal authority to sanction, when appropriate, those who violate the public service television regulations.

On the other hand, it has no power to resolve conflicts arising between operators. Any legislative or budgetary initiative is channelled through the national government. That is to say, it has no power to draw up, present or defend its budgets before the legislative bodies.

Finally, the TV service operators pay different rates to the ANTV depending on the type of service. Free view TV operators paid a monthly percentage of 1.5% of their advertising revenue, while pay to view TV operators paid two monthly rates that are updated annually, based on the total number of service users in the market (for 2016 these rates were approximately equivalent to 0.95 euros per user with current contract).

• The **Superintendence of Industry and Commerce** (hereinafter "**SIC**") is a technical agency, a legal entity, and financial and budgetary autonomy, and under the Ministry of Commerce, Industry and Tourism. The organization is headed by a Superintendent appointed by the Prime Minister. The law expressly states the specific requirements for applicants for this position[42], as well as a specific period of four years for the Superintendent. There are no regulated mechanisms or established causes for removal. Existing general rules governing the civil service in terms of incompatibilities and disqualifications and special ones related to the

[42] Decree 1083 of 2015. Article 2.2.34.1.2. (Amended by Decree 1817 of 2015)."Professional Degree and Master's Degree or PhD in areas related to the position and a minimum of ten (10) years of professional experience related to the duties of the office".

particular appointment[43]apply.

In the telecommunications field, by law[44] the function of monitoring, control and sanctioning of the conduct of operators who violate the rights of users or engage in anti-competitive market practices is exercised autonomously. However, the Ministry of Information Technology and Communications has specific functions of supervision of the sector through the specific department responsible for directing the processes and procedures of supervision and control of telecommunications services, undertaking administrative and research activities.

The SIC publishes an Institutional Strategic Plan every three years and an action plan with goals and strategies for monitoring of the sector every year. Therefore, the results are testable against what is laid down in these plans. Like all the Colombian regulatory agencies and supervision under analysis, it publishes annual management reports and evaluation of results.

The SIC has resources allocated by the general budget of the nation and those perceived from payment of fines. The allocation of its own resources by the tax system is not contemplated.

3.3.3. Some relevant cases that reflect the perception of legal security and protection of foreign investment

Colombia is an attractive country for foreign investment. There are many examples of success which demonstrate this. The forecast for 2017 is that Colombia will be the Latin American market in which Spanish investment most increases, over Chile, Peru and Mexico[45]. For this reason, we will analyse in more detail some of the recent important events that affect the perception of legal security and protection to foreign investment in this country.

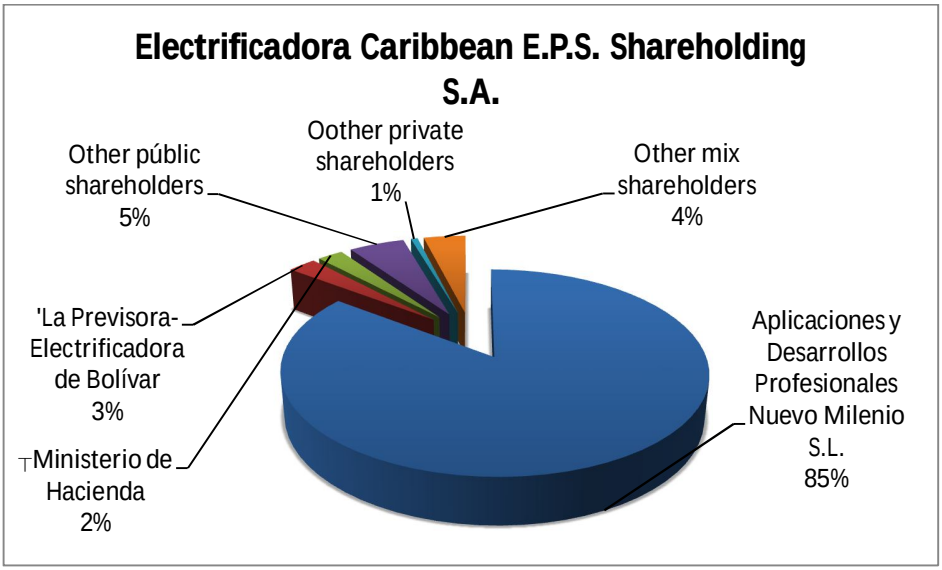
[43] http://www.sic.gov.co/

[44] Law 1341 of 2009, which defines principles and concepts regarding information companies and the organization of Information Technology and Communications, and "creates the National Spectrum Agency and other provisions ".

[45] **IE Business School y Llorente & Cuenca.** *Panorama de Inversión Española en Iberoamérica.* Madrid. 2017.

Electrificadora Caribbean - Electricaribe S.A. E.S.P.

Electrificadora del Caribe (Electricaribe) S.A. E.S.P. (hereinafter "Electricaribe"**)** provides the electricity energy supply services to the provinces of Atlantico, Bolivar, Cesar, Cordoba, La Guajira, Magdalena and Sucre. Union Fenosa, which was later merged with Natural Gas and took control of the company in 2000 through Professional Applications and Development Nuevo Milenio, S.L., has faced difficulties due to payment defaults by users of the service, including some public institutions.



Source: http://www.electricaribe.com/co/conocenos/inversionistas/hechos corporativos/1297110271591/composicion accionaria.html

On 14 November 2016, the SSPD, through Resolution SSPD 20161000062785,

ordered the taking possession of the property, assets and business of Electricaribe. This Resolution became law on November 15 of that year[46].

In accordance with the aforementioned resolution, the SSPD stated the company was guilty of infringing two of the causes contemplated by Law 142 of 1994 of Public Services to proceed with intervention: **(i)** the existence of a financial situation that could lead the company to imminent suspension of payments under the terms of paragraph 7 of Article 59 of this Act and; **(ii)** not being able to provide energy services with continuity and adequate quality, in terms of paragraph 1 of Article 59, as a result of the lack of sufficient solvency to buy generators the energy required to accomplish tasks of distribution.

The purpose of the takeover is to determine one of three possible lines of action:

- Verify that the company can resume ordinary conditions to correctly undertake its corporate purpose;
- Establish the necessary measures to enable it to agree new terms with its creditors and regain its activity;
- Proceed to the liquidation of the entity.

Legally, the process of takeover or intervention of a public service company involves mandatory adoption of the following measures, amongst others:

- To advise that the Special Agent appointed by the monitoring organization, who exercises temporary public functions and is responsible for the general administration of the affairs of the company, is entitled to end any kind of contract in existence at the time of the takeover if it is not deemed necessary. The Special Agent is authorized to perform actions aimed at guaranteeing and improving the service the company is responsible for. To this end, it is empowered to promote agreements with creditors, collect funds and assets that the intervened company should provide, manage assets; and undertake all acts and all expenditure which it considers necessary for the undertaking of the social objective;
- Make sure that all debtors of the intervened company may only make payment of their commitments to the Special Agent;
- Make sure that each and every one of the natural and legal persons in business with the intervened company only deal with the Special Agent for all legal purposes;
- Unless expressly authorized by Special Agent, registrars must refrain from

[46] http://www.superservicios.gov.co/Electricaribe

cancelling encumbrances in favour of the company on goods subject to registration and register any act affecting the ownership of the property owned by that company;

- Throughout the process, including administration or liquidation, the Special Agent may finalise agreements with the creditors of the intervened entity;
- The measures undertaken shall take into account the need to protect the assets of the entity and prevent loss of value.

The SSPD may also take the following measures, which are optional: **(i)** Remove managers, directors and tax advisors from their positions, as indeed has been ordered by the Superintendency in the case of the takeover of the Electricaribe; **(ii)** Order the suspension of payments of all outstanding obligations until the takeover.

Since the takeover of the company, on November 14, 2016, the SSPD has two months, extendable by two more as has been the case, in order to determine whether the company may undertake its objectives, or if other measures that allow creditors to pay their debts are required.

Once it has adopted that decision, the intervention will last for the time required for the implementation of the solution will be defined, in the case of considering that it may continue to exercise its corporate purpose, or that liquidation is required, under the terms established in articles 121 and 123 of Law 142 of 1994.

The Colombian Government has reported that the SSPD has appointed a team of experts to conduct a comprehensive analysis and determine what action should be taken in order to improve service quality of Electricaribe. To this end, it has advised that it counts on the technical support from the firm Tetra Tech, a NASDAQ listed company with extensive experience in revitalizing companies distributing and marketing energy worldwide. The Government also notes that in recent years, Tetra Tech reorganized more than 200 power companies in countries like India, Egypt, Nigeria, Afghanistan and Haiti.

However, the existence of a system of discretionary removal of the highest authority that ordered the takeover of Electricaribe, conveys a misleading message about the extent of its neutrality and technical autonomy in the exercising of its powers, especially in pre-election and highly politicized contexts, which increase investor uncertainty before takeovers, like the one performed, and the risks of direct or indirect expropriation.

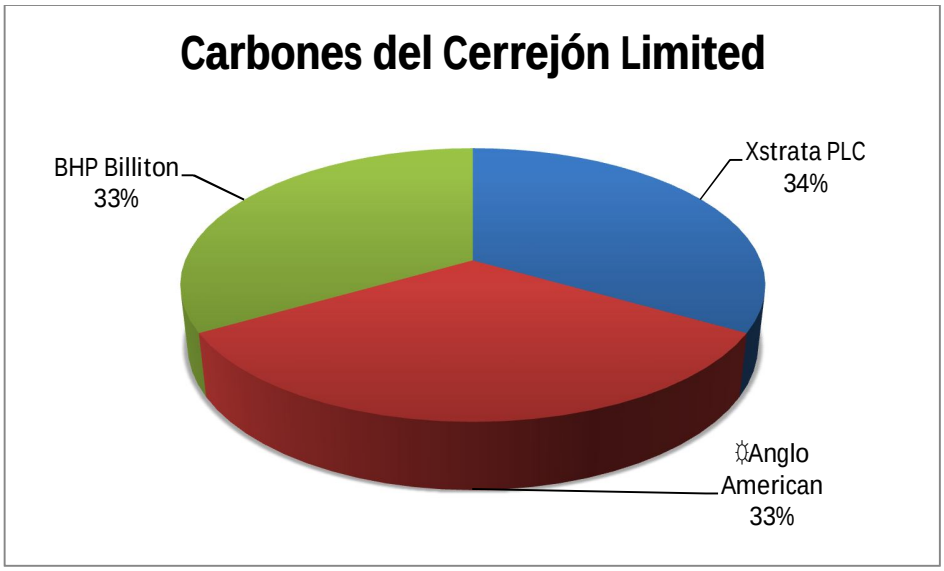
The high risk of decision-making based on electoral criteria conveys a dangerous

message to national and international investors in the northern region of the country.

The necessary improvement in the soundness and independence of regulatory and supervisory agencies is one of the most important defence guarantees for investments in this region of Colombia. A region that, on 21 February 2017, given the high politicization of its institutions, the undue management of its powers and the existence of flagrant acts of corruption, registered the first case in which the central government has taken over a regional government.

• Glencore PLC

GLENCORE



Source:

http://www.cerrejon.com/site/nuestra-empresa/historia/nuestra-historia-2000.aspx

The Swiss multinational Glencore PLC is one of the investors with greatest participation in the Colombian mining sector. It owns 33% of the coal mining company Carbones del Cerrejón Limited, through Xtrata PLC, owner of Glencore Colombia.

Glencore PLC, is also owner of Prodeco Business Group (through its subsidiaries Xstrata PLC and Glencore PLC Colombia). Through the Prodeco Business Group, the multinational has invested approximately US $1,000 million in the coal sector in the Colombian State, for the undertaking of Mining contract 044/89 of the Calenturitas project, a surface mine that produces low sulphur thermal coal with high calorific power. This mine has a production potential which allows it to transport by rail up to twenty-three million tonnes per year.

The company requested a study by the Ingeominas mining authority to review and clarify the basis for calculating price considerations, update the figures to establish compensation for gross revenues, replace the FOB price to the price at the mine head, change the key indicators of the sector - ICR for API2 - and clarify the application of additional royalties, in order to achieve a more favourable environment to undertake investments and expansion plans. In 2010, with regard to this, the contractual aggregation to the concession agreement known as Otrosí No. 8 was signed, through which the value of the royalties to be paid was reduced. This decision counted on the endorsement and participation of Ingeominas (now the Colombian Geological Service) and the Ministry of Mines and Energy.

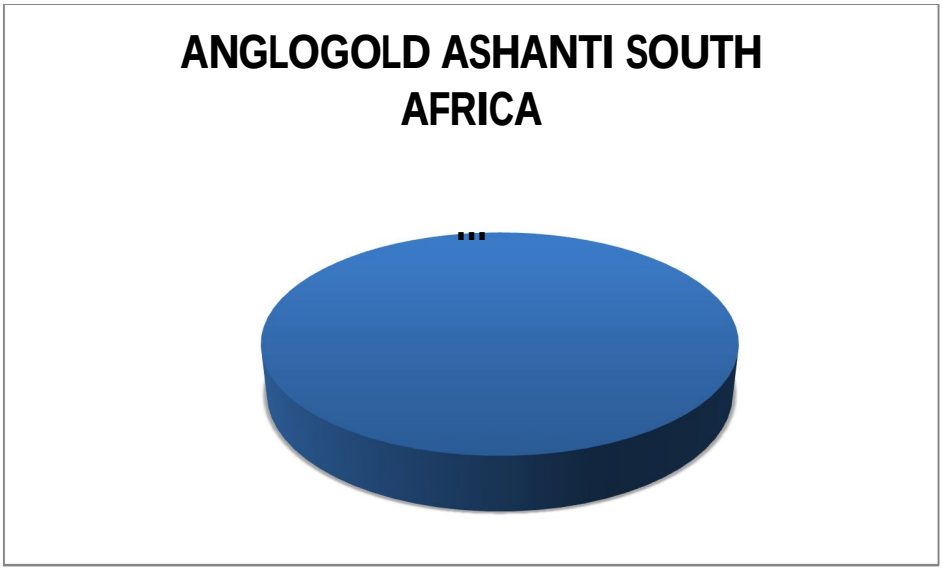
However, the aforementioned contractual addition was reviewed by the Controller General of the Republic, responsible for ensuring public resources. This entity did not endorse it and, on the contrary, sanctioned C.I. Prodeco S.A. for sum of over 60,000 million dollars, arguing that *"before implementing the changes enshrined in the Otrosí, the State received 129,512 million dollars, and after this adjustment this went down to 77,298 million dollars"*, affecting the interests of the State as a result of the changes in the calculations for settling basic, additional royalties and compensation gross income for production in 2010.

The sentence imposed for tax liability substantially changed the contract conditions and in light of the fact that, before reopening negotiations of the concession contract, the company was obliged to pay the tax penalty imposed. Were they not to comply, the law states that this situation is grounds for termination of the contract.

In March 2016, the company turned to ICSID under a bilateral investment protection agreement signed between Switzerland and Colombia in 2006, in order to overcome the legal situation that had led to the cancelling of the concession agreement that allowed it to perform activities of mining extraction.

AngloGold Ashanti - Project "La Colosa"

The need to strengthen levels of coordination between the various regulatory institutions in the mining sector was evident in 2006 when the South African multinational AngloGold Ashanti, with a presence in Colombia, discovered one of the gold deposits of greatest surface areas in the world in the province of Tolima (located in the centre of the country).What appeared to be a driving force for investment and royalties for the country has generated more uncertainties than certainties, especially for the foreign multinational.



Source: http://www.anglogoldashanti.com.co/saladeprensa/Paginas/Inicio.aspx

AngloGold applied for and obtained the permits required for exploration from the mining authority. Exploratory activity represented an initial investment of 50 million euros and a potential for much greater investment in the process of exploitation of the mine. However, the exploration project has encountered numerous difficulties because the environmental authority of Tolima considers that the project represents a threat to the region's water resources. Finally, the national environmental authority, the Ministry of Environment, declared the area as a protected wilderness area. An area in which previously work of exploration had already been done and the respective mining rights authorised and granted through a concession contract.

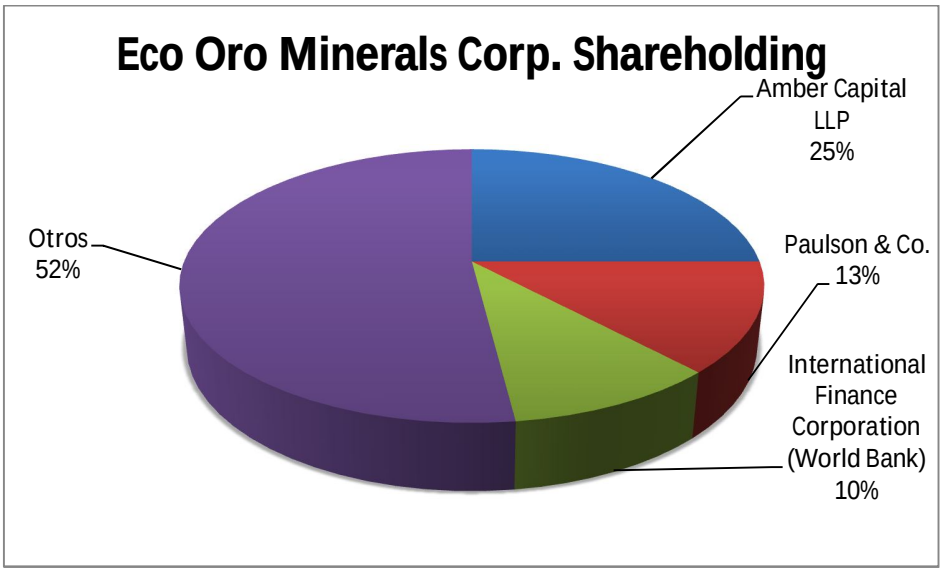
This is an example of a lack of coordination between regulatory authorities, because the environmental authority, subsequent to the allocation of the concession, declared the area to be a protected wilderness area and severely restricted mining activities of the company.

The uncertainty noted in the mining sector goes together with that generated by the declaration of unconstitutionality of Law 1382, which approved the 2010 Mining Code and, therefore, the return to the obsolete Code approved by Law 685 of 2001.

• Eco Oro Minerals Corp.- "Angostura Project"

The Canadian multinational Eco Oro Minerals Corp., is a company dedicated to the exploration for and extraction of precious metals and which trades on the Toronto Stock Exchange. It currently has presence in Colombia with a portfolio of projects among which the underground mining for gold and silver referred to as "Angostura", located in the Santurbán Wilderness, in the province of Santander.

According to the 2012 ranking of global natural resources that possess deposits and gold mines, Angostura is among the top 50 undeveloped sites, with a level of over one million ounces at an international level.



Source: http://www.eco-oro.com/i/pdf/Presentations/ECOORO_Presentation.pdf

The company has had a presence in Colombia since 1994, during which it has invested around US $250 million in development and in supporting communities directly[47] affected by it. The Colombian government granted the company the rights (concessions) to eight mining areas, covering a total area of30,000 hectares.

In September 2012, the National Mining Agency (ANM) took the decision to grant Eco Oro a license to explore in the Angostura mine, warning that the Company should not perform any exploration activity in areas that constitute the wilderness until the Ministry of Environment and Sustainable Development determined the definitive boundaries of this ecosystem.

Until then, Eco Oro had government permission to conduct its activities in accordance with the Act and its concession contract, given that it did not consider the "Angostura" project was in an area of wilderness and moreover the Ministry of Environment had not yet established the boundaries of the area of the Santurbán wilderness.

However, in 2014 the Ministry of Environment decided to demarcate the area of the Santurbán wilderness for protection under Resolution 2090 of 2014[48].In order to guarantee acquired rights, the National Development Plan of 2014-2018 determined, in Article 173, that within areas defined as a wilderness activities for the exploration and extraction for which the contract and environmental license had been granted prior to February 9, 2010 (as was the case of Eco Oro) could continue to run to completion without the possibility of extension.

However, the Constitutional Court issued the Judgement C-035, 2016[49], under which it declared unconstitutional (not adjusted to the Constitution) Article 173 of the National Development Plan 2014-2018.

Thus, regardless of the holding of an enabling legal concession, the prohibition of the undertaking of extraction activities was extended, without exception, to the wilderness areas of the country, thus affecting the legal security that provided the concession

[47] Figure published by Eco Oro in the statement of December 9, 2016:"*Since the mid-1990s, the Company has Invested over US $ 250 million to Develop the Angostura mining project (the "Project") by completing more than 360,000 meters of drilling and 3,000 meters of underground development ".* Available at: http://www.marketwired.com/press-release/eco-oro-files-request-for-arbitration-against-colombia-tsx-eom-2182150.htm

[48] https://redjusticiaambientalcolombia.files.wordpress.com/2016/03/res_2090_2014-santurban.pdf

[49] http://www.corteconstitucional.gov.co/relatoria/2016/c-035-16.htm

contract Eco Oro.

In this situation, Eco Oro, under the Free Trade Agreement between Canada and Colombia in 2008, decided to take action against the Colombian state due to the aforementioned decision of the Constitutional Court. So it was, in March 2016, that the company notified of its intention to initiate an international investment dispute that could lead to a formal process of international arbitration, following a formal negotiation process[50].The government chose not to accept the proposal of negotiating with Eco Oro and proceeded, in compliance with the ruling of the Constitutional Court, to revoke the mining rights granted to the multinational in the Santurbán wilderness[51], arguing the predominance of public interests over private ones.

In December of 2016, the company filed a formal request for arbitration against the Government of Colombia[52] before the World Bank International Centre for Settlement of Investment Disputes, arguing that the Colombian Government had taken arbitrary, inconsistent and disproportionate measures which had destroyed the value of their investments in the mining sector and has violated the rights acquired in the concession contract that included the Angostura Project area. This behaviour was, from the perspective of Eco Oro, a flagrant violation of the obligations assumed by the country in the Free Trade Agreement in force with Canada.

Undoubtedly, the situation just described creates uncertainty regarding legal security for investments which can be seriously affected by decisions of different authorities and which conflict with international agreements to which Colombia is a party.

• Cosigo Resources

COSIGO RESOURCES LTD.

[50] http://www.eco-oro.com/s/NewsReleases.asp?ReportID=741972&_Type=News-Releases&_Title=Eco-Oro-Minerals-Notifies-Colombian-Government-of-Investment-Dispute

[51] On August 2, 2016 Resolution VSC 829 was issued by which Eco Oro was notified of the revocation of its mining concessions located in the Santurbán Wilderness.

[52] http://www.marketwired.com/press-release/eco-oro-files-request-for-arbitration-against-colombia-tsx-eom-2182150.htm

The Canadian company Cosigo Resources Ltd. specializes in exploration for gold deposits in Colombia and Brazil. Its flagship project is the Gold Machado project, which it fully owns and which is located in the gold belt of Taraira in south-eastern Colombia. It also operates in the provinces of Boyaca, Cauca, Nariño and southern Bolivar, where it prospects for various minerals. It also has other projects in Colombia and assets in Brazil.[53]

The Cosigo and Tobie Mining and Energy companies are signatories of the mining contract IGH-15001X, corresponding to the Taraira Sur concession, located in the Colombian province of Vichada on the border with Brazil.

The mining project has encountered many difficulties because, in parallel with the steps taken by companies to obtain permits in 2007, the Association of Indigenous Communities of Yaigojé Apaporis (ACIYA) launched the process to have the government declare the territory a National Park, which culminated in their favour and with all mining being banned.

The controversy arose because the granting of the mining contract was signed on October 29, 2009, but the official declaration of creation of the Yaigojé-Apaporis National Park appears dated October 27, two days before, and therefore prevails over the mining contract. This was the reason for the National Mining Agency (ANM) declaring the expiry of the deed and the complete suspension of the concession contract.

Although Cosigo and the Association of Indigenous Communities Taraira and Vaupes (Acitava) itself, appealed against the decision, the Constitutional Court decided to declare the existence of the Park legal and, therefore, ordered the suspension of mining activities in these regions.

This situation meant that, on February 19, 2016, the companies submitted a request

[53] https://www.bnamericas.com/company-profile/es/cosigo-resources-ltd-cosigo-resources

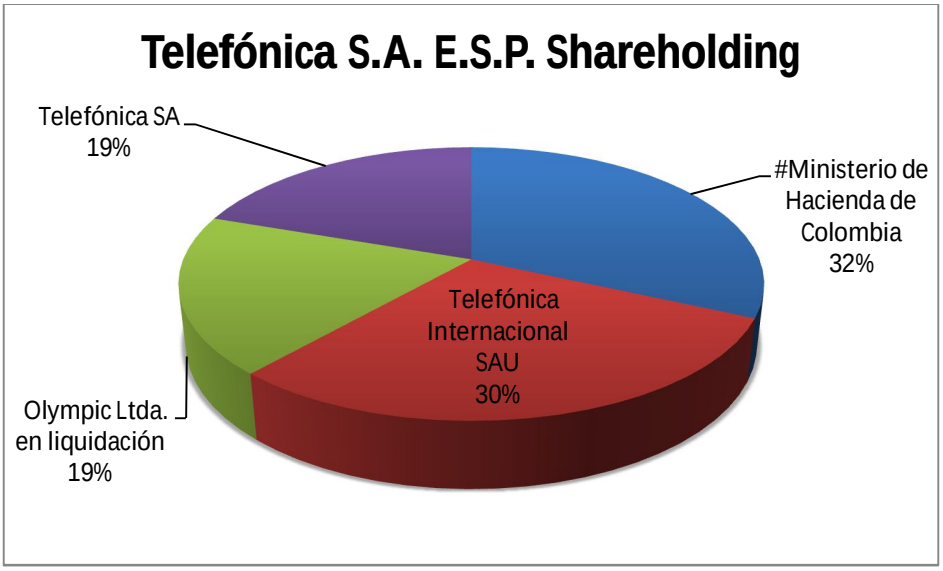
for arbitration against the Colombian government before the American Arbitration Association in the city of Houston, alleging a violation of the free trade agreements in force. A demand for the payment of US $16.5 billion was presented, in damages and loss of profits for the mining concession of South Taraira.

The Colombian government, meanwhile, asked the Court to divide the proceedings, to summarily resolve jurisdictional issues before addressing the substantive issues of the dispute. It also requested the arguments put forward by the companies appealing to be rejected as much as, in their opinion, the alleged expropriation of South Taraira mining concession had not been demonstrated.

Currently, it is in the phase pending the designation of the corresponding Members of the Court before the American Arbitration Association.

• América Móvil and Telefónica - Reversion of Infrastructure

In the early nineties, mobile telephone companies began operating in Colombia. The first concessions were granted by the Government in 1994 to six different companies for distinct areas of coverage, but after mergers and acquisitions the most important two companies consolidated national coverage: Claro (previously Comcel), part of the América Móvil group, and Telefónica Movistar, public state and private foreign shareholders.



Source: http://www.telefonica.co/nuestros-accionistas

Subsequently, as a result of a liberalization process and opening up of competition in the sector, other companies providing services appeared[54].However, Claro and Telefonica remained the most important mobile operators in the country, with a share of 48.68% and 23.20% of the market respectively[55].

Their concession contracts with the government date back to 1994 and specifically included both the permit to operate as well as the radio electric spectrum frequencies.

In addition, the contracts with the operators established the requirement that, upon completion, they should return to the State both the frequencies of radio spectrum which they had been assigned, as well as any items, goods and infrastructure related to the operation of the concession.

This obligation was included in the concession contracts in the following terms:

[54] Among which Tigo-UNE stands out, with a market share of 18.74% (figure taken from the Quarterly Bulletin published by the Ministry of Information Technologies and Communications). Available at: http://colombiatic.mintic.gov.co/602/articles-47512_presentacion_cifras.pdf

[55] Information published in the Quarterly Bulletin published by the Ministry of Information Technologies and Communications.Available at: http://colombiatic.mintic.gov.co/602/articles-47512_presentacion_cifras.pdf

"Reversion: At the end of the term of the concession, the items and goods directly affected by it become the property of the Nation-Ministry of Communications, without these incurring any compensation ".[56]

However, and during full implementation of concession contracts, the problem of reversion acquired paramount importance, since it was the same Colombian State which, through subsequent legislation, decided that telecommunications concessions, would be subject only reversion frequencies allocated radio spectrum, thus excluding from the obligation to revert to the State other items, goods and associated service delivery infrastructure.

These laws declared in this regard:

Act 422, of 1998
"ARTICLE 4. In the concession contracts for telecommunications services, the reversion will only imply that radio electric frequencies assigned to the service granted reverts to the State. The reversion of frequencies will not require any special administrative act".

Law 1341 of 2009
"ARTICLE 68. (...) In concessions, licenses, permits and authorizations for telecommunications services at the time of entry into force of this law, the reversal only mean that revert to the State radio frequencies assigned to the service granted. The reversion of frequencies will not require any special administrative act". (…)

In that vein, Claro and Telefonica, protected by the principle of legality, assumed that these new laws were applicable to concession contracts which in operation and that their terms would be subject to reversion radio electric spectrum frequencies to the state.

However, in 2013, *ad portas* of the expiry of these contracts, the Constitutional Court

[56] Clause 23 of the concession contracts agreed between the Colombian government and operators of cellular mobile telephone companies (TMC).

of Colombia, in Judgement C-555 of 2013, issued a sentence that the reversion clause, as understood at first (including both spectrum and infrastructure), applied to concession contracts, although subsequent laws had removed this aspect. This was because, according to the Court, contracts granted before 1998 were never changed in the light of laws and for that reason there was an obligation by the State to protect the public interest and to demand the reversion of tangible and intangible goods[57].

Along with this, Claro and Telefonica found themselves at a competitive disadvantage compared to other mobile phone companies that provide the service in the country, since the latter began operating after 1998, i.e. during the existence of the previously mentioned laws, by which they would only be obliged to return the spectrum and not the infrastructure.

The precedent of the Constitutional Court sent a discouraging message for the development of mobile phone networks, because there would be no point in Claro and Telefonica continuing to invest in the infrastructure of their business, since at the end of the concession unlike its competitors, it must be reverted to the State.

The decision of the Court additionally posed a risk of legal uncertainty for potential investors in the sector. This has been revealed in various analyses, as included in the edition of Money Magazine, dated 16 February 2016,[58], which warns of the risks arising from this case:

"The Court's decision leaves open many fronts in terms of legal security and investment in the sector.

The legal debate regarding the settlement of the first contracts has sent warning signals through the sector. For some analysts, in addition to eventual complaints for economic imbalance, the debate comes amid increasing requirements for improved signal quality, which requires more investment and greater coverage. The ruling of the Court and its impact on decisions could slow down plans by operators who will seek to make better use of existing networks.

The debate remains open regarding the real value of spectrum - which is one thing with reversion of assets and another without, both for the nation and for operators - and adjustments that are required at the time when a new call to tender is prepared.

[57] http://www.corteconstitucional.gov.co/RELATORIA/2013/C-555-13.htm
[58] http://www.dinero.com/pais/articulo/tribunal-de-arbitramiento-entre-mintic-claro-y-movistar/219335

In addition, the provider who is using support infrastructure of one of the operators subject to reversal, given the uncertainty, could be forced to deploy their own infrastructure. This may result in duplication of networks, increasing costs in providing services and thus affecting the final user fee, in addition to the problems associated with the provisions of environmental enforcement and regional planning".

This dispute between operators with greatest market shares in the country and the Colombian State has passed to the behest of national and international arbitration.

The concession contracts of Claro and Telefónica established that, in case of dispute, the parties would be subject to an arbitration procedure. In these circumstances, the Government of Colombia, at the request of the Minister of Information Technologies and Communications of Colombia, presented the case at the Centre for Conciliation and Arbitration of the Chamber of Commerce of Bogotá in February 2016.Here it should be noted the peculiarity that the Colombian State has a shareholding in Telefónica[59], a fact that lends the case more complexity.

Meanwhile, America Móvil (owner of Claro) rejected and dismissed the powers of the Centre for Conciliation and Arbitration of the Chamber of Commerce of Bogotá as the competent authority to resolve the conflict, and for this reason filed for resolution with the International Centre for Settlement of Relative Differences and Investment Disputes (ICSID), arguing that there was a violation by the Colombian State of international law and the Free Trade Agreement between the Republic of United Mexican States and the Republic of Colombia.

The ICSID accepted the request for arbitration by América Móvil in October 2016.To date, both parties' attorneys have already been designated and the process is pending.

[59] Among the recommendations made by the OECD for the telecommunications sector in Colombia, the entity has warned of its concern about the Government's shareholding in Telefónica.In its report *"OECD study on telecommunications policy and regulation in Colombia,* page 154, OECD states: *"The framework lacks an independent regulatory body (...).This fact is especially worrying if one considers that the government of Colombia owns 30% of the second largest telecommunications operator in the country (Colombia)".*

3.4. CHILE

CHILE

Population	17.95 million	2015
GDP	$240.8 billion	2015
GDP growth	2.3%	2015
Inflation	4.3%	2015

Source: World Bank

http://www.bancomundial.org/es/country/chile

3.4.1. Incorporation of the country to the multilateral free trade and investment protection system

Chile is one of the most competitive, stable and best rated emerging economies of the region, thanks to its tradition of respect for foreign investment and guarantee of the principles of free trade[60].

It has free trade and international investment protection agreements with 60 countries.

Chile has agreements for the promotion and reciprocal protection of investments with more than thirty-four countries. These include Germany, Argentina, Austria, Belgium, Spain, France, Switzerland and the United Kingdom.

It has also signed trade agreements and free trade agreements with more than

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[60] **Ferrada B, J. C. & Tapia C, J.** *Potestades públicas y ámbito privado en el sector eléctrico chileno: el caso de los CDEC como organismos autorreguladores. Revista chilena de Derecho*. Vol.42, Nº.1. Santiago de Chile. 2015; **Aguilar Abaunza, D. y Montoya Pardo, M.F.** Panorama de las energías renovables en América Latina: El caso de Colombia, Chile y Perú. En: La regulación de las energías renovables ante el cambio climático. Aranzadi. 2014; **Vergara Blanco, A.** *Instituciones de Derecho Minero.* Ed. Abeledo Perrot Legal Publishing. Santiago de Chile. 2010; **Mena Coronel, L.** *Regulación en Telecomunicaciones: Estudio de caso para Chile.*2006.The World Dialogue on Regulation for Network Economies (WDR). Technical University of Denmark. 2006; **Jordana, J.; Levi-Faur, D. and Fernández i Marín, X.** *The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion.*Comparative Political Studies October 2011,44. 2011;**Jordana, J. y Levi-Faur, D.** *¿Hacia un Estado Regulador Latinoamericano? La difusión de agencias reguladoras autónomas por países y sectores.* Fundación CIDOB. Barcelona. 2005; **Rivera Sánchez, M.** La regulación de las telecomunicaciones en Chile: El difícil camino hacia la transparencia. Pontificia Universidad Católica de Chile. Santiago de Chile. 2005, **Rozas Balbontín, P.** *Privatización, reestructuración industrial y prácticas regulatorias en el sector telecomunicaciones.* CEPAL. Santiago de Chile. 2005; **Levi-Faur D.** *The politics of Liberalisation: Privatisation and regulation-for-competition in Europe's and Latin America's telecoms and electricity industries.* Eur. J. of Pol. R. 2003; **Gutiérrez, L.H.** *Regulatory governance in the Latin America telecommunications sector.* Departamento de Economía, N° 26. Universidad del Rosario. Bogotá D.C. 2002.

nineteen countries, including Australia, Colombia, South Korea, United States, India, Japan, Malaysia, Mexico, Panama, Peru, Thailand and Turkey.

It also maintains double taxation agreements with more than thirty-two countries, including Brazil, Canada, Korea, China, Spain, France, Ireland, Italy, Japan, Mexico, Norway, United Kingdom, Russia, South Africa and Sweden.

The country is a signatory of the following international agreements, amongst others:

- Trade Protocol Alliance Pacific between Chile, Colombia, Mexico and Peru.
- Association Agreement with the European Union.
- EFTA Free Trade Agreement with Iceland, Norway, Liechtenstein and Switzerland.
- MERCOSUR trade agreement with Argentina, Brazil, Paraguay and Uruguay.
- Economic Partnership Agreement "P4" with Chile, Singapore, New Zealand and Brunei.
- Free Trade Agreement of Central America with Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.

In its World Investment Report 2015, the UNCTAD placed Chile as the world's eleventh largest recipient of Direct Foreign Investment (DFI).

The flow of DFI in Chile has shown an increasing trend since 2010.And in 2016, DFI flows amounted to US$ 23.3 billion, an increase of 15% on 2015.

This investment is particularly focused on mining, services and generation, distribution and supply of electricity, gas and water, with Spain being one of the three countries with the highest levels of investment.

For the coming years, Chile has established a state policy aimed at continuing to attract foreign investment in sectors such as energy, mining, services and infrastructure.

According to the Government Energy 2050 programme, the goal is to ensure that by 2050 at least 70% of national electricity generation is from renewable sources. In 2035 that figure should reach 60%.

Meanwhile, mining companies plan to invest US$57,000 million in the country by 2024 and the annual expenditure of these on ancillary services will exceed 15,000 million dollars.

Likewise, for the period 2014-2020 there is the potential portfolio of concession projects of over US$9,900 million, including airports, highways, dams, etc.

These sectors have legal stimuli for investment. These include those contained in Law 20,365, 2009 and Law 20,848 of 2015:

- The first (Law 20,365) states that construction companies of infrastructure for solar power generation will be entitled to deduct, from the amount of their provisional mandatory payments established by the Law on Income Tax, a credit equivalent to all or part of the value of solar thermal systems installed in buildings constructed by them.

- The second (Law 20,848) provides the legal framework for foreign investment in the country and sets up specific institutions for protection. Among them, the Agency for Promotion of Foreign Investment, responsible for issuing certificates recognizing as such foreign investors and allowing them to access the special regime of benefits applicable to foreign investment in the sectors of energy, telecommunications, infrastructure and research, amongst others.

Finally, it should be noted that the country is occupies a prominent place in various international rankings of business:

- Ease of doing business (2nd in Latin America - Doing Business Ranking World Bank, 2015).

- Business Environment (13th at international level - Business Environment Ranking of the Economist Intelligence Unit, 2014-2018).

- Competitiveness (35th at International Level - Competitiveness Ranking of the World Economic Forum, 2015).

- Best countries for doing business (30th at International Level - Forbes Magazine, 2015).

3.4.2. Institutional framework for regulation and supervision of regulated Energy and Telecommunications markets

3.4.2.1. Electricity, gas and liquid fuels sectors

• **The National Energy Commission** (hereinafter "**CNE**") is the highest body of sectoral regulation and is constituted as a public agency, is a legal entity and has its own assets, under the auspices of the Ministry of Energy. Heading the CNE is an Executive Secretary, appointed for a period of three years by the President of the Republic, through the selection process for senior public managers provided for by Law 19,882. The Senior Public Management Council chose a short list, by public tender, which is proposed for the consideration of the President of the Republic. Once elected the Executive Secretary, may be renewed in their mandate on two occasions. They undertake their duties full time and have the right - in the case of renunciation application - to compensation for each year of service in the office up to a maximum six.[61]

Senior public managers whose positions are assigned by the Senior Public Management, such as the Executive Secretary of the CNE, sign a performance agreement, which fulfils the dual function of orientating and evaluating the performance of these. The agreement is signed with their hierarchical superior and lasts three years. These agreements include annual strategic performance goals for the position and objectives to be achieved, with the corresponding indicators, means of verification and basic assumptions on which compliance with these is based.

The senior manager must report the degree of compliance with the objectives, and it corresponds to the Minister of Energy to determine the degree of compliance with the agreed targets.

The CNE is responsible for:**(i)** setting technical standards to which production companies must adhere in production, generation, transmission and distribution of energy, in order to provide a sufficient, safe and quality service; **(ii)** technically analyse the structure and level of prices and tariffs for goods and energy services; **(iii)** monitoring and forecasting the current and expected performance of the energy

[61] https://www.cne.cl

sector, and proposing to the Ministry of Energy the laws and regulations that are required, for matters within its powers.

The assets of the CNE will consist of resources assigned annually in the National Budget or by other general or specific laws.

• **The Agency of Electricity and Fuels** (hereinafter "**SEC**") is the highest authority of supervision or sectoral audit, a legal entity with its own assets, under the auspices of the Ministry of Energy. At the head of the SEC is a Superintendent appointed in a discretionary manner by the President of the Republic.[62]

The role of the SEC will be:**(i)** controlling and monitoring compliance with laws and regulations, and technical standards for generation, production, storage, transport and distribution of electricity, gas and liquid fuels; **(ii)** granting provisional concessions for producing power stations, gas production plants, electrical substations, transmission lines and distribution of electricity; **(iii)** issuing of reports on applications for definitive concessions made to the Ministry; **(iv)** taking the necessary steps on expiry of concessions; **(v)** ensuring the quality of services provided by the sector's entities; **(vi)** resolving conflicts between sector stakeholders and proposing reforms or improvements to sectoral legal framework, among others.

The assets of the CNE will consist of resources assigned annually in the National Budget or other general or specific laws.

• **The Chilean Nuclear Energy Commission** (hereinafter "CCHEN**"**) is the public body for regulation and supervision of nuclear and radioactive sources rated as first class and operators of these.[63]

The institution is run and managed by a Board of Directors and an Executive Director. All members of the Board and the Executive Director himself are appointed by the President of the Republic. Only the Executive Director is selected through the previously mentioned System of Senior Public Management.

Its powers are aimed at protecting individuals and the environment with regard to

[62] https: //www.sec.cl/
[63] http://www.cchen.cl

radiation and to monitor radioactive waste in the various sectors that make use of this energy.

3.4.2.2. Telecommunications sector

• **The Department of Telecommunications** (hereinafter "**SUBTEL**") is a regulatory and supervisory body under the auspices of the Ministry of Transport and Telecommunications. At the head of the SEC is a discretionary Superintendent appointed by the President of the Republic.[64]

SUBTEL's main duties are to coordinate, promote, encourage and develop telecommunications in Chile. For the undertaking of its powers it issues sectoral regulations in accordance with national telecommunications policies and according to the guidelines of the government sector; it adopts measures to increase the quality of service, defend competition between the different entities providing communication services; and it protect the rights of users and consumers.

The Chairman shall also exercise vigilance and supervision of public and private sector companies in the country, ensuring compliance with laws, regulations and regulatory standards.

However, in recent years, and under government initiative, there have been legislative initiatives to separate into two institutions, its industry regulatory powers and the duties of supervision, surveillance and sanctioning of companies: The first is maintained by the current SUBTEL, while market control falls on the new Agency, in accordance with Bulletin 8034-15 the Senate of the Republic of Chile.

3.4.3. Some relevant cases that reflect the perception of legal security and protection of foreign investment

The perception of legal security and protection of foreign investments in Chile can be

[64] http://www.subtel.gob.cl

summarized in two complex cases of multinational companies which, despite their financial difficulties, very quickly found new foreign partners to bring international capital to these important projects.

EIG Global Energy Partners - Abengoa
Cerro Dominator Project

The Spanish multinational Abengoa was declared winner of the tender called by the Chilean government to build the first plant of concentrated solar power in the country.

The plant allows the provision of energy twenty-four hours a day, unlike conventional wind generation or solar and consists of two units:**(i)** a photovoltaic plant of 100MW in capacity; **(ii)** a solar power plant of 110 The latter directs 10,000 mirrors at the central tower. This heats a solution of salts to 600 degrees, which can accumulate heat energy in the hours when there is no sun and feed a conventional thermal power plant.

Having settled the tender and signed the contract in February 2014, the contractor undertook an investment of more than 1,000 million dollars, of which 20 million dollars corresponded to the subsidy granted by State Authorities for carrying out the project in the mining area of the Region of Antofagasta.

In March 2015, the US company EIG Global Energy Partners acquired 50% ownership of the project, as a means of ensuring the financial viability of the project. Thus, an additional US $850 million was added to the energy investment for the project.

Rockwood Lithium - Albermale

The multinational Rockwood Lithium, a subsidiary of the US company Albermale invested 600 million dollars in the Antofagasta Region, after reaching an agreement with the Corporation for Production Development (CORFO), the Institution of the Chilean State responsible for promoting national productive activity.

This agreement included the development of lithium derivatives for energy storage. The aim was in particular to strengthen the market of electric powered cars.

Rockwood Lithium and its parent company Albermale estimate that by the end of 2020 the target established, consisting of the production of 82 thousand tons of lithium, will be reached.

Clarin Newspaper

After nineteen years of legal disputes, the ICSID Arbitration Court ruled on September 13, 2016 the second claim by Spanish businessman Victor Pey and the Salvador Allende Foundation, for the expropriation of the publisher of the Clarin newspaper in Chile.

In 1972 Victor Pey acquired the Chilean newspaper, Clarin. However, in 1973, the government of Augusto Pinochet ordered the confiscation of the property of the publisher of Clarin newspaper. In 1995, after his return to Chile, Mr. Pey located property rights that the then President, Eduardo Frei, refused to return. Two years later, he filed for international arbitration. Simultaneously to the proceedings of international arbitration, in the month of April the Ministry of National Assets dictated Decision 43 of 2000, compensating those affected by the expropriation of Clarin.

Following this compensation, considered insufficient by the plaintiffs, the Court of Arbitration ordered the Republic of Chile to pay Victor Pey damages caused by the expropriation carried out.

This 2008 decision became invalid four years later, after annulment of the adjudication. That resolution had condemned Chile to pay compensation of US $10.1 million, plus interest.

Later, Victor Pey and the Salvador Allende Foundation filed a second claim in order to also demand compensation corresponding moral damages. Their argument was based on the fact that the annulment of the first sentence did not remove the Court's declaration regarding the breach of the Agreement for the Reciprocal Promotion and Protection of Investments between Spain and Chile, because of Decision 43, nor their right to compensation. In 2014, the plaintiffs filed claims. In 2015 the hearing took place in the city of London, in which the parties presented their positions in the case before the Arbitration Tribunal and on March 17, 2016 ICSID notified the parties of the closure of the proceedings.

Finally, in September 2016, the Arbitration Tribunal unanimously decided that there is no reason, in the circumstances, to award compensation for moral damages, considering that the applicants, who had the weight of relevant evidence, had not sufficiently proved that they had suffered any additional damages susceptible to quantification.

3.5. COSTA RICA

COSTA RICA

Population	4.808 million	2015
GDP	$54.14 billion	2015
GDP growth	3.7%	2015
Inflation	0.8%	2015

Source: World Bank
http://www.bancomundial.org/es/country/costarica

3.5.1. Incorporation of the country to the multilateral free trade and investment protection systems

Since 2015, Costa Rica forms - together with Colombia - the small group of Latin American countries in the process of joining the OECD.[65]

An essential part of the process of incorporation of Costa Rica to the OECD is, as in the case of Colombia, the improvement of legal security and protection of foreign investment. [66]

[65] http://www.forbes.com.mx/costa-rica-da-primer-paso-llegar-la-ocde/#gs.iDzkNmM

[66] **OECD.** *Government at a Glance*. Paris. 2016; **Bolaños González, J.** *La Autoregulación.*Revista de Derecho Empresarial Nº.3.San José, Costa Rica. 2015; **Guadamuz Flores, A.** *Funcionamiento del Fondo Nacional de Telecomunicaciones (FONATEL) y su influencia en el mercado empresarial en Costa Rica.* Revista de Derecho Empresarial. Nº.3. San José de Costa Rica. 2015; **Mata Coto, C.A.** *La prestación de los servicios en régimen de competencia*. Revista de Ciencias Jurídicas Nº128. San José de Costa Rica. 2012; **Jordana, J.; Levi-Faur, D. and Fernández i Marín, X.** *The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion.*Comparative Political Studies October 2011 44: 1343-1369. 2011; **Jordana, J. y Levi-Faur, D.** *¿Hacia un Estado Regulador Latinoamericano? La difusión de agencias reguladoras autónomas por países y sectores.* Fundación CIDOB. Barcelona. 2005; **Levi-Faur D.** *The politics of Liberalisation: Privatisation and regulation-for-competition in Europe's and Latin America's telecoms and electricity industries.* Eur. J. of Pol. R. 2003.

Costa Rica has a strong democratic background and increasing implementation of the economy of knowledge, and has been incorporated for many years in international conventions and agreements that guarantee free trade, investment protection and confer on investments by third party countries conditions equally favourable to those accorded to domestic investments.

Article 19 of the Constitution guarantees equal treatment between foreign and Costa Rican investors[67].Its legal system does not impose any restrictions on transfers of capital funds associated with foreign investment, nor are there any regulations that restrict reinvestment or repatriation of profits, royalties or capital. There is also no registration of foreign investments by government authorities.

In the past three decades, it has become state policy to promote free trade zones and significant tax incentives (100% tax on corporate income, for eight years and 50% over the next four years, exemptions on import duties, export and excise duties, taxes on remittances and capital repatriation[68]), especially development-oriented electronic manufacturing, information technology, biotechnology and tourism and environmental sectors, among others[69].

In 2016, Costa Rica grew 26% on the previous year in direct foreign investment perceived, according to the statement by the United Nations Economic Commission for Latin America and the Caribbean. However,[70], according to the Central Bank of Costa Rica, there are also signs of stagnation in foreign direct investment, since growth, although stable, is slowing down[71].

An important part of foreign investment in the country is involved in the construction of public infrastructure, such as the renovation of ports, airports and roads[72].However,

[67] http://www.cepal.org/publicaciones/xml/8/9678/capitulo-cuatro.pdf

[68] http://www.icex.es/icex/es/Navegacion-zona-contacto/revista-el-exportador/invertir/REP2014290160.html

[69] http://www.icex.es/icex/es/Navegacion-zona-contacto/revista-el-exportador/noticias/4678705.html

[70] https://www.larepublica.net/noticia/inversion_extranjera_directa_aumento_26_en_costa_rica/

[71] http://www.nacion.com/economia/indicadores/Inversion-directa-muestra-signos-estancamiento_0_1607839216.html

[72] http://www.central-law.com/es/noticias/item/375-la-concesion-de-obra-publicacomo-desarrollo-en-la-infraestructura-en-costa-rica-y-su-adaptacion- al-modeloeconomico-global-de-la-tax-international

bureaucracy and multiple permits must be requested put back the construction process for several years. A major complaint is that just the process of expropriation of private property for the construction of public works, can last up to four years[73]. In April 2015 Law 9286 Comprehensive Law Amendment of Act 7495, Expropriation Act, entered into force aiming to accelerate this process for investors and the State[74].

Also in August 2016 Law 19,530, Law of Protection Act of minority investors, was approved as part of the upgrade of the country's standards for entry to the OECD[75].

The foreign investor also has the guidance and assistance of the Commission for the Promotion of Competition (COPROCOM), an entity under the Ministry of Economy, Industry and Commerce (MEIC).

Costa Rica is also highlighted in various international *rankings*, as the leading exporter of high technology industrial products in Latin America (World Bank, 2013), the high quality of its education system in Latin America (WEF 2012-2013), security (Latin Business Chronicle, 2012), availability of scientists and engineers in Latin America (WEF 2012-2013), the leader in Latin America according to the World Innovation Index (INSEAD, 2013) and in social progress (Report on social progress Index 2014)[76].

Colombia is fully integrated into international conventions and agreements of guarantee for foreign investment, return of dividends and capital, as well as mechanisms for mediation and international arbitration for dispute resolution. Likewise, Colombia belongs to multiple international cooperation organizations which are critical in terms of momentum for free trade and protection of foreign investment. These include:

- International Centre for Settlement of Investment Disputes (ICSID).
- The United Nations Organization (UN).
- World Trade Organisation (WTO).
- The Organization of American States (OAS).
- Latin American Economic System (SELA).

[73] http://www.elfinancierocr.com/economia-y-politica/Expropiaciones-retraso_de_procesos_0_259174106.html

[74] http://www.centralamericadata.com/es/article/home/Costa_Rica_Entra_en_vigencia_Ley_de_Expropiaciones

[75] http://www.blplegal.com/consideraciones-sobre-la-nueva-ley-de-proteccion-al-inversionista-minoritario/?lang=es

[76] https://www2.deloitte.com/content/dam/Deloitte/cr/Documents/tax/doingbusiness/160223-Como_hacer_negocios_en-Costa_Rica-Guia_del_inversionista_2016.pdf

- Association of Caribbean States (ACS).
- Latin American Integration Association (ALADI).
- Economic Commission for Latin America (ECLAC).

Similarly, Costa Rica has signed and updated numerous free trade agreements with Mexico, Canada, Chile, Dominican Republic, Trinidad and Tobago, Panama, China, Singapore, Peru and the European Union[77].

Despite the advantages mentioned above, the FITCH Index downgraded Costa Rica from BBB to BB, influenced by the perception of growing political instability in Costa Rica, heavy debt burden, institutional deadlock and absence of substantive tax reform[78].

3.5.2. Institutional framework for regulation and supervision of regulated Energy and Telecommunications markets

The OECD has recommended institutional reform to reduce unnecessary red tape, promote budget flexibility of autonomous Institutions and the creation of agencies or general measures of clearer guidance for the coherent development of a national plan[79].Among the most important institutions that are currently carrying out the tasks of regulation and supervision of markets in Costa Rica the sectors of energy and telecommunications stand out.

While most of the autonomous institutions of Costa Rica enjoy mechanisms for the independent exercise of their powers, others are more under the control of central government, as the case of the Superintendency of Telecommunications (SUTEL). The OECD considers that the regulatory and supervisory bodies, to exercise their functions more independently of encouraging competition and supervision, should have more institutional autonomy[80].

[77] http://embassycr.org/index.php?q=negocios
[78] https://www.larepublica.net/noticia/inversion-en-costa-rica-se-ve-mas-arriesgada
[79] http://www.oecd.org/countries/costarica/costa-rica-improving-institutional-arrangements-for-better-service-delivery.pdf
[80] http://www.oecd.org/countries/costarica/costa-rica-modernising-competition-law.pdf

[81]On the other hand, there are frequent complaints of universities[82]and companies with respect to the regulatory bodies, and there is a perception that these unnecessarily hinder competition, or are not sufficiently trained to monitor a more free market, which is demanded by both companies as well as consumers. In the case of telecommunications, some operators say that SUTEL does not have the technical and administrative capacity to allow full market liberalization[83].This perception includes regulatory and supervisory bodies in various sectors[84].

3.5.2.1. Electricity, gas and liquid fuels sectors

• **The Public Utilities Regulatory Authority** (hereinafter "**ARESEP**") is an autonomous institution of multi sectoral regulation and supervision, a legal entity with its own assets and independent budget, which enjoys technical and administrative autonomy, governed by Law 7593, 996 and Law 8660 on Strengthening and Modernization of Public Entities in the Telecommunications Sector of 2008.[85]

The ARESEP is equipped with powers in the areas of generation, transmission, distribution and marketing of electricity, supply of hydrocarbon fuels, as well as in the sectors of telecommunications, land-based public transport and air and shipping services, among others.

It is chaired by a Board of Directors and a General Regulator. The Board is composed of five members elected for terms of six years who may be reappointed.

The candidates to the Board of ARESEP are appointed by the Government, the allocation of appointment of each candidate being presented for consideration by

[81]http://iij.ucr.ac.cr/sites/default/files/documentos/estructuras_administrativas_complejas_para_la_regulacion_de_las_actividades_de_los.pdf
[82] http://revistas.ucr.ac.cr/index.php/iusdoctrina/article/view/27477
[83] http://www.crhoy.com/archivo/operadores-de-telecomunicaciones-reclaman-competencia-efectiva-pero-sutel-no-esta-lista/nacionales/
[84] http://iij.ucr.ac.cr/sites/default/files/documentos/t11-regimen_legal_supervision_bancaria._procedimiento_sancionatorio.pdf
http://iij.ucr.ac.cr/sites/default/files/documentos/supervision_del_sistema_financiero_nacional.pdf
http://www.nacion.com/opinion/editorial/Reformas-financieras-pendientes_0_1551244866.html
[85] https://aresep.go.cr

the Legislative Assembly, which has a period of thirty days to object to the appointment. If within that period no objection is made, they are ratified. In case of objection, the Governing Council will replace the candidate objected to and the new appointee will be subject to the same procedure.

Members of the Board may not be removed unless there are legally established and duly justified cases, according to the principles of due process.

Also, members of the Board must act in accordance with the legal provisions establishing regulations for disqualification and incompatibilities with the exercise of their powers.

Likewise, ARESEP is by law an institution with high levels of functional independence, in order to adhere in the exercise of its powers to what is laid down by the law, without allowing undue interference by other administrative bodies or by regulated industries. It is only subject, in relation to the Executive, to the provisions of the National Development Plan and sectoral plans and general policies established by the national Government in the undertaking of its faculties.

The objectives and powers granted to the ARESEP are, among others:**(i)** harmonize the interests of consumers, users and providers of public services; **(ii)** seek balance between the needs of users and the interests of lenders of public services; **(iii)** formulate the requirements for quality, quantity, timeliness, continuity and reliability necessary to optimally provide the public services under its authority and ensure compliance thereof; **(iv)** assist State agencies with powers in environmental protection, in the event of the provision of regulated services or the granting of concessions.

Among other functions, it is responsible for **(a)** granting concessions involving the extraction of limited capacity power plants; **(b)** setting prices, fees and rates for public services regulated by law, in observance of the principle of service cost and subject to the criteria of social assets, environmental sustainability, energy conservation and economic efficiency, as defined in the National Plan development as well as in the pursuit of financial stability for the company or loaning service entity; **(c)** ensure compliance with the standards of quality, reliability and respect for environmental resources; **(d)** declare the expiry of concessions granted for the provision of public services regulated by law; **(e)** intervene and, if necessary, liquidate providing companies where necessary; **(f)** require providers to update studies of demand for the service, demand in growth in the use of natural resources and investment plans updated to meet the expectations of growth; **(g)**

control of facilities and equipment dedicated to the service and testing accuracy and reliability of instruments must be submitted to and measurement systems used for the provision of services, amongst other things.

Financially it has indefeasible resources from fees imposed on regulated bodies and the recovery of costs incurred in providing advice, consulting, training and other activities related to their functions, as well as those allocated in the National Budget. In the energy area, ARESEP collaborates with the Costa Rican Electricity Institute (ICE), a public body that is configured as a sole, redistributing buyer of the national electricity service and the body responsible for establishing general policies for the energy sector, which is the Ministry of Energy and Environment (MINAE).

3.5.2.2. Telecommunications sector

• **The Agency of Telecommunications** (hereinafter "**SUTEL**") is a body endowed with a budget and its own legal powers, with administrative and technical autonomy, governed by the Law 8660 on Strengthening and Modernization of Public Sector Entities Telecommunications of August 18, 2008.The entity is attached to the ARESEP mentioned, and its main function is to regulate and monitor compliance with the legal system by the telecommunications market.[86]

SUTEL is directed by a Council composed of three members, one of whom acts as chairman. Council members are appointed by a qualified majority by the Board of ARESEP, for a period of five years full-time and may be re-elected only once.

The Board of ARESEP, once they have appointed the members of the Council of the SUTEL, send all records to the Legislative Assembly, which has a period of thirty days to comment on the appointments. If objection does not occur to any appointment during that period, they shall be considered ratified. In case of objection, the Board will replace the member of the Council to whom there has been objection, and the new appointee will be subject to the same procedure.

Council members of SUTEL may be dismissed only if they fail to meet the requirements of the appointment; incur some cause of destabilisation, incompatibility, or incur a serious breach in the exercise of their functions,

[86] https://sutel.go.cr

whenever so determined by the Board of ARESEP through a number of votes at least equal to that required for appointment, in full respect for the principles of due process.

The SUTEL Council's functions include: **(i)** protect the rights of users of telecommunications services, ensuring efficiency, equality, continuity and quality; **(ii)** impose, operators and suppliers, the obligation to give free access to their networks and the services they provide to providers and users of telecommunications services, generators and receivers of information and providers and users of information services; **(iii)** encourage investment in the telecommunications sector through a legal framework to ensure transparency, non-discrimination, fairness and legal security, to the country to obtain the maximum benefits of technological progress and convergence; **(iv)** grant authorizations and perform the procedure and render expert advice to the Executive Branch, to grant, transfer, extension, expiry and termination of concessions and permits required for the operation and operation of public networks telecommunications; **(v)** manage and control the efficient use of radio spectrum, radio broadcasts, as well as inspection, detection, identification and elimination of harmful interference; **(vi)** resolve conflicts that arise in implementing the regulatory framework for telecommunications and which may arise between the different operators of networks and providers of telecommunications services, as well as between operators and between providers.

It is also responsible for establishing and managing the National Register of Telecommunications, ensuring provision to the public of information on procedures applicable for interconnection, information concerning the authorization of certificates, their terms and conditions and the procedures required of telecommunications service providers; determine the existence of operators or major suppliers in each of the relevant markets, taking into account the criteria defined in the Law on Promotion of Competition and Effective consumer protection; ensure that scarce resources are managed in an efficient, timely, transparent and non-discriminatory manner; establish minimum quality standards for public networks and telecommunications services; order the non-use or removal of equipment, systems and terminal equipment causing interference or harming the integrity and quality of networks and services; submit for the approval of the Board of the Regulatory Authority, strategies of the entity, annual operating plans, financial statements and general rules of organization of the Agency; develop technical standards, with the consultation of the Regulatory Authority and propose them to the Executive Branch for approval, and set tariffs for telecommunications, in accordance with the dictates of the law.

The SUTEL budget consists of royalties, fees and rights obtained in the exercise of their functions; State transfers made in favour of it and donations and grants from other states, public institutions or international organizations, without compromising its independence, transparency and autonomy.

3.5.3. Some relevant cases that reflect the perception of legal security and protection of foreign investment

The legal framework for protection of foreign investment in Costa Rica has allowed it to increase its successfulness as an attractive country for foreign investment.

By 2015, direct foreign investment accounted for 3,094 million dollars. An important part of that investment is directed at the energy sector, telecommunications and technologies.

- **Gas Natural Fenosa**

In the electricity sector, foreign investment in renewable energy in Costa Rica was the most important investment registered in Latin America in 2015. This has allowed the achievement that, at the end of 2016, electricity consumption in the country had its origin in renewable sources. Much of this energy comes from major hydropower projects, such as the Reventazon plant, the largest in Central America, producing 305.5 megawatts, accounting for an investment of 1,216 million dollars, financed by national and international banks, including the European Bank for Investments. Abengoa was the beneficiary of the concession of the project for the supply, construction and testing of substation transmission of this hydroelectric project.

Spanish private investment is also significantly involved in these projects, as is the case of the Torito hydroelectric plant, where Copisa and Global Power Generation, a subsidiary of

Gas Natural Fenosa, are involved. Meanwhile, Fenosa invested 178.2 million euros in this project and is the largest private electricity producer in the country.

The Fenosa Group started operations in the country in 2003 with the construction of the hydroelectric project of La Joya in Tucurrique of Carthage. This project currently generates 51 MW, counting on an investment of 77 million dollars in its construction, and generates a significant proportion of private electricity purchased by the Costa Rican Electricity Institute for distribution throughout the country. It was built under the BOT method (build, operate and transfer), and operated for 17 years by Fenosa.

By 2015, hydroelectric generation represented a total of 408 MW, of which a quarter is generated Fenosa through La Joya and Torito.

However, that same year, the people of Tucurrique undertook a joint action against the company, alleging environmental damages. The Criminal Court of Turrialba imposed an injunction preventing further construction in the event that the cases of alleged facts were verified. Local people reported that the construction detrimentally affected irrigation and the flow of the river Pejibayito. The works were suspended from November 2004 to January 2005, when the Criminal Court decided to lift the precautionary measures. Finally, the Constitutional Court found no significant environmental damage and dismissed the action of the residents of the area. It found that the construction met with corresponding environmental studies and with the appropriate permissions from the National Environmental Technical Secretariat (SETENA), the body responsible for conducting environmental impact studies and monitoring projects tendered. In 2007, the United Nations reported the project as a Clean Development Mechanism.

In 2012 the residents of Turrialba reported Fenosa again on the same terms, but this time for the construction of the Torito project. They claimed that a dam that the company had built along the Reventazon River caused erosion in surrounding areas. Again, both the SETENA, as well as the relevant courts found no negative environmental impacts and the work was not suspended. In the month of September 2016, the final judgement was delivered, in which no significant environmental damage was found[87].

[87] http://www.gasnaturalfenosa.com/es/actividades/presencia-en-el-mundo/america/1285338593122/costa-rica.html
http://www.nacion.com/ln_ee/2004/octubre/02/pais1.html
http://www.nacion.com/ln_ee/2005/enero/12/pais9.html
http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia¶m2=1&tem1=fenosa&nValor1=1&nValor2=294534¶m7=&strTipM=T&lResultado=6&strLib=LIB
http://semanariouniversidad.ucr.cr/pais/pobladores-de-peralta-de-turrialba-reclaman-a-unin-fenosa-

Similarly, Gas Natural Fenosa assumed a social commitment to provide resources of community development associations for the affected people. These resources have allowed advancement of initiatives in the fields of education, technology and infrastructure in the region.

Other examples of important investment by Spanish companies in this sector are Acciona, Gamesa and Iberdrola in wind power generation.

• Projects of SUTEL and MoviStar, Claro and Kolbi: the INTEL case

In the field of telecommunications, the Intel case is relevant, reflecting the transformation of the Costa Rican economy and its commitment to legal security and protection to foreign investors. In 1997, the technology giant announced the opening of its microchip factory in the country, allocating 115 million dollars. As a result of its decision, 130 more companies started their operations, and foreign investment increased from 406.9 million dollars in 1997 to 1,851.8 million dollars in 2016.

By 2014, the plant's exports represented 20.7% of total exports of the country. In 2016, the export of specialized services and high technology represented 42% of total exports, and reached 7,000 million dollars, consolidating the country as the leading exporter of

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por-cambios-en-el-ro-reventazn/
http://omal.info/spip.php?article4969
http://www.nacion.com/archivo/Avanzan-Torito-Turrialba-generara-megavatios_0_1333666681.html
http://www.globalpower-generation.com/es/inauguracion-hidroelectrica-torito/
http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia¶m2=1&tem1=fenosa&nValor1=1&nValor2=676180¶m7=&strTipM=T&lResultado=9&strLib=LIB

technology services in Latin America, above countries like Mexico and Brazil.

Spain is no stranger to investment in the technology sector in Costa Rica. An important part of this investment corresponds to the entry of Telefónica in the telecommunications market in the Central American country, making Spain the second highest investor, after the United States.

The sector was, until 2008, under the state monopoly company ICE, when a series of legal reforms, stemming from the signing of the CAFTA, liberalized the sector. The Spanish firm entered the country in September 2011 and by 2016 had already become the second operator in the country, reaching 25% of the market, thanks to its strategy of investment in services and in 4G LTE network nationwide. Telefonica has been instrumental in the development of networks and modernization of the overall infrastructure of the country and has made Costa Rica the first country in the region to have 4G technology.

This is not to ignore the need to look more closely at the challenges facing SUTEL to increase the competitiveness of the system, coverage and speed of the networks.

The opening of the telecommunications market represented a challenge for both incoming operators and institutions and established operators. The Free Trade Agreement with the United States was submitted on October 7, 2008 to the first national referendum with the aim of approving it. Slightly less than half of the population voted against it.

However, the evolution of the telecommunications market in the following years demonstrated that domestic and foreign operators Movistar, Claro, and Kolbi (the state company that ICE created to compete as operator) were equipped to compete. Likewise, there have also been repeated observations by operators regarding the unsuitability of the regulator to promote a more open and competitive environment.

SUTEL has been frequently reported by operators for setting limits beyond the market's reality. The General Controller of the Republic stated that the regulator showed significant lack of knowledge in the field.

In 2012, the Legislative Assembly assessed the possibility of removing the SUTEL Council on the grounds that its resolutions repeatedly attacked the constitutional principles of reasonableness, proportionality and legality.

In June 2014, SUTEL was reported for using outdated data 2009 to calculate the imposition of new economic control measures in the market. The Administrative Court and the Treasury ordered them to update their market research.

As a group, all operators constantly demand greater freedoms to compete in an effective free market but apparently, inefficiency and lack of clarity on the part of the regulator has impeded progress in the sector.[88]

[88] http://internacional.elpais.com/internacional/2007/04/16/actualidad/1176674404_850215.html. http://semanariouniversidad.ucr.cr/pais/vienen-desagradables-sorpresas-con-apertura-en-telecomunicaciones-alerta-expertos/ http://semanariouniversidad.ucr.cr/pais/empresas-mexicanas-y-espaolas-tras-telecomunicaciones-ticas/ http://semanariouniversidad.ucr.cr/sin-categoria/telefnica-de-espaa-con-va-libre-para-operar-en-costa-rica/ http://semanariouniversidad.ucr.cr/pais/sutel-est-en-periodo-de-aprendizaje-cnones-de-telecomunicaciones-estn-en-veremos/ http://semanariouniversidad.ucr.cr/pais/piden-destitucin-del-consejo-de-la-sutel/ http://semanariouniversidad.ucr.cr/pais/sutel-utiliz-datos-viejos-para-justificar-nueva-modalidad-de-cobro/ http://semanariouniversidad.ucr.cr/pais/ice-demanda-a-sutel-por-usar-informacion-desactualizada-para-regular-telecomunicaciones/ http://semanariouniversidad.ucr.cr/destacadas/98215/ http://semanariouniversidad.ucr.cr/destacadas/tribunal-ordena-a-sutel-actualizar-informacion-de-mercados-que-perjudica-al-ice/ http://semanariouniversidad.ucr.cr/pais/telefonicas-cobran-ilegalmente-internet-en-telefonia-movil-4g/. http://semanariouniversidad.ucr.cr/pais/error-de-sutel-provoc-retraso-en-telefona-e-internet-para-zonas-rurales/ http://semanariouniversidad.ucr.cr/pais/dinero-de-fonatel-se-usa-para-expandir-telefonicas-privadas/

3.6. MEXICO

MEXICO

Population	127.0 million	2015
GDP	$1.144 trillion	2015
GDP growth	2.5%	2015
Inflation	2.7%	2015

Source: World Bank
http://www.bancomundial.org/es/country/mexico

3.6.1. Incorporation of the country to the multilateral free trade and investment protection system

Mexico is a country with a strong tradition of respect for foreign investment and free trade principles. Foreign investors who invest in the country have the same guarantees and resources under the Constitution as Mexican investors. [89]

[89] **Fresco, F. & Pereira, E.G.** *Latin American Upstream Oil & Gas. A Practical Guide to the Law and Regulation*. Globe Law and Business. 2015; **Oropeza García, H.A.** (Coord.) *Reforma energética y desarrollo industrial. Un compromiso inaplazable.* UNAM. México D. C. 2015; **Comisión Federal de Mejora Regulatoria.** *Impacto de las Reformas en Telecomunicaciones. Análisis del Marco Regulatorio y Fortaleza Institucional.* México D.F. 2015;**Comisión Federal de Competencia y OCDE.** *Eliminación de restricciones a la participación extranjera en México. Evaluación de los beneficios potenciales en algunas industrias.* México D.F. 2012; **Comisión Federal de Mejora Regulatoria.** *Fortaleza institucional de las agencias reguladoras en México.* México D.F. 2012; **Comisión Federal de Mejora Regulatoria.** *Política y Gobernanza Regulatoria. Promoción y revisión de la regulación nacional en México.* México D.F.2011**; Comisión Federal de Mejora**

The country has an extensive network of ten free trade agreements with 45 countries, 32 agreements for the reciprocal promotion and protection of investments with 33 countries, nine agreements of limited scope (Economic Complementation Agreements and Partial Scope Agreements) in the framework of the Latin American Integration Association (ALADI) and is a member of the Trans-Pacific Partnership Agreement (TPP).

In addition, Mexico is actively involved in multilateral and regional organizations and forums such as the World Trade Organization (WTO), the Asia-Pacific Mechanism Economic Cooperation (APEC), the Organization for Economic Cooperation and Development (OECD) and the ALADI.

Among the treaties that Mexico has signed are included the North American Free Trade Agreement (NAFTA), the Free Trade Agreement with the European Union and the Latin American Integration Agreement (ALADI).

Similarly, Mexico is party to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 (1958 *New York Convention*) and the common custom regarding large investments in the country, is that the documents that confirm the operation (*PPA's, EPC, PPA, Loan Agreements, MOU, Partnership Agreements*, etc.) stipulate an arbitration clause with an international institution like the *International Chamber of Commerce* or another of similar importance.

At the institutional level, it is appropriate also to highlight the task advanced by Proméxico, entrusted by the Government of Mexico and established by Presidential Decree in

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Regulatoria. *Fortaleza Institucional de los Reguladores Sociales en México.* Documentos de Investigación en Regulación Nº6. México D.F. 2011; **Comisión Federal de Mejora Regulatoria.** *Regulación Basada en Riesgos: Un nuevo enfoque para el diseño de la política regulatoria en México.* Documentos de Investigación en Regulación nº8. México D.F.2011; **Jordana, J.; Levi-Faur, D. and Fernández i Marín, X.** *The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion.*Comparative Political Studies October 2011 44: 1343-1369. 2011;**Vargas Suárez, R**. *La nacionalización de los hidrocarburos bolivianos en la presidencia de Evo Morales.* Latinoamérica. Revista de Estudios Latinoamericanos. Nº.49. México. 2009; **Álvarez, C.L.** *Derecho de las telecomunicaciones.* UNAM. México D.F. 2013; **Cárdenas Gracia, J.** *Constitución y reforma petrolera.* Boletín Mexicano de Derecho Comparado. Número conmemorativo. México D.F. 2008; **Ovalle Favela, J.** *La nacionalización de las industrias petrolera y eléctrica.* Boletín Mexicano de Derecho Comparado 118. México D.C. 2007; **Jordana, J. y Levi-Faur, D.** *¿Hacia un Estado Regulador Latinoamericano? La difusión de agencias reguladoras autónomas por países y sectores.* Fundación CIDOB. Barcelona. 2005; **Levi-Faur D.** *The politics of Liberalisation: Privatisation and regulation-for-competition in Europe's and Latin America's telecoms and electricity industries*. Eur. J. of Pol. R. 2003.

2007.This entity promotes the active participation of the country in the international arena and promotes it as an attractive, safe and competitive destination for foreign investment.

It should also be emphasized that in 2012 an in-depth constitutional reform in the energy sector was performed. This reform changed the way of doing business in the oil, hydrocarbon, power generation and alternative energy source industries. Thus, the difficulties the previous model offered to investment in Mexico were left behind. Previously, the exploration, extraction and refining of hydrocarbons, basic petrochemicals, as well as the activities of transmission, distribution and sale of electricity were reserved exclusively by the State, through Petroleos Mexicanos (PEMEX) and the Federal Electricity Commission (CFE). It is true that this has not fully prevented the participation of individuals in power generation, but it has restricted recruitment capacity by the CFE to limited self-supply, cogeneration and export modalities.

This constitutional reform sought that greater legal security exist in energy, for both national and international investors and to encourage investment in these sectors, so that competitive prices for industry and services existed. Nevertheless, the reform established that public service contracts for transmission and distribution of electricity should contain a minimum percentage of national investment. Similarly, it established the obligation for the law to provide the percentages of national investment in services provision for allocations and contracts to public and private companies that are awarded the national industry, encouraging a minimum average national investment for all assignments and contracts for exploration and extraction of hydrocarbons.

Similarly, it should be noted that the year 2013 relevant constitutional reforms were also made to encourage foreign investment in telecommunications and strengthen economic competition.

The reform encompassed within its main goals, allowing public access to information and communications technology, including broadband, in terms of quality, plurality, universal coverage, interconnection, convergence, open access and continuity. All this without forgetting the guarantees of the rights of users and consumers of telecommunication services and access to content that promotes educational, cultural and civic education, with fairness, opportunity and objectivity.

At the same time, competition conditions were improved, new television licenses were offered and free competition encouraged in telecommunications services and broadcasting in order to increase competitiveness and improve service in terms of quality and price.

As a result of this reform, in 2014 the new Federal Telecommunications Act and

Broadcasting was published**,** which is to regulate the use, development and exploitation of radio electric spectrum, i.e., the space used to provide telecommunications services and broadcasting, public telecommunications networks, the provision of public services of general interest and telecommunications broadcasting (fixed and mobile telephone services and pay to view and free view television) and the convergence between them.

The law also provides for the **rights of users and audiences** and the process of free competition in these sectors contributes to the aims and the exercising of the rights established in the Constitution of the United Mexican States with regard to this issue.

3.6.2. Institutional framework for regulation and supervision of regulated Energy and Telecommunications markets

3.6.2.1. Electricity, gas and liquid fuels sectors

• The **Energy Regulatory Commission** (hereinafter "**CRE**") is a body which is a legal entity with technical, operational and managerial autonomy, attached to the Ministry of Energy, which aims to promote energy development.[90]

The CRE is governed, according to the Law of Regulatory Bodies in energy coordinated in 2014, by a governing body composed of seven members, including its Chairman. The Commissioners are appointed for seven years of staged annual succession, with the possibility of being reappointed on one occasion for an equal period.

To name each Commissioner, the President of the Republic submits three candidates for consideration by the Senate, which, prior to hearing the persons nominated, appoint a Commissioner by the vote of two thirds of the members present, within thirty days. If within that period there is no pronouncement on the matter, the President will choose a candidate from the corresponding list of three. In the event that the Senate rejects the entire list proposed, the President of the Republic shall submit for their consideration a new list, on the same terms set forth above. If this second group is also rejected, the position of Commissioner, will be appointed President of the Republic from within this group.

[90] http://www.gob.mx/cre

The President of the CRE is appointed from among the three candidates presented to the Senate for such purpose by the Federal Executive. The President serves for a period of seven years. In the event of removal of the Chairman of the CRE, the President of the Republic submits three candidates for consideration by the Senate to fill the vacancy for the time remaining, to complete the corresponding period.

In all events, the person holding the office of President, may be in the position for more than fourteen years.

Candidates for Commissioners of the CRE must meet the legally established requirements and not incur the disqualifications and incompatibilities indicated in the Law.

Throughout their term, the Commissioners may only be dismissed for the reasons legally established in Article 9 of the Law of the Regulatory Bodies in energy coordinated 2014.These include being sentenced for committing a deliberate crime; being declared in a state of interdiction; breach of any of the obligations referred to in fractions XI, first paragraph, XII and XIII of Article 8 of the Federal Law of Administrative Responsibilities of Public Servants, where such breach is determined by final judgement.

The sessions of the governing body are public, for which reason they must be transmitted by electronic media, with the exception of the sessions in which proprietary or confidential information under the terms of the legal provisions applicable is discussed.

The agreements and resolutions governing the body are also public and published on the website of the regulatory body itself, except for the parts that contain proprietary or confidential information, in the terms established by the applicable legal provisions.

The CRE regulates and promotes the generation of electricity, utilities of electricity transmission and distribution, electricity transmission and distribution that is not part of the public service and marketing of electricity; the efficient undertaking of transport activities, storage, distribution, compression, liquefaction and reclassifying and the sale to the public of oil, natural gas, liquefied petroleum gas, petroleum products and petrochemicals, as well as transport, storage, distribution and sale to the public of bio energy.

Similarly, the CRE promotes the efficient undertaking of the industry, promotes competition in the sector, protects the interests of users, promotes adequate national coverage and assures the trust stability and security in the supply and provision of services.

The CRE has a Consultative Council, a body that aims to contribute to the public consultation process to analyse the regulatory criteria contained in the administrative provisions of a general nature issued. In this Advisory Council, convened by the governing body, may participate representatives of leading energy institutions and academia, and associations that bring together assignees, contractors, authorised stakeholders and users.

The general rules, acts or omissions of the CRE may be challenged only by judgement of indirect protection under Mexican law, and are not subject to suspension. Only in cases of imposing fines, these will be executed until resolved by the protected judgement, if necessary, that they were promoted by.

In the case of resolutions of the CRE issued by court proceedings these may be only be challenged on the termination of the same for violations committed in the decision or during the procedure; the general rules applied during the procedure may only be recurred to in the proceedings brought against the resolution referred.

In carrying out its functions, the CRE must be coordinated with the National Hydrocarbons Commission (CNH)[91], the Federal Competition Commission (CFCE)[92], the Agency of Industrial Safety and Environmental Protection and the Ministry of Energy, through the mechanisms established in Chapter VI of the Act Regulatory Bodies Coordinated in Energy, in order that their acts and resolutions are issued in accordance with general framework that establishes the public policy of the Federal Government. To this end, the Coordinating Council of the Energy Sector has created as a mechanism for coordination of regulatory bodies in energy, the Energy Department and other agencies of the Federal Executive.

Finally, from a financial perspective, it should be noted that the CRE may have income from rights and exploitations established for their services in issuing and managing permits, authorizations, assignments and contracts. Likewise, it can also draw up its preliminary draft budget, to present to the Secretariat of Finance and Public Credit.

[91] http://www.gob.mx/cnh/
[92] https://www.cofece.mx/cofece/index.php

• The **National Hydrocarbons Commission** (hereinafter "**CNH**") was established by Act of the National Hydrocarbons Commission, 2008, attached to the Federal Executive Branch, and endowed as a legal entity with technical autonomy and budgetary self-sufficiency. The highest authority of the CNH is the Governing Body composed of seven members, elected for periods of seven years by the Senate from lists submitted by the President of Mexico.

The Commissioners, in accordance with the Law of Regulatory Bodies coordinated in energy of 2014, shall be appointed for seven years of staged annual succession, which will begin from 1 January of each year, with the possibility of being designated again, on one occasion for an equal period of seven years.

To name each Commissioner, the President of the Republic submits three candidates for consideration by the Senate, which, before hearing the persons nominated, appoint the Commissioner by the vote of two thirds of its members present, within thirty days. If the Senate fails to decide within that period, the position of Commissioner the person will be occupied by the person who, within that short list, is designated by the President of the Republic.

Should the Senate reject the entire list proposed, the President of the Republic shall submit a new one. If this second group is also rejected, will the position of Commissioner will be occupied by the person, within the group, is appointed President of the Republic.

The President of the CNH Commissioner shall be appointed for seven years from amongst the members of the three candidates for this purpose, before the Senate of the Federal Executive.

During the term of office, the Commissioners may only be removed by any of the grounds expressly referred to in Article 9 of the Law of the regulatory bodies in energy coordinated 2014.These include being sentenced for committing a deliberate crime; being declared in a state of interdiction; breach of any of the obligations referred to in fractions XI, first paragraph, XII and XIII of Article 8 of the Federal Law of Administrative Responsibilities of Public Servants, where such breach is determined by final judgement.

In the exercise of its powers, it corresponds to the National Hydrocarbons Commission **(i)** to provide the technical elements for the design and definition of

the policy of hydrocarbons in the country, as well as for the formulation of sectoral programs in exploration and extraction hydrocarbons, according to the mechanisms established by the Secretary of Energy; **(ii)** participate, with the Ministry of Energy, in determining the policy of restitution of hydrocarbon reserves**; (iii)** establish technical provisions applicable to the exploration and extraction of hydrocarbons in the area of competence and verify compliance; **(iv)** provide, within its competence, technical support as requested by the Secretary of Energy to carry out its functions; **(v)** establish technical guidelines to be observed in the design of the exploration and extraction of hydrocarbons, considering the opinion of Petroleos Mexicanos; **(vi)** rule technically exploration and extraction of hydrocarbons prior to the allocations granted by the Ministry of Energy and its substantive amendments. The execution of works, works and services of the project and its operation will be performed as established in the corresponding regulation; **(vii)** establish mechanisms for evaluating operational efficiency in the exploration and extraction of hydrocarbons; **(viii)** promote evaluation studies, quantification and verification of oil reserves; **(ix)** carry out inspection visits as requested by the Secretary of Energy, handing over the report; **(x)** monitor, verify, monitor and inspect the implementation and compliance with the official Mexican standards in the field of competence are issued, among other powers legally granted.

Finally, from a financial perspective, the National Hydrocarbons Commission has revenues of and duties established for their services in issuing and managing permits, authorizations, assignments and contracts, as well as other activities and corresponding procedures according to their powers, to finance its total budget. Likewise, it can also draw up its preliminary draft budget, to present to the Secretariat of Finance and Public Credit.

3.6.2.2. Telecommunications sector

• **The Federal Telecommunications Institute** (hereinafter "**IFT**") is an autonomous, independent public body in its decisions and functioning, a legal entity with its own assets, which is to regulate and promote competition and efficient development of telecommunications and broadcasting in the scope of the powers conferred upon it by Article 28 of the Constitution of the United Mexican States and in the terms fixed the Federal Telecommunications Act and Broadcasting and other

applicable provisions.[93]

The IFT is composed of a Plenary and its President, and is composed of seven members, including the President.

Its directors are appointed by the President of the Republic and must be ratified by the Senate, as in the case of the CRE, the National Hydrocarbons Commission or the Federal Competition Commission (CFCE)[94].

The appointment of each Commissioner is for a period of nine years, not renewable.

The nomination of candidates must meet the legally required qualities and a rigorous selection process is followed. Similarly, the Commissioners must adhere to a strict system of disqualifications and incompatibilities.

If the removal of a Commissioner is required, it is affected by a one of the causes expressly established and through due process.

Like the CRE and the National Hydrocarbons Commission (CNH), the IFT will count on the Consultative Council to exercise as an advisory body regarding the principles set out in the Act.

The IFT is responsible for the regulation, promotion and supervision of the use, development and exploitation of radio spectrum; satellite services, telecommunications networks, including public telecommunications networks and the provision of public services of general interest broadcasting and telecommunications, as well as access to active and passive infrastructure, ensuring the provisions of Articles 60 and 70 of the Constitution of the United Mexican States.

Also, the IFT is the authority on economic competition in the sectors of broadcasting and telecommunications, and so in these areas will exercise, exclusively, the powers that Article 28 of the Constitution of the United Mexican States, the Federal Law Economic Competition and other applicable legal provisions established for the Federal Economic Competition Commission.

[93] http://www.ift.org.mx
[94] https://www.cofece.mx/cofece/index.php

The IFT is also the authority on technical guidelines concerning infrastructure and equipment that connect telecommunications networks, as well as type-approval and conformity assessment of the infrastructure and equipment; regulate, promote and monitor the use, development and efficient use of the radio spectrum resources and satellite services, telecommunications networks and the provision of broadcasting services and telecommunications, as well as access to active, passive and essential inputs infrastructure; develop the strategy in international affairs competence of the Institute; approve the calls and databases bidding frequency bands of the radio spectrum, as well as the occupation and exploitation of orbital resources for commercial or private use and, as appropriate, declare the / the winners of public tenders on telecommunications and broadcasting, and radio resource with its associated frequency bands and, where appropriate, declare deserted public tenders; asymmetrically regular participants in the broadcasting and telecommunications markets in order to effectively remove barriers to free competition; resolve incidents compliance and enforcement of judgements in terms of Articles 132 and 133 of the Competition Law; To resolve whether concentrations between concession operators, concessions and changes in control resulting from them, as long as there is a preponderant economic agent in the telecommunications and broadcasting sectors, meet the requirements not to require Authorization of the Institute, to which the ninth transitional article of the Decree of the Telecommunications Law refers; Order that the economic stakeholders, the investigating body and the Investigating Authority be summoned to the oral hearing scheduled for the proceeding in the form of a trial; Order the closing of files, resolve on the granting of the benefit of exemption or reduction of the amount of the fines provided for in article 100 of the Competitivity Law.

In addition, it must approve the submission of statements and documents as *amicus curiae* in terms of Article 598 of the Federal Code of Civil Procedure; authorize requests for additional services originally covered by the concessions granted using frequency bands of the radio spectrum and concessions Prevailing economic operators with substantial power; impose, if necessary, penalties for violations of the laws, regulations or administrative provisions; or for breach of the provisions of the concession agreements or resolutions, measures, guidelines or regulations issued by the Institute, to issue precautionary measures and declare, if any, loss of property, plant and equipment for the benefit of the nation, among other.

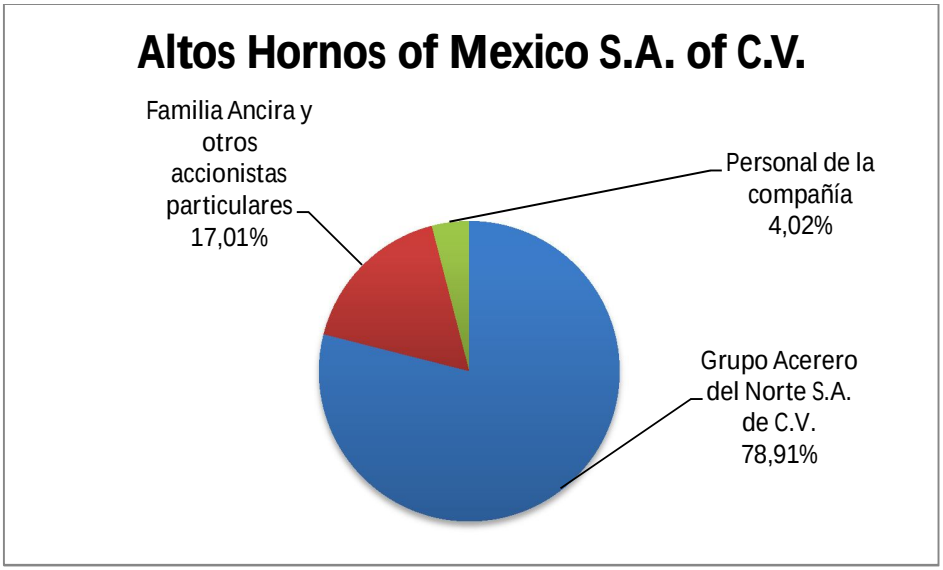
Furthermore, the 2013 constitutional reform of states that the IFT has an autonomous budget to enable the effective and timely exercise of its powers and, to do so, the Chamber of Deputies ensures it of budgetary sufficiency.

3.6.3. Some relevant cases that reflect the perception of legal security and protection of foreign investment

• Altos Hornos de Mexico S.A.B. of C.V.(AHMSA)

ALTOS HORNOS DE MEXICO, S.A. DE C.V.

Altos Hornos de Mexico S.A.B of CV is Mexico's largest steel maker. On May 25, 1999 AHMSA was declared insolvent by judicial decision and Mexican Stock Exchange, as a measure of protection to investors, suspension trading on the Stock Exchange of the common shares of the company was ordered. The same happened on the Stock Exchange of New York and the accumulation of ADS (American Depositary Shares) and convertible bonds were suspended.



Source:
https://www.bmv.com.mx/docs-pub/infoanua/infoanua_687065_2015_1.pdf

AHMSA operated for 15 years under the suspension of payments to creditors under the Law of Bankruptcy and Suspension of Payments. This Law was applicable to the case even though it was repealed in 2000 by the Bankruptcy Act.

After a lengthy judicial process and negotiations between creditors and lawyers, an agreement with most of its creditors for an amount of 1,700 million euros, 100% of the debt of the steel maker, was reached in 2016.This agreement provides that creditors may capitalize part of the debt in shares of the company. The agreement was made possible by providing capital and debt purchases by foreign investors. The next step is to re-activate its shares on the Mexican Stock Exchange.

Among the main creditors is the private equity *hedge fund* US subprime -hedge fund- Black River, who were architects of the agreement together with the team of advisers Nader, Hayaux & Goebel, SC. This foreign capital investment was needed to lift the suspension of payments which AHMSA had been operating for more than 15 years. This

successfully placed AHMSA in a position to improve its long-term potential, which will give the company the ability to have more financial flexibility to maximize the rationalization of its capital structure and compete more efficiently. The capital received and the lifting of the suspension of payments will allow AHMSA to establish a financially sound platform from which to carry out its operational initiatives and strategic priorities.

In 2015, AHMSA produced approximately 5 million tonnes of liquid steel and 2.89 million tonnes of finished steel products.

• Macquarie — Mareña Renovables

This wind power project, initiated in 2012, began with the aim of being the largest wind farm in Latin America. This meant the generation of 396 megawatts (MW) by 132 wind turbines with an estimated production of 1310 GW at a cost of 14 thousand 454 million pesos. It was an important commitment to the renewable energy sector in the state of Oaxaca. To fund this project resources from the private and public sector were brought together. Among others, the Federal Government through the Ministry of Energy and many local government bodies in the State of Oaxaca, with the collaboration of the Energy Regulatory Commission and the National Foreign Investment Commission.

This project sought to achieve a reduction in carbon dioxide emissions of up to 879

thousand tonnes per year.

Macquariem, through its subsidiaries Mexico Infrastructure Fund and Macquarie Infrastructure Trust II, has a share of 32.5%. Similarly, Mitsubishi Corporation and Dutch Pension Investment Group (PGGM) also they participated, as well as small investors and institutional investors who bought Certificates of Capital Development (CKD) on the Mexican Stock Exchange. Moreover, the project is also financed by a loan from the Inter-American Development Bank.

The project, however, was suspended because the indigenous community filed an appeal, in accordance with Mexican law. In Mexico, there are specific, rigid regulations for arable lands like those on which it was planned to raise part of the project. In accordance with the Land Law these "ejidos" are rural properties, i.e. land that cannot be exploited by citizens since it is communal land, and the Mexican state protects. These lands are often granted to farmers to cultivate them. When a community "ejido" (legal entity made up of farmers) lodged a Protection case, immediately granted the suspension is being considered vulnerable and social rights in accordance with the Law of Protection. The interposition of the respective resource suspended work on the project despite the investment already made.

After 5 years investors have decided to withdraw because the delay in the administration of justice has prevented progress on the project and return to it. Macquarie has informed its investors of the existence of "significant obstacles" to continue with the wind farm.

• IUSACELL — AT&T

As already mentioned, in 2014 the fundamental constitutional reform in

telecommunications and related to Foreign Investment Law was introduced. The abolition of restrictions on shareholding percentages that foreign companies could previously have in this sector, caused the doors to international investment to open.

In 2015 AT&T opted for the Mexican market and bought IUSACELL subsidiary company of mobile telephone Group Salinas, amounting to 2,500 million dollars. Nader was involved in the operation, Hayaux & Goebel, SC on behalf of the Salinas Group and by AT & T, Sullivan & Cromwell LLP and Galicia Abogados Lawyers.

In 2016 AT&T announced an investment in Mexico for 3,000 million dollars. This was part of a total of 4,500 million investment in the sector of mobile telephony and telecommunications. Thus, the presence of AT&T in the Mexican market was strengthened and incorporated competitive new stakeholders within a traditionally controlled by América Móvil market.

3.7. PERU

PERU

Population	31.38 million	2015
GDP	$189.1 billion	2015
GDP growth	3.3%	2015
Inflation	3.6%	2015

Source: World Bank
http://www.bancomundial.org/es/country/peru

3.7.1. Incorporation of the country to the multilateral free trade and investment protection system

The reforms undertaken in Peru to strengthen economic growth have enhanced protection institutions and safeguarded foreign investment.[95]

[95] **Tirado, R. M.** *El control jurisdiccional de la actuación de los organismos reguladores. Balance crítico de la experiencia peruana.* Actualidad jurídica N°274. Lima. 2016; **Fresco, F. & Pereira, E.G.** *Latin American Upstream Oil & Gas. A Practical Guide to the Law and Regulation*. Globe Law and Business. 2015; **Maldonado Meléndez, M. A.** Los organismos reguladores de los servicios públicos. Gaceta Jurídica. Lima. 2015; **Aguilar Abaunza, D. y Montoya Pardo, M.F.** Panorama de las energías renovables en América Latina: El caso de Colombia, Chile y Perú. En: La regulación de las energías renovables ante el cambio climático. Aranzadi. 2014; **Blanco Silva, F; Venero Carrasco A; Gutiérrez, N.R.; Chacín L; Jácome, J.S; López Díaz, A; Utrera Caro, S.** *La transición a la competencia en el mercado eléctrico en diversos países de Iberoamérica: Estudio comparativo de España, Perú, Venezuela y Ecuador.* Revista Peruana de Energía. Nº3. Lima.

Peru's Political Constitution of 1993, Articles 58, 59 and 70, sets out the principles of free competition, inviolability of property, respect for private initiative and encouraging free enterprise.

And Article 63 states that national and foreign investment is subject to the same conditions. At the same time, this article indicates that the State and other public law representatives may submit disputes arising from contractual relationships to tribunals constituted under international treaties[96].

More recently, and through Legislative Decree 1224, the 2015 Framework for Promotion of Private Investment was approved by Public Private Partnerships and Projects Assets. The aim of this Legislative Decree is to establish processes and procedures for promoting private investment for the development of public infrastructure, public services, services related to, applied research projects or technological innovation and project execution in assets.

Among the most important provisions laid down by Legislative Decree 1224 for the protection of investments is Article 24 of Assurances and guarantees, which explicitly

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2013; **CEPAL/SEGIB.** *Espacios iberoamericanos. Hacia una nueva arquitectura del Estado para el desarrollo.* 2011; **Dammert, A, García Carpio, R. y Molinelli, F.** *Regulación y Supervisión del Sector Eléctrico.* Fondo Editorial de la Pontificia Universidad Católica del Perú. Lima. 2008; **Thornberry Villarán, G.***El nuevo papel del regulador de telecomunicaciones.* Revista de Derecho Administrativo. Lima. 2008; **Ramió Matas, C.** *La fortaleza de las nuevas agencias reguladoras de los países de América Latina: los casos de Perú y de República Dominicana.* Barcelona. 2007**; Gallardo, J. y Vásquez, A.** *Sistemas de supervisión y esquemas de sanciones para el sector hidrocarburos.* Osinergmin, Oficina de Estudios Económicos, documento de trabajo Nº 10. Lima. 2006; **Danós Ordóñez, J.** *Los organismos reguladores de los Servicios públicos en el Perú: Su régimen jurídico, organización, funciones de resolución de controversias y de reclamos de usuarios.* En: Derecho administrativo (autores varios). Asociación peruana de Derecho administrativo. Jurista editores. Lima. 2004.

[96] Article 63.Constitution of Peru."Domestic and foreign investment are subject to the same conditions.The production of goods and services and foreign trade are free.If another country or countries adopt protectionist or discriminatory measures that harm the national interest, the State may, in defence of it, to adopt similar measures.In every contract the State and persons of public law consists foreigners domiciled subjecting them to the laws and courts of the Republic and renounces any diplomatic claim.They can be exempted from the financing arrangements national jurisdiction.The State and other public law persons may submit disputes arising from contractual relationships to tribunals constituted under existing treaties.They may also submit a national or international arbitration, in the way prescribed by law ".

recognizes that "*Public-Private Partnership contracts may contain clauses stipulating the compensation to which the investor is entitled in the event that the State suspend or rescind the contract unilaterally or failure of it. Such indemnity clauses are guaranteed by contract between the State and the investor, at the request of the latter*". Similarly, Articles 25, 26 and 27 embody different guarantee mechanisms for the benefit of international investors.

Such broad Legislative Decree guarantees offered by Legislative Decree 757 of 1991 approving the Framework Law for Private Investment Growth and Legislative Decree 662, 1991, whereby a stable legal status granted to foreign investment in all sectors of economic activity and in any of the business or contractual forms permitted by national law.

Peru is fully integrated into the international conventions and agreements guarantee foreign investment, dividends and return of capital, as well as mechanisms for mediation and international arbitration for dispute resolution. Some of the trade agreements to strengthen free trade and protection of foreign investment are:

- Trade Agreement between Peru and the European Union.
- Pacific Alliance (Chile, Colombia, Mexico and Peru).
- Andean Sub regional Integration Agreement ("Cartagena Agreement").
- Economic Complementation Agreement No. 59 (ECA 59), Andean Community - MERCOSUR.

Likewise, Colombia belongs to multiple international cooperation organizations that are critical in terms of momentum for free trade and protection of foreign investment. These include:

- International Centre for Settlement of Investment Disputes (ICSID).
- The United Nations Organization (UN).
- World Trading Organization (WTO).
- Latin American Economic System (SELA).
- Latin American Integration Association (ALADI).
- Economic Commission for Latin America (ECLAC).
- Andean Development Corporation (CAF).
- The Organization of American States (OAS).
- Andean Community (CAN).

3.7.2. Institutional framework for regulation and supervision of regulated Energy and Telecommunications markets

Peru has undertaken in recent years a process aimed at improving the institutional framework for regulation and supervision of energy and telecommunications markets. For this it has aimed at guaranteeing higher levels of organic, functional and financial autonomy, in order to improve its transparency, objectivity and technical quality, and prevent undue political interference in the same reforms.

3.7.2.1. Electricity, gas and liquid fuels sectors

• **The Supervisory Agency for Investment in Energy and Mining** (hereinafter **"OSINERGMIN"**) is a public institution, a legal entity, technical, administrative, economic and financial entity, in charge of regulating and supervising companies in the electricity sector, oil and mining comply with the laws of their activities.

This body is attached to the Presidency of the Council of Ministers and in accordance with Article 32 of Law 29158 of 2007, it is administered by a Board, whose members are appointed by public competition for a period of five (5) years and may be appointed for an additional period. It further provides that the law on the subject establishes the requirements and procedure for appointment, removal in the event of serious misconduct and manifest incompetence correctly established by due process and with the approval of the Council of Ministers.

Law 27332, Framework for Regulatory Agencies Private Investment in Public Services Act establishes the composition, requirements, incompatibilities and the procedure for the appointment of members of the Governing Councils of Regulatory Agencies Private Investment Services public (energy and mining, telecommunications, road and sanitation infrastructure).

This law provides that the Board shall consist of six (6) members appointed by supreme resolution countersigned by the President of the Council of Ministers, the Minister of Finance and Minister of the sector.

Said Board is comprised of two (2) member proposed by the Presidency of the Council of Ministers, one of whom shall be the representative of civil society. One of those proposed by the Presidency of the Council of Ministers chaired by Board

members and has the deciding vote; two (2) members proposed by the Ministry of Energy and Mines, one of which must be professional specializing in mining; one (1) member to proposed by the Ministry of Finance and Economy (1) member at the proposal of the Institute for Defence of Competition and Intellectual Property.

To become a member of the Board, Articles 7 and 8 of Law 27332 establish the requirements for candidates running to be part of the Board, and the corresponding system of incompatibilities.

As for the causes of removal of Board members, Article 6.4 of Law 27332 provides that occur in case of serious misconduct duly verified and substantiated upon investigation that are given within fifteen days to file its claims in accordance with what is designated in their respective regulations. The removal will be made by supreme resolution countersigned by the President of the Council of Ministers, the Minister of Economy and Finance and the Minister of Energy and Mines. In addition, the cause for dismissal for serious misconduct, Article 6.6 of the Law 27332 lays down other assumed grounds which allow it.

While the law does not indicate the entity in charge of the investigation, since the resolution declaring the vacancy on the Board is signed by the President of the Republic, the procedure should be undertaken by the President of the Republic or officials designated. It should be noted that according to the doctrine established by the Peruvian Constitutional Court has consistently held, for removal processes of public officials, including the removal process of the members of the Board of Regulators is, applies the own guarantees of the right to due administrative procedure.

Article 32 of Law 29158, provides that Regulatory Bodies, within their respective areas of competence, they have supervisory functions, regulatory, policy, audit and sanctions; and settlement of disputes and claims, under the terms provided by the law of matter. It adds that they must define their technical requirements, objectives and strategies, determine their political spending in accordance with the general policy of the Government.

According to the General Regulations of the Supervisory Board for Investment in Energy and Mining, the exercise of regulated function rests with the Board of the Regulatory Authority and has delegated.

The regulatory and supervisory functions of this institution are governed by technical criteria. These include the to ensure the quality and continuity of supply of

electricity; full and complete compliance with electrical concession contracts, transportation of oil by pipeline and natural gas distribution pipeline network; ensure that users have access to electricity services and transport and distribution of natural gas, in the best conditions of quality and timeliness, making sure that the rates are fixed according to the criteria established in the regulations on the matter; promote the development, modernization and efficient operation of the electricity and hydrocarbons monitor ongoing and timely fulfilment of investment commitments and other obligations arising from the process of promoting private investment in state enterprises in the energy sector, according to the provisions of the respective contracts, and ensure safety and prevent electrical hazards caused by the presence of electrical installations in areas of public and local use with access allowed to the public, in compliance with the provisions of the National electrical Code.

In their development phase the rules must comply with established precepts of prior consultation and publicity.

It should also be noted that the recent Legislative Decree 1310, which incorporates the obligation for all entities of the Executive Branch (including regulatory bodies) to submit a report regulatory quality of all regulations and future provisions adopted, a Multi sectoral Commission of the Presidency of the Council of Ministers, who will propose the ratification or issuance thereof, respectively. It is noteworthy that benefit, necessity, effectiveness, proportionality of regulatory requirements - through Regulatory Quality Analysis principles and the cost are evaluated. Failure to follow the above process, the decree provides as consequences, if automatic repeal of existing rules, and non-entry into force in case of new regulations or regulatory changes.

Similarly, this body has the power to reconcile conflicting interests between entities or businesses under their purview, between them and their users or to resolve conflicts arising between them, recognizing or rejecting the rights claimed.

According to the General Regulations of the Supervisory Agency for Investment in Energy and Mining, the exercise of the function of dispute settlement is exercised by the Collegiate Bodies in administrative court and the Court Dispute Resolution OSINERG, in second and last administrative instance. They are bodies that have no functional or administrative subordination to the Board of the Regulatory Authority.

The agency's budget is made up of the payments of procedures and contributions

by regulation to be paid by regulated companies, transfers of public sector entities, as well as those budget allocations legally established by Congress.

Regarding income regulation which makes reference to the general regulations of regulators, Article 10 of Law 27332 provides that the regulatory bodies collect from businesses and entities under its scope, a regulatory income, which may not exceed 1% (one percent) of the value of annual turnover, net of the General Sales Tax and Municipal Promotion Tax, companies under its scope. The income shall be determined, in each case, by supreme decree approved by the Council of Ministers, countersigned by the President of the Council of Ministers and Minister of Economy and Finance.

Moreover, although the budget of the regulatory bodies is formed with its own resources, according to the General Law of the National Budget approved by Law 28411, its budget is included in the procedure established by the Act. Accordingly, the Board of Regulators approve its annual budget, it notifies the Ministry of Economic and Finance who, in turn, submitted for approval thereof to the Presidency of the Council of Ministers. Once obtained, the approval of the President of the Council of Ministers, the President of the Republic proposes, through a bill, the Congress, the public-sector budget for the corresponding year, which will be approved by a simple majority of Congress of the Republic.

3.7.2.2. Telecommunications sector

• **The Supervisory Agency for Investment in Telecommunications** (hereinafter **"OSIPTEL"**) is a public institution and a legal, functional, technical, administrative, economic and financial entity, in charge of regulating and supervising companies in the telecommunications industry comply with the legal provisions of their activities.

This body is attached to the Presidency of the Council of Ministers and in accordance with Article 32 of Law 29158 of 2007, it is administered by a Board, whose members are appointed by public competition for a period of five (5) years and may be appointed for an additional period. It further provides that the law on the subject establishes the requirements and procedure for appointment, removal in the event of serious misconduct and incompetence manifests duly established and with the approval of the Council of Ministers and due process to proceed to verify the reasons for retirement.

In this regard, Law 27332, Framework for Regulatory Agencies Private Investment in Public Services Act establishes the composition, requirements, incompatibilities and the procedure for the appointment of members of the Board of Regulators of Private Investment public services.

The Board shall consist of five (5) members, i.e. one less than the corresponding to the Regulatory Agency for Investment in Energy and Mines, appointed by supreme resolution countersigned by the President of the Council of Ministers, the Minister of Economy and Finance and the appropriate Minister.

Legally the Board of the Regulatory Authority is composed of two (2) proposed by the Presidency of the Cabinet members, one of whom shall be the representative of civil society. One of those is proposed by the Presidency of the Council of Ministers chaired by Board members and has the deciding vote; one (1) member nominated by the Ministry in the field; one (1) member proposed by the Ministry of Economy and Finance, and one (1) member at the proposal of the Institute for Defence of Competition and Intellectual Property.

Law 27332 prescribes the requirements to be nominated as a member of the Board, as well as the incompatibilities.

As for the causes of removal of members of the Board, and as happens in other Peruvian entities of regulation and supervision, the same will occur in case of serious misconduct duly verified and substantiated, previous research which confers upon them fifteen days to submit their claims in accordance with what is designated in the respective regulations.

Like other regulatory bodies, within their respective areas of competence, they have supervisory functions, regulatory, policy, audit and sanctions; and settlement of disputes and claims, under the terms provided in accordance with Law 29158. Law also define their technical requirements, objectives and strategies, and determines its spending policy in accordance with the general policy of the Government.

Among the regulatory and supervisory functions of the Board of the organization are to promote the existence of conditions of competition in the provision of telecommunications services; ensuring universal access to public telecommunications services; ensure the quality and continuity of the provision of public telecommunications services; ensure full compliance with concession

contracts; monitor impartially the interests of the State, investors and users in the telecommunications market; establish adequate protection for users policies, and ensure access to services at reasonable rates; facilitate the development, modernization and efficient operation of telecommunications services; others established by law and regulations.

Similarly, this body has the power to reconcile conflicting interests between entities or businesses under their purview, between them and their users or to resolve conflicts arising between them, recognizing or rejecting the rights claimed.

According to the General Regulations of the Supervisory Agency for Investment in Telecommunications, the exercise of the function of dispute settlement is exercised by the Collegiate Bodies in administrative court and the Court Dispute Resolution OSIPTEL, in second and last administrative instance. They are bodies that have no functional or administrative subordination to the Board of the Regulatory Authority.

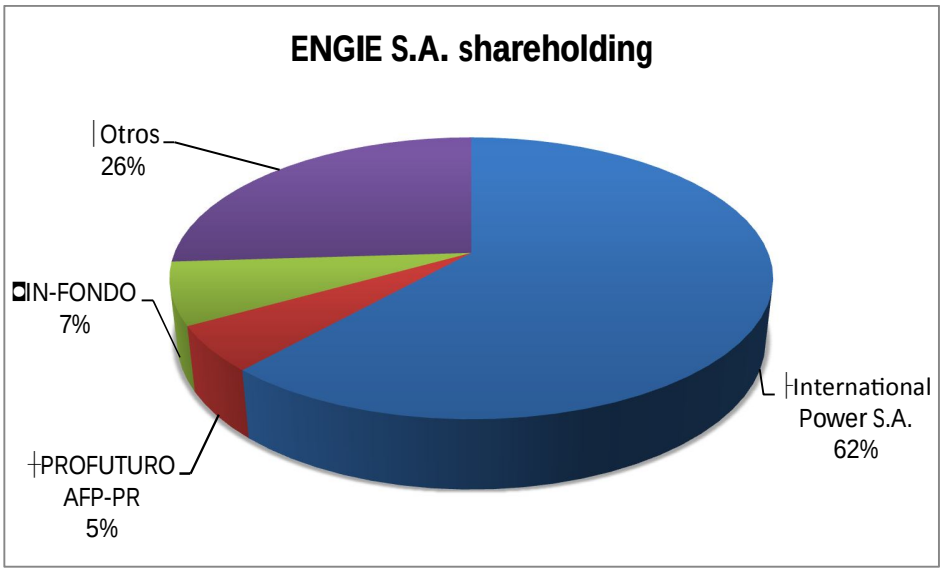
The agency's budget is made up of payments of procedures and contributions by regulation to be paid by regulated companies, transfers of public sector entities, as well as those budget allocations legally established by Congress.

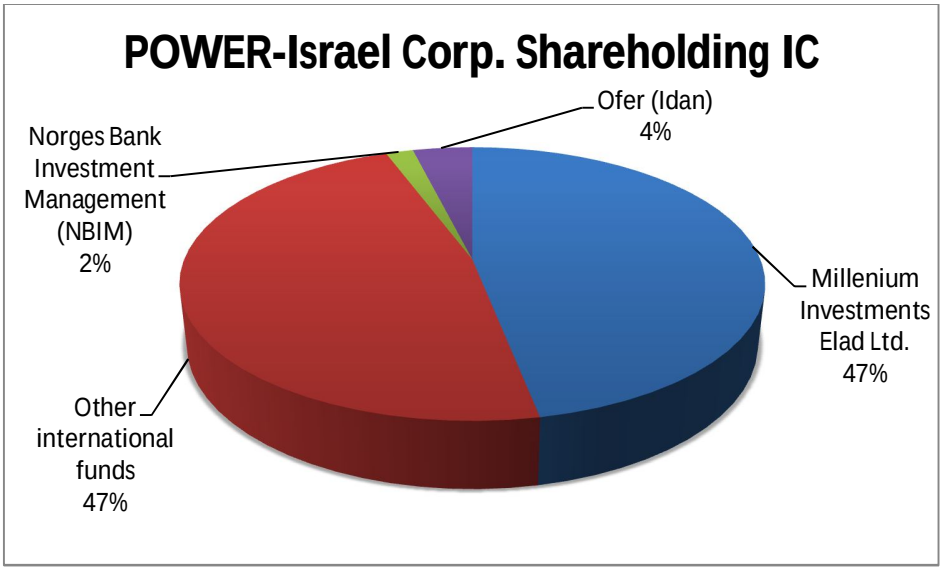
Regarding income regulation which makes reference to the general regulations of regulators, Article 10 of Law 27332 provides that the regulatory bodies collected from businesses and entities under its scope, a regulatory income, which may not exceed 1% (one percent) of the value of annual turnover, net of the General Sales Tax and Municipal Promotion Tax, companies under its scope. The income shall be determined, in each case, by supreme decree approved by the Council of Ministers, countersigned by the President of the Council of Ministers and Minister of Economy and Finance.

3.7.3. Some relevant cases that reflect the perception of legal security and protection of foreign investment

- **ENGIE, IC and ENEL POWER. Protection of legitimate expectations.**

This is a case of regulatory change in the methodology for determining compensation. Specifically in the area of the generators by the use of transmission facilities.





Sources:
http://engie-energia.pe/stakeholder/accionistas/acciones-enersur/estructura-accionaria/

- Background and relevant regulatory framework

In accordance with the Electricity Concessions Law (LCE) adopted in 1993, the generators must compensate the owners of transmission facilities for the use of facilities that are assigned as exclusive use of the generation or sharing generation / demand. The LCE also establishes that the allocation methodology to quantify their use Generators transmission facilities is the responsibility of OSINERGMIN.

With the approval in 2006 of the Law 28832, Law to Ensure Efficient Development of Electricity Generation legal framework for the regulation of electricity transmission systems was improved. Thus, it became transparent and predictable methodology defined by OSINERGMIN for the allocation of responsibility for payment of transmission facilities, having for these approved in 2008 effects, the "Procedure for the Allocation of Responsibility Payment TSS and SCT " ("Standard Assignment of Responsibility "), through Resolution No. 383-2008-OS / CD.

For the purposes of this analysis, it should be noted that, by Standard Allocating Responsibility, the concept of generators Relevant was established, whose application resulted generators only remunerate transmission facilities, whose use is evident through

the implementation of the "topological Distribution factors" methodology.

- Description of the controversy

In 2016, OSINERGMIN published the draft regulations amend the Allocation Policy Accountability, eliminated the concept of generators Relevant, and establishing the new methodology "force-distance" whose application resulted generators remunerate all facilities transmission, regardless of whether a physical use of them appeared.

Generators, among other arguments, indicated that the regulatory project generates a substantial change, and amending the rules for installed generators, showing the lack of predictability regarding investments, so it should be subject to a methodology stable in the time, so that generators wishing to settle or demand want to connect, to know the charges they will face in a predictable manner, which, to be effective, it must extend the lifetime of the projects.

In addition, generators from a legal point of view, considered that the proposed regulatory change contravened the principles of legal protection to legitimate expectations, predictability and safety and of a reasonable nature. In addition, they indicated that the draft law was arbitrary and discriminatory, since using the new methodology was given a clear benefit to generating public capital, whose compensation would be lower than those that came with the methodology now paying repealed.

Finally, certain companies requested the introduction of a transitional period in order that companies can adapt their generating trade relations to the new methodology approved by OSINERGMIN.

- Regulatory Statement

OSINERGMIN concluded that the responsibility for approving the methodology for calculating the use made by generating transmission facilities, not only includes the ability to approve the procedure, but also its subsequent amendments, in order to ensure the public interest, or perfect the rule against sustained experience in its application. In other words, OSINERGMIN considers that there is an acquired right, having generating the assurance that the methodology for calculating compensation remains unchanged over time.

On the issue of the new methodology favoured generation companies public capital, it said OSINERGMIN not have included any provision that has created a differentiated regime between public and private companies engaged in electricity generation activity. On the

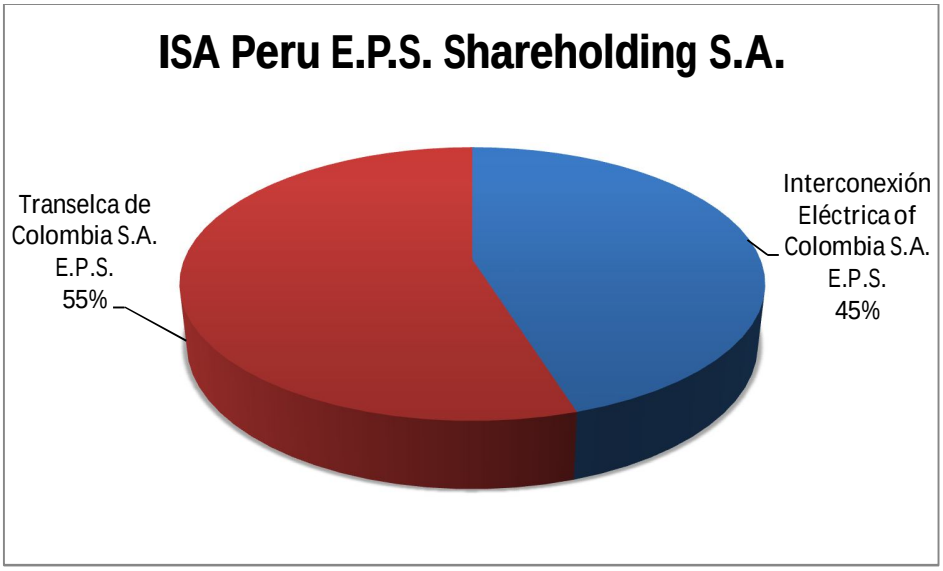
contrary, establishes OSINERGMIN, defined that all generators without any distinction payment of compensation of the transmission facilities are distributed based on internationally accepted methodology.

Moreover, without making explicit the principle of legitimate expectations mention OSINERGMIN ordered the application of a transitional mechanism Standard Assignment for the next five years, in order not to affect suddenly the value of compensation generators paid with the old methodology.

In conclusion, investors in the electricity generation sector must assume the cost overruns by the regulatory change in the regulation of the electricity sector, without liability by the state. Still, the regulator has implicitly accepted the principle of legitimate expectations by varying its initial position set out in the pre-publication and final publication created in the transitional period for the implementation of the new methodology.

• Interconexión Eléctrica E.S.P.S.A. and Transelca E.P.S.S.A.

This case revolves around the assumption of cost overruns for change in the technical specifications for power transmission projects under concession by contract build, own, operate and transfer (BOOT) safely and guarantees granted by the Peruvian State to Colombian companies Interconexión Eléctrica E.S.P.S.A. and Transelca E.S.P.S.A.



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Background

With Ministerial Resolution No. 408-2012-MEM / DM, published on September 11, 2012, the Ministry of Energy and Mines instructed the Promotion of Private Investment (PROINVERSION), conducting the bidding process necessary to award Project "500 kV Transmission Line Mantaro - Marcona - Socabaya - Montalvo and Associated Substations".

As a result of the bidding process, the July 18, 2013, it won the Award to the company Interconexión Eléctrica E.S.P S.A of Colombia, which offered the sum of US $278,365,620 for investment costs; and US $6,959,140 for operation and maintenance costs.

On September 26, 2013, the company Consorcio Transmantaro SA (hereinafter "CTM") representing Interconexión Eléctrica E.S.P S.A, as the Concessionaire, signed with the Peruvian government the Concession Agreement SWG Transmission Line 500 kV Mantaro-Marcona-Socabaya-Montalvo and Associated Substations (hereinafter "SWG Concession Agreement").

- Relevant contractual framework

According to clause 3.1 of the Concession Agreement SWG, its object is as follows:

"The Concessionaire is required to design, finance, supply the required goods and services, build, operate and maintain the power line, and provide the service, all in accordance with the Contract and the Applicable Laws. In that reason, the Concessionaire shall define, among others, the path and alignment follow the power line, and provide convenient to overcome contingencies and thus meet the construction deadlines clearances. The stroke of the line described in Annex 10 is referential. "

According to the "General Scope" section in Annex 1 No. 1 of the Concession Agreement SWG, the Electric Line is composed of the following components:

"The project includes the construction of the following transmission lines, substations and complementary facilities:

- *Transmission Line (LT.) 500 kV Mantaro Nueva - Poroma (Marcona), simple turn.*
- *Transmission Line (LT.) 500 kV Poroma (Marcona) - Socabaya Nueva, simple turn.*
- *Transmission Line (LT) Socabaya Nueva 500 kV - Montalvo 500 kV simple turn.*
- *Link in 220 kV between substation (SE) Mantaro Nueva and S.E. Campo Armiño, simple turn.*
- *Opening the LT220 kV Cerro Verde - existing Socabaya to link this line with the SE Socabaya Nueva.*
- *Re powering, 600 MVA per circuit, the section of existing 220 kV line between SE Socabaya existing and S.E. Socabaya Nueva.*
- *Construction of the S.E. Mantaro Nueva 500/220 kV.*
- *Expansion of the S.E. Campo Armiño in 220 kV.*
- *Expansion of the S.E. Poroma 500 kV.*
- *Construction of the S.E. Socabaya Nueva 500/220 kV.*
- *Expansion of the S.E. Montalvo 500 kV.*
- *Socabaya substation adjustments in existing and Cerro Verde 1. "*

With regard to the immutability of the technical specifications of the project, the section itself Scope General of Annex 1, establishes the following obligation to CTM:

"The Concessionaire will be responsible for include other elements or components not

described in this Annex, measure, modify or adapt whatever was necessary, in order to ensure proper operation of the Project facilities and the service provided by the standards of quality applicable to the National Interconnected System (SEIN) "

It is important to mention that the winners of the bidding process Transmission System of Guaranteed Transmission System, are entitled to throughout the duration of the concession (30 years), the investment costs and costs of operation and maintenance awarded in the bidding process. Since the winners of the Concession Contracts SWG are given assurances and guarantees of the statements made by the Peruvian state in the contract, the latter cannot be modified by the State in the exercise of their legislative or regulatory powers. In case of default, Legislative Decree 1224 provides that the investor is entitled to compensation.

- Description of the controversy

During the execution of the contract, although the SWG Concession Agreement had anticipated that CTM must be connected to the S.E. Ermine field, the System Operator (COES) under the approval process Pre-Operability Study It not[97] approved this connection as a result of the unavailability of such substation capacity. In order to avoid shut downs in the project, the company CTM is forced against the system operator to build a section of transmission line 220 kV and two 220 kV cells in the SE Colcabamba for connecting the CH Cerro del Aguila, elements that were not included in the Concession Agreement SWG (hereinafter "Other information").

While the other elements not originally included in the Concession Agreement SWG MAMO, its execution was designed by CTM, in order to overcome the objections of a technical nature raised by the System Operator under the approval process for the study of pre-operation of the project. The technical solution conceptualized by CTM, was not previously consulted, so the costs involved in implementing it, were fixed unilaterally by CTM, in fulfilment of its obligation to design the components of the project, as stipulated in Annex 1 Concession contract.

- Conceding pronouncement

[97] All SWG Concession Contracts provide that the holder must perform its obligations under the current regulatory framework (called Applicable Laws).According to the Electricity Concessions Law and its Regulations, any holder of a generation and transmission project that interconnects the SEIN must get approval by the COES Study Pre-Operability.

While the obligation to take the risk of design transmission infrastructure lies with the dealers, that obligation must have an economic limit, otherwise the principle of contractual good faith, applicable to all types of contractual relationship is affected.

The Concession Agreement does not provide for a limit SWG that the concessionaire must assume the risk of project design; however, the contract itself provides that the economic and financial balance of the concession will be affected in case vary by 5% investment costs or Base Tariff established in the Concession Agreement, exclusively by changes in applicable laws.

In this context, in the opinion of the Peruvian State, it is reasonable and proportional use this limit, for the purposes of assessing the economic and financial recovery generated by the risks inherent in the fulfilment of the obligation of CTM dimension, modify or adapt it to the annex 1 of the contract of concession SGT, necessary for purposes of ensuring the proper operation of the facilities of the project and the provision of the service according to the quality standards applicable to the SEIN.

According to it previously designated, is of highlight that CTM assumes as risk and venture of the project, a limit of the 5% of them costs of investment or Base tariff by which, applying criteria of reasonableness and proportionality, the request of increase of Base tariff of CTM must evaluate is on such criteria.

After the technical economic evaluation provided, it was determined that the extra cost caused by the execution of the additional works is lower than the percentage of 5%, reason by which shows that they are within the random factor of the contract and risk of CTM, not to and must therefore accept the increased investment costs raised by CTM.

In conclusion, the investors in the sector of transmission electric of the system guaranteed of transmission should assume them costs by adjustments to the project (variation in them specifications technical) until by a limit of the 5%. Exceeded that limit, the State may assess the recognition of them costs incremental, which not necessarily will coincide with those costs actually incurred.

4.CONCLUSIONS

Finally, it should be highlighted that this report has attempted to provide an overview of the current situation of institutions in some of the most representative Latin American countries, with the intention of assessing levels of protection of foreign investments, especially in denominated sectors regulated. This is a study, therefore, not intended to be exhaustive or geographical scope or concerning the scope of potentially relevant for foreign investment economic activities. It would be wise to assume, however, that the representation of countries and sectors is adequate, not so much as to provide conclusive data and fully binding conclusions but to provide some useful guidance in making decisions and, where appropriate, as a basis for a more detailed and focused on a specific country or area of production analysis. The methodology is predominantly descriptive. In consideration of the current OECD guidelines on the matter the study outlines the regulations and institutions of each of the selected countries, with a brief background and some prospective outline the future horizon immediate situation. The study of each country includes an account of the most prominent cases of both success and failure, to show the current performance of governance.

As regards the meaning of the OECD guidelines on regulatory quality on the institutional supports government agencies and reliability standards, respect for property rights and freedom of investment, there is a basic criterion that, level conclusions should be highlighted. This is the rivalry of socio-political groups, both national and sub-national and supranational, in attracting investment resources. Indeed, the success of the communities territorially is decided by a simple crossroads: to be able to create *stock* fixed capital flows-generator of resources in the medium and long-term by stable immobilization of resources that come from surplus savings worldwide. This is impossible without a strong commitment to public bodies of governance for the proper functioning of transactions, which translates into clear, stable and actually implemented regulatory frameworks, effective remedies for dispute resolution, tangible guarantees against confiscation and, ultimately, loss of margins political decision at the domestic level. You cannot achieve one without the other. Domestic policy actions consisting of injure foreign investment in exchange for electoral gains are the most formidable impediment to sustainable development. Evidence credited with forcefulness that the most disadvantaged political units are the most dysfunctional institutionally by a mistaken view of intra- and inter-generational assets, which only has the

short term, both for voters and for the elect. The so-called strategic sectors are regulated or, for that very reason, an excellent test bank for the correct behaviour of economic, social and political stakeholders in all regional governance contexts.

Standards, principles, rules and directives issued by the OECD have long had an undeniable influence, to set guidelines specific behaviour (some defined or suggested by the studies themselves and documents of the Organization), both already integrated countries her as potential members. We must recognize that those guidelines are some benchmarks (*yardsticks*) Generally accepted in the international community for assessing institutional settings, organizational governance structures and functioning of economic exchanges and production processes. Hence we have started this report with a section devoted to the summary of the aforementioned guidelines, then use them as analytical and reference patterns in the study of each country and cases most significant experiences or exposure.

We make the conclusions of the report on the following points:

4.1. The OECD recommendations regarding legal security and protection of investments are concentrated, so that we specifically interested in the following:

4.1.1. Attention and improved **regulatory quality**, based on rules promoting the general interest, produced through transparent and participatory processes. In the aspect of quality normative content, the technique suggested most notable is that of the **Regulatory Impact Assessment**, as much *ex ante* as *ex post*, both in quantitative and qualitative terms. On the right side of the action by regulatory agencies, the OECD advocates the need to give effect to the principles of due process, effective judicial protection, not enough motivation and confiscation.

4.1.2. Establishment **of independent regulatory authorities**, i.e., equipped with operational, financial and decision-making in relation to the political authorities autonomy. The aim is that the authorities generate **public confidence** to all economic operators and citizens, **competitive neutrality** and **impartiality**. For this it is essential that the regulatory authorities are subject to screening procedures and performance evaluation.

4.2. It permits the proposal of certain **Specifications** - always of those recommendations under the guidelines formulated by the OECD itself - to be transferred to the analysis of country and cases:

4.2.1. Incorporation of the country into bilateral and multilateral regime **international agreements on protection of foreign investments**.

4.2.2. **Organizational and functional structure of regulatory authorities**: appointment and dismissal of charges, operational independence in decision-making, defence mechanisms operators and financial autonomy.

4.2.3. Avoidance of situations of **capture of regulators** by those subject to regulation as a significant threat to efficient, balanced, pro-competitive, non-discriminatory regulation and promoting the general interest.

4.3. Also, analysis of each of the countries surveyed in the report, is necessary to indicate some lines of action that should be explored in order to make further progress in reforming the mechanisms designed to ensure legal security and the necessary protection of investment.

4.3.1. With regard to **Argentina**, we make a hopeful and positive assessment of the recent change of political orientation, which seems to be addressed to correct the unfortunate decline experienced by the country in the field of legal security for foreign investment. The best-known cases of conflict in strategic projects warn of the need to continue with determination the reform process. Reforms should also be aimed at overcoming the perception of the country as an economy in which to do business is highly complex.

We suggest the importance of changing the current national rules on discretionary dismissal of members of the governing bodies of regulatory authorities, especially ENACOM, since the absence of absolute grounds to need to stick the Government to proceed with the removal of those who make their Management body is an obvious weakness of the institution to any undue pressure by the National

Executive. This is one of the most decisive reforms to strengthen the Argentine model of protection for foreign investments.

Nevertheless, we insist that the general autonomous nature of its regulatory and supervisory institutions, especially those of the energy sector (ENRE and ENARGAS) and the political change of direction that the new Government represents, allows us to affirm that one of the main conclusions of this Report is the return of Argentina to its traditional position as an attractive and safe country for international investment.

4.3.2. **Bolivia**, as is well known, stands out for the already long process of output from the environment of international capital movement, with the consequent reduction in the rates of replacement investment and the progressive withdrawal of foreign operators in their strategic sectors, not accompanied by the creation of a productive structure itself, which has passed into the hands of the state as a consequence of the operations of nationalization.

The legal framework for protection of foreign investment in Bolivia has been seriously affected as a result of an intense nationalization policy. In recent years, more than 20 foreign funded companies have been subject to this practice. Especially, those dedicated to the generation and transmission of electricity, hydrocarbons and telecommunications. Unfortunately, the analysis of the most relevant cases (Empresa Transportadora de Electricidad TDE, Empresa Eléctrica Guaracachi S.A.-Rurelec PLC, Repsol YPF, Entel S.A., among others) strongly confirms this situation.

Likewise, the lack of minimally independent regulatory authorities is a pervasive feature within the system of regulation and supervision of the country. Only a determined policy shift will be able to reverse the process of productive deep deterioration of the country, which made alarm bells ringing in economic indicators. Unfortunately, the analysis of the most relevant cases strongly confirms this.

Perhaps this is an example, along with other political regimes in the region, uncertainty and concern generated by some governments of populist orientation. Governments, with varying degrees of intensity, frequently adopt measures electioneering and expropriatory, which pose a real potential for legal security and investment protection or threat.

4.3.3. In relation to **Colombia**, it should be noted that its geo strategic position, together with the favourable evolution of the historical stakeholders of internal destabilization, have made it a key country in the region as a whole and a firm candidate for incorporation in the OCDE.

However, as the OECD itself has noted there is an urgent need for regulatory reform that gives true independence and autonomy to the regulatory and supervisory authorities, particularly in the areas of energy and mines and telecommunications.

We propose to elaborate on the clarification of the map of the regulatory bodies, which combines jurisdictional confusion and lack of coordination that lead to, on many occasions, the legitimate expectation of the investor to the existence of criteria not always coincide is affected by given of different regulatory and supervisory agencies.

It is also very important that there is progress in setting up a supervisory system more independent. Not only through the generalization of the system of appointment of superintendents for a pre-established time but also, and more importantly, the consecration of assessed causes and transparent procedures designed to protect supervisors and the supervised from undue political pressures, beyond its character technical oversight body.

The consolidation of Colombia as the preferred destination of foreign investment goes to clear any uncertainty about the confluence of criteria other than strictly in regulatory decision making of deep economic and reputational impact for regulated sectors. The existence of a model of free appointment and removal of the highest authority overseeing public services in Colombia, it becomes a body with little technical neutrality and autonomy from the government in the exercise of its powers. This extends an inevitable mantle of doubt on the neutrality of their actions. This could be the case Electrificadora Caribbean (Electricaribe S.A.), whose recent intervention by the Superintendency of Public Services, in a pre-election context, highly politicized and grave risk of expropriation, is generating uncertainty among investors in the sensitive Colombian energy market sector.

The weakness of the supervision model to electoral pressures inside and outside the Colombian Caribbean generates significant uncertainty. To this is added, as an important element for the understanding of this case that has become the subject of heated political debate in the region. In February 21, 2017 and for the first time in the institutional history of Colombia, the central government intervened formally

at the highest level, a regional government. An intervention that took place precisely in this region, as a result of flagrant acts of corruption, high politicization of its institutions and mismanagement of its powers.

This is a clear example of the need to undertake urgent reforms that Colombia needs to consolidate a more competitive business model. A system of regulation and supervision sector less vulnerable and stronger in the face of the inevitable interference by outside regulatory policy electoral interests.

This concern is added to that affecting international companies investing in the mining and telecommunications sectors, in which a surprising increase has also been recorded in cases of international arbitration (Glencore PLC, Cosigo Resources, América Móvil, Telefonica, AngloGold Ashanti, etc.), and shows the need for further reforms that the country seems to have postponed, regarding the structure and operation of the different regulatory and supervisory agencies.

Concern over this setback to the country in the perception of stability for foreign investment also affects small and medium shareholders, as these sectors in an international market fully interconnected values, as already noted, are one of the alternatives conservative investment and low risk for household savings, pension funds or resources to ensure the most basic social rights, and also require the protection of institutions.

Therefore, one of the main conclusions of this report is the severe setback experienced by the country in relation to the perception of legal certainty offered to foreign investment.

4.3.4. In reference to **Chile**, there is little else the Report can do but confirm its leading position in the region and international reference of good behaviour in promoting investment.

The recent strengthening of national strategies spending has generated social tensions and fiscal imbalances, but has not damaged a correct and well-established regulatory structure. The projects analysed in the most relevant regulated sectors confirm that settlement and away, in principle, any concern.

These projects, which have included important transnational companies such as Global Energy Partners, Abengoa or Albemarle, among others, show that

companies facing financial difficulties, very quickly found new foreign partners to contribute international capital to these important projects. These cases reinforce the perception of legal security and protection of foreign investment in the country

This does not, however, emphasize the importance of discussing again, as it has been doing recently, the advisability of reforming the regulatory and supervisory body of the SUBTEL telecommunications, given its limited autonomy from the National Executive.

4.3.5. **Costa Rica** is possibly one of the most internationally recognized success stories for what interests our report. Costa Rica forms -together with Colombia- the small group of Latin American countries in the process of joining the OECD, and has been fully incorporated into bilateral and multilateral investment protection network and, as a logical consequence, has experienced exponential growth in the attracting foreign capital and raising of concrete capital in abundant and varied projects in regulated sectors, some of them outlined in the report, such as Gas Natural Fenosa, América Móvil or Telefónica.

The legal framework for the protection of foreign investment in Costa Rica has allowed it to increase its experience of success as an attractive country for foreign investment.

By 2015, direct foreign investment represented US $ 3,094 million. An important part of this investment is directed at the energy, telecommunications and technology sectors.

As an aspect of contrast, we detected important components of bureaucratization, political instability, lack of independence and little technical expertise of regulatory authorities, as they have highlighted the serious criticism of the system that public control agencies have made in the country. It should be recalled that in June 2014, SUTEL was denounced by using outdated data from 2009 to calculate the imposition of new economic control measures on the market and the Administrative Court and the Treasury ordered them to update their market research.
All this advises of the need to keep the effort on policy and regulatory reforms already undertaken organization in a country that has turned its openness to foreign investment into real state policy.

4.3.6. **Mexico** is undoubtedly a country with a strong tradition of receiving foreign

investments. This trend has been reinforced by the recent constitutional and legal reforms enabling the opening to competition of hitherto monopolized sectors vertically by the State, namely energy besides the communication, although to a lesser extent. To this overviews of autonomous regulatory authorities with clear mechanisms that move in the direction proposed by the OECD, organization to which it belongs. Mechanisms which manifest themselves in the management system of the various regulatory bodies and sector monitoring, joins in the appointment its commissioners, the term of their mandate and assesses the existence of causes and decides to proceed, if necessary, to a cessation based solely on legally established assumptions.

Likewise, these regulatory and supervisory bodies also have, in general terms, well-defined powers and transparent operations which contribute to attracting an increasing flow of capital to the country.

Cases related to investments of multinational companies like AT&T or investment funds like Black River in the Altos Hornos de México S.A.B. of C.V have been studied by way of example, among others.

Nevertheless, one of the case studies shows, however, some gaps in conflict resolution, namely the Renewable Mareña project. These shortcomings invite further advancement in the continuous improvement of a system that has become the benchmark for all regulatory analysis on sectoral regulatory institutions in Latin America.

4.3.7. Lastly, **Peru** is a good example of improvement in all aspects of legal security for foreign investment, regulatory quality and institutional strengthening.

The regulatory design of the independence of the regulatory authorities has characteristics that also respond, in general terms, along the lines suggested by the OECD. Members of the various boards of the regulatory and supervisory agencies have pre-established periods mandate, as with causes and specific procedures to determine their eventual separation or removal, once verified the legally established causes.

Similarly, there is a clear delineation of the powers conferred on these agencies and how to exercise them through the participation of the sectors concerned and making necessary assessments to the quality and impact of regulatory standards. Also, this country has a suitable system for dealing with disputes and guarantee

against bailouts or interventions. There are quite outstanding elements of good performance in this country in recent years.

We carefully analysed important cases of foreign in the country, with the participation of every relevant companies like Engie, IC POWER, ENEL, Electric Interconnection S.A. and Transelca S.A.

And from these examples, we have found that, despite the failures of regulatory performance manifested in reforms of the system of responsibility for transmission and distribution of electric generators, there have also been prudent mechanisms developed for conflict for conflict resolution through design *a posteriori* of a reasonable transitional regime.

As can be seen throughout the report, one of the conclusions drawn in this report is that Peru, Mexico and Argentina, are countries that have strengthened or regained their perception as a safe destination for foreign investment, thanks to the greater independence of their agencies sector regulation and supervision, and the perception of greater political stability and legal certainty for foreign investment in the region.

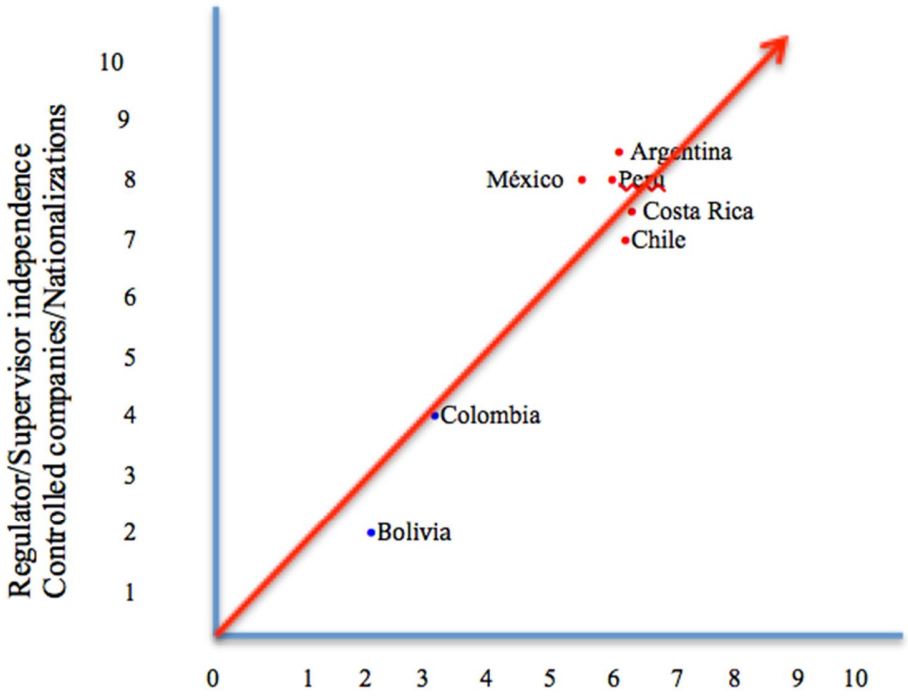
Also, another of the report's findings is summarized in severe setback experienced by Colombia's image and its perception as a destination that a country of the importance and significance of Colombia, making it even more necessary to make progress on many of the proposal made by the OECD in order to strengthen the soundness of the institutions in this new and decisive historic stage for country.

Similarly, we must be very attentive to the evolution of the reforms implemented in Costa Rica, proposals for strengthening the system of regulation and supervision in Chile, and any changes that are recorded in Bolivia.

To sum up, we hope that the content of the report and proposals satisfy, at least in part, the needs of those who require contextualized knowledge of the situation. Such knowledge requires, as we have justified, understanding the international reference framework for the protection of foreign investments, the present state of the institutional framework of each country and its effective materialization in concrete experiences.

5. APPENDIX

Positioning graphic matrix per country



Unsuccessful Projects Score and high levels of ICSID

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