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THE COLOMBIAN SIMPLIFIED CORPORATION: AN EMPIRICAL ANALYSIS OF A SUCCESS STORY IN CORPORATE LAW REFORM

*Francisco Reyes**

INTRODUCTION

On December 5, 2008, the Colombian government enacted Law 1258.¹ Over the five years since it was enacted, the country has witnessed a revolutionary turnaround in its corporate law.² Law 1258 introduced a new type of business entity to the Colombian system, which is referred to as a *Sociedad por Acciones Simplificada* (SAS).³

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¹ L. 1258, diciembre 5, 2008, DIARIO OFICIAL [D.O.] (Colom.) [hereinafter Law 1258].

² See *Data: Colombia*, THE WORLD BANK, <http://data.worldbank.org/country/colombia> (last visited Nov. 12, 2014) (Colombia is a Latin American developing country. It has a mid-size economy, the fourth in Latin America after Brazil, Mexico, and Argentina. According to the World Bank, its GDP for 2012 was U.S. \$369.8 billion and its ranked 30th within 214 countries on the GDP 2012 index).

³ The entity's name was taken from French legislation enacted in 1994 concerning the *Société par Actions Simplifiée*. Additional legal provisions of the Colombian SAS were also transplanted from the French model. However, the entity also derives its inspiration from U.S. and Colombian sources. In fact, certain reforms initiated in Colombia almost twenty years ago (L. 222 diciembre, 20 1995, DIARIO OFICIAL [D.O.] (Colom.)) which had a limited impact in the business community, were reviewed and incorporated within the SAS law.

Consistent with a progressive approach, this law reduced cumbersome incorporation formalities to a filing before the Mercantile Registry.⁴ Moreover, the law streamlined operations, reduced costs, and minimized formalistic requirements.⁵ Importantly, Law 1258 made it clear that shareholders would be shielded from any liability concerning obligations arising from corporate business. It also reduced old-fashioned prohibitions pertaining to shareholders and managers activities and, most significantly, it reinforced an effective principle of freedom of contract. Furthermore, Law 1258 introduced an innovative enforcement environment where arbitration and administrative adjudication superseded inefficient judicial procedures⁶.

The Colombian SAS legislation is a simple but comprehensive legal system that governs relationships between shareholders and other corporate participants and outsiders, and also between the participants themselves. It is endowed with legal personality, inventor ownership, and full-fledged limited liability. All these features are available to corporate participants at the outset through an expeditious incorporation system. Concerning relationships with outsiders, the law provides a system of exceptional shareholder liability through the

⁴ Pursuant to L. 1258 art. 5, “the simplified corporation shall be created through a contract or a unilateral decision, that must be consigned in a private document filed before the Mercantile Registry . . .” All traditional forms of business entities that existed before the SAS are still subject to Article 110 of the Commercial Code, whereby a company can only be created through a public deed granted before a notary public. Such deed must contain at least the clauses referred to in already quoted Article 110 (paragraphs 1 to 14), and fulfill the requirements set forth in L. 960, junio 20, 1970 [D.O.] (Colom.), for any instrument to be granted before a Notary Public. For additional information on the proceedings required to create a traditional type of business association in Colombia, see NÉSTOR HUMBERTO MARTÍNEZ, *CÁTEDRA DE DERECHO CONTRACTUAL SOCIETARIO* 96 et seq. (Abeledo Perrot ed., 2010).

⁵ See L. 1258, art. 5-8; see also *Menos Trámites*, REVISTA SEMANA, Jan. 11 2009, at 68; see also *Las Sociedades por Acciones Simplificadas*, REVISTA DINERO, Mar. 25, 2010, at 20. See also Ignacio Sanín Bernal, *La ley SAS Remoja las Sociedades Comerciales (y Crea, También, Nuevos Retos)*, in ESTUDIOS SOBRE LA SOCIEDAD POR ACCIONES SIMPLIFICADA 47 (Franciso Reyes Villamizar ed., 2010).

⁶ See L. 1258, art. 40 (stating that all differences arising among the corporation, shareholders, officers and directors can be submitted to arbitration); see also Alejandra Buitrago, *Colombia Simplifica Creación de Sociedades*, PORTAFOLIO, Dec. 18, 2008, at 6 (“Conflicts in the SAS can be resolved at the Superintendency of Companies or through private arbitration . . .”).

application of the disregard of the legal entity theory, although restricted to the events of abuse or fraud. As a result of the SAS revolution, there is increasing awareness concerning the need to revise anachronistic legal institutions that still hinder commerce and represent an obstacle to economic development.

The creation of this successful entity has changed the manner in which people do business in Colombia. The SAS has contributed vigorously to the regulation of thousands of businesses that in the absence of the benefits afforded by the new law would have never been formalized. It has also permitted local and national governments to collect millions of dollars in taxes.⁷ At the same time, the SAS has fostered an exponential growth in franchise fees charged by mercantile registries all over the country.⁸ Social security contributions, as well as other payments to governmental agencies, have increased over the last five years thanks to this new type of business entity.⁹ Furthermore, several accounting, legal, and managing services have flourished along with the new business realities that the SAS has brought about.¹⁰

Even more significant is the impact that the SAS has had in the creation of new jobs. Statistical analysis suggests that the unemployment rate may have gone down after the introduction of this new type of business entity. According to statistical analysis rendered by the National Office of Corporations (*Superintendencia de Sociedades*),

⁷ According to a report rendered on September 2013 by the Deputy Superintendent for Economic and Accounting Matters at the Superintendence of Companies (on file with author) for the years 2010 to 2012, the SAS paid significant amounts of income taxes. In fact, the report states the following figures: Col\$ 1.311.589.000 for income taxes on 2010, Col\$70.784.132.000 for 2011, and Col\$176.571.054.000 for 2012. For franchise taxes (i.e., registration fees) and State registry tax see Table 6 below.

⁸ See report rendered by the Colombian Confederation of Chambers of Commerce, March 2015 (on file with author).

⁹ *Id.*

¹⁰ See *El Último Grito*, REVISTA DINERO, Feb. 21, 2012 (stating that the SAS is broadly use for all sorts of undertakings involving foreign investment). See also Miguel Ramírez, *Sociedades por Acciones Simplificadas (SAS) y sus Ventajas para los Emprendedores*, COLUMBIA LEGAL CORPORATION, (Sept. 1, 2013), <http://www.colombialelegalcorp.com/sociedades-por-acciones-simplificadas-sas-ventajas-para-emprendedores/> (holding that this type of business entities are intended to promote entrepreneurial and technological creativity and innovation).

at least two and a half million people all over the country are employed through the existing SAS.¹¹

Furthermore, the SAS has displaced almost all traditional business forms that existed during the 1971 Colombian Commercial Code rule.¹² Today these outdated forms represent 3.4% of business entities that file articles of association before the country's fifty-two Mercantile Registries.¹³ Not surprisingly, the remaining 96.6% of new incorporations corresponds to the formation of new Simplified Corporations.¹⁴ This is probably due to the formalistic nature of the previous regulation and the SAS' reduced transaction costs, simplified structure, and contractual flexibility. Moreover, the new type of entity has sparked legal innovation and fostered new business structures that were difficult to design in the recent past.

Law 1258 also sought to curtail opportunistic behavior by controlling shareholders, directors, and officers. By replacing *ex ante* directory rules with *ex post* legal standards, it has allowed for more nuanced scrutiny of the insiders' activities. Standards such as good faith and fiduciary duties of directors and officers (also applicable to controlling shareholders)¹⁵ are intended to promote honest behavior in the day-to-day affairs of the corporation.¹⁶ In order to make these new

¹¹ See *supra* note 7.

¹² Those types of entities were: (1) The General Partnership (*Sociedad Colectiva*), (2) The Corporation (*Sociedad Anónima*), (3) The Limited Liability Company (*Sociedad de Responsabilidad Limitada*), (4) The Limited Partnership by Quotas (*Sociedad en Comandita Simple*), and (5) The Limited Partnership by Stocks (*Sociedad en Comandita por Acciones*).

¹³ See Graph 2.

¹⁴ *Id.*

¹⁵ Through the legal concept of "Shadow Directors" all the rules governing fiduciary duties of directors and officers can also be applicable to controlling corporations. According to Article 27 of Law 1258, "natural persons or legal entities that shall intrude in any positive managing or administrative activity in the corporation will be subject to the same liabilities and penalties applicable to managers."

¹⁶ The now famous case of Finagro against Mónica Semillas SAS is a good example of the application of *ex post* standards in a specific case of abusive behavior. In this case a number of sham corporations were used to unduly obtain governmental agricultural subsidies. The Superintendence decided that this was a form of "deputization" and, therefore, reversed the illegal transactions. See

standards workable, an innovative enforcement system has been put in place. A highly sophisticated and efficient corporate law has replaced an inefficient judicial system.

Within this advanced legal framework, it is expected that the usually high consumption of private benefits of control by majority shareholders will decrease overtime. This qualitative change would allow for a more reasonable allocation of economic benefits among all shareholders. Likewise, it is expected that in the future minority shareholders will be able to profit from the controlling shareholders' monitoring and managerial efforts without being exposed to the exponential risk of expropriation.¹⁷ In this manner, the conceivable distributional effects that may stem from a more flexible regulatory business environment will be timely enabled by the efficient application of the above-mentioned standards.

The starting point for the Simplified Corporation's original proposal was the idea of facilitating the formalization of business entities and updating the legal system in order to introduce forward-looking approaches to corporate law. For that purpose, a thorough and critical revision of the company law framework was required. This analysis was made under a functional Comparative Law methodology along with the application of relevant notions of Economic Analysis of Law. As expected, the results of such evaluation revealed the inadequacy of most company law provisions and the need to carry out an overhaul of both the legal and the institutional frameworks.¹⁸

SUPERINTENDENCIA DE SOCIEDADES, JURISPRUDENCIA SOCIETARIA 335 et seq. (vol. I, 2014).

¹⁷ The higher level of protection that can be attained with the SAS regulation is clearly demonstrated in the amount of cases being brought before the Court at the Superintendence of Companies. Several cases involving Simplified Corporations have been adjudicated within the last 3 years. Such cases are consistently reported by the Superintendence as can be seen in the publication entitled *Jurisprudencia Societaria* edited by the same governmental entity. The first volume was published in Bogotá in March 2014. The second one was published by the same institution in July 2015. *See supra* SUPERINTENDENCIA DE SOCIEDADES note 16; SUPERINTENDENCIA DE SOCIEDADES, JURISPRUDENCIA SOCIETARIA (vol. II, 2015).

¹⁸ *See* FRANCISCO REYES, LATIN AMERICAN COMPANY LAW, A NEW POLICY AGENDA: RESHAPING THE CLOSELY HELD ENTITY LANDSCAPE (2013).

Soon after the law was passed, the business community reacted eagerly to the new legal realities. The SAS has not only changed the manner in which people do business in Colombia, but it can also be credited for a significant change in the legal culture. This new type of business association has fostered additional legal reforms to other traditional institutions that were still present in old codes and statutes in Colombia.¹⁹ Surprisingly, until 2008, legal scholars found these outdated laws appropriate for the local business environment, and had unanimously hailed this antiquated legislation as a virtuous body of law.²⁰

Also, Law 1258 of 2008 represents a step forward in the manner in which corporate documents can be written. Notably, the law permits corporations to choose the type of clauses to be included in their own bylaws. However if the corporation's bylaws are silent on a matter, default provisions of general corporate law apply. Yet, despite the option for corporations to create unique bylaws, the default rules contain provisions, which are particularly useful for those parties who lack the expertise, time, or resources needed to negotiate tailor-made corporate contracts and shareholders agreements.²¹ To this effect, the Colombian Mercantile Registry offices have designed and implemented model bylaws that are extensively used by Micro Small and Medium Entities (MSMEs)²² across the country. In this manner

¹⁹ For instance, Law 1429 of 2010 introduced substantial changes to the processes of dissolution and liquidation of corporations. Following the trend initiated with the SAS, this new law reduced unnecessary formalities and created hasty proceedings to wind up a business corporation. L. 1429, diciembre 29, 2010, DIARIO OFICIAL [D.O.] (Colom.).

²⁰ CUBEROS DE LAS CASAS FELIPE, *SOCIEDAD POR ACCIONES SIMPLIFICADA: NOVEDADES, ACIERTOS Y DESACIERTOS* 43 (2012) (quoting Gabino Pinzón holding that the types of business entities regulated in the commercial codes were sufficient to satisfy the needs of business people). The author goes as far as holding that the idea of single member simplified corporations such as the SAS is a "conceptual mistake." *Id.* at 49.

²¹ *See* L. 1258, art. 45 (stating that the by-laws are fully enforceable if there is no specific rule to the contrary on the statute).

²² Colombian law provides rules to define the concept of MSMEs on the grounds of the amount of assets, income and number of employees. Accordingly, for a company to be classified as a small or medium size business it has to meet the requirements set forth in Laws 590 of 2000, L. 590, julio 10, 2000, DIARIO OFICIAL [D.O.] (Colom.), and 905 of 2004, L. 905, agosto 2, 2004, DIARIO OFICIAL [D.O.]

entrepreneurs can significantly reduce transaction costs and may incorporate without the aid of costly advisors.²³

Naturally, the SAS' opt out approach also allows for private parties to step out of the standard provisions contained in model bylaws and to draft sophisticated agreements that are appropriate for more complex undertakings. The enabling non-directory provisions of Law 1258 have fostered private ordering and sparked innovation in corporate law across the country. Aside from the boilerplate type of agreements that are used by most start-ups, practicing attorneys are becoming skillful at developing new legal models suitable for a more sophisticated business environment. A survey conducted by the Bogotá Chamber of Commerce, in the capital city, has allowed for the identification of several types of business in which one or more SAS can be properly used for an unlimited number of business purposes.²⁴

The Colombian SAS represents a substantial improvement in reducing transaction costs and providing contractual flexibility to business parties. In accordance with this approach, Law 1258 of 2008 requires formalities to be applied only with regard to those matters that have a functional effect on the marketplace.²⁵ It also promotes private ordering, fosters the drafting of innovative shareholders agreements, and facilitates corporate capitalization through the issuance of all types of securities.

This new type of business entity is also intended to dramatically alter the inefficient enforcement landscape by aiding in the development of a specialized jurisdiction in which matters are rapidly resolved by proficient and honest judges. The deterrence effect of decisions rendered by this jurisdiction in a short period of time has

(Colom.), which refer to the number of employees and the total assets, as measured in current legal minimum monthly wages.

²³ See, e.g., CÁMARA DE COMERCIO DE BOGOTÁ, <http://www.ccb.org.co>.

²⁴ See CÁMARA DE COMERCIO DE BOGOTÁ, *PERFIL ECONÓMICO Y JURÍDICO DE LA SAS EN SU PRIMER AÑO 19-38* (2010).

²⁵ See, for example, L. 1258, art. 5 requiring registration of the private document of incorporation in order to provide publicity concerning basic data on the corporation. Likewise, art. 22 sets forth minimum standards for quorum and majorities at shareholders' meetings.

impacted the business community in an unprecedented manner.²⁶ Knowing that justice will be on the side of those who play by the rules and that wrongdoers will be rapidly punished signals that Corporate Governance mechanisms work²⁷ at least in the context of closely held corporations. It remains to be seen, however, if in the long run this enforcement system will have a direct impact on the cost of capital. It is foreseeable that this will be the case, as the system is rapidly migrating from personal to impersonal exchanges. It is also expected that this new legal reality will have an impact in the reduction of the usually high control premium in closed corporations, and also in incentivizing local and foreign investment by minority shareholders in this type of business.

Six years after the enactment of Law 1258 of 2008, the success of the Simplified Corporation has surpassed all expectations. The empirically measured success of the Colombian SAS in both the legal and business environment can be attributed to the simplified nature of the substantive provisions that govern its incorporation and operation, and to the efficient results of the specialized jurisdiction put in place immediately following the enactment of the SAS.²⁸

The Colombian SAS can become an export product. It is a blend of common law and civil law approaches to business associations. Instead of adhering to dogma or established tradition, it

²⁶ In fact, before the enactment of Law 1258, conflicts between shareholders had to be brought before the ordinary courts. After the creation of the Corporate Court at the Superintendence of Companies litigators have found a significant opportunity to get their cases decided in a reasonable period of time. *See* Graph 8. The expeditious nature of the processes handled before the Superintendence. Along with this significant development the periodical publication of decisions rendered by the new court provide predictability and legal certainty both to practitioners and parties alike. *See* SUPERINTENDENCIA DE SOCIEDADES, vols. I & II *supra* note 17.

²⁷ A good example of this sort of effect can be seen in the case of Serviucis S.A. vs. Clínica Sagrado Corazón SAS reported by the Superintendence of Companies. In this case the breach of a shareholders agreement along with an abusive exercise of the voting right by the defendant gave rise of the application of a remedy of specific performance by the Court. In this case the enforcement of the agreement as well as the decision rendered against the defendant's wrongdoing have signaled to the business community that this sort of behavior shall not be tolerated. *See* SUPERINTENDENCIA DE SOCIEDADES, *supra* note 16, at 385-420.

²⁸ *See* Graph 2.

reflects the economic needs of common business people and successfully offers clear and sensible solutions to reduce entry barriers, ameliorate organizational problems, and provide expedited dispute resolution mechanisms. This legislation is also an attempt to deal with agency problems that are common in most countries without taking into account each jurisdiction's ownership pattern.²⁹ For this reason, the Organization of American States' (OAS) Legal Committee has recommended the adoption of a Model Act on Simplified Corporations for all countries in the Americas on the grounds that it represents a "very credible case in favor of legislative reforms to permit such innovative business forms" to promote economic growth.³⁰

This paper briefly analyzes the evolution of the Colombian SAS over the first five years following the enactment of Law 1258 of 2008. It provides an empirical evaluation based on statistical data collected at the Colombian Confederation of Chambers of Commerce, the Mercantile Registry of Bogotá, and the National Office of Corporations.

I. EMPIRICAL DEMONSTRATION CONCERNING THE COLOMBIAN

²⁹ The success of legal transplants in the area of closely held firms is significantly facilitated by the homogeneity of agency problems that are present in non-listed firms everywhere. Therefore, the dichotomy between diffuse and concentrated ownership and the resulting differences in the identification of the relevant agency problems become irrelevant in the context of non-listed firms. Additionally, incentives to neutralize agency problems in closely held companies could be applied in different jurisdictions, without regard to the economic circumstances prevailing in each country. See REYES, *supra* note 18, at 60.

³⁰ See David P. Stewart, *Recommendations on the Proposed Model Act on the Simplified Stock Corporation*, in ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE FORTY-SECOND REGULAR OF THE GENERAL ASSEMBLY 50 (2012) (the OAS Legal Committee Model Act was crafted after Law 1258. It is not intended to serve as a partial amendment to be introduced to traditional business forms regulated in national codes and statutes. Instead, what is recommended is that the enactment takes place on a separate legislation that could be linked to the existing system).

SAS

The enactment of Colombian Law 1258 of 2008 has been by far the most successful recent company law reform in Colombia.³¹ The implementation of the SAS corporation model has given rise to a certain degree of competition among the different types of business associations that exist within the country's commercial legislation. The creation of this new business form allows entrepreneurs to choose between a traditional legal regime, and a new modern corporate entity. The comparative inferiority of traditional business association types formerly used to structure closely-held companies make their future use unnecessary. The preference of business people for the recent legislation is evident in light of the exponential growth of the Simplified Corporation in Colombia.³²

The following empirical analysis is divided into three parts. Part A refers to data gathered at the Colombian Confederation of Chambers of Commerce,³³ and corresponds to the evolution of SAS in Colombia. Part B relates to information obtained by the Bogotá Chamber of Commerce and, naturally, is restricted to the urban perimeter of Colombia's capital city. Part C relates to the empirical analysis undertaken by the Superintendence of Companies concerning the operation of the new specialized Corporate Law Court³⁴ that operates in the same Office.

³¹ See FRANCISCO REYES, REFORMA AL RÉGIMEN DE SOCIEDADES Y CONCURSOS (1996) (certainly, previous reforms such as the one introduced by Law 222 of 1995, L. 222, diciembre 20, 1995, DIARIO OFICIAL [D.O.] (Colom.), had a more restricted impact than the SAS. This law constituted only a "patch up" reform to traditional corporate rules contained in the Colombian Commercial Code. Such approach limited the scope of legislative changes that otherwise could have been made under a more progressive orientation).

³² See *Editorial*, PORTAFOLIO.CO (Feb. 3, 2011), <http://www.portafolio.co/archivo/buscar?producto=portafolio&q=febrero+3+de+2011&a=2011&pagina=1&m=02&d=03>.

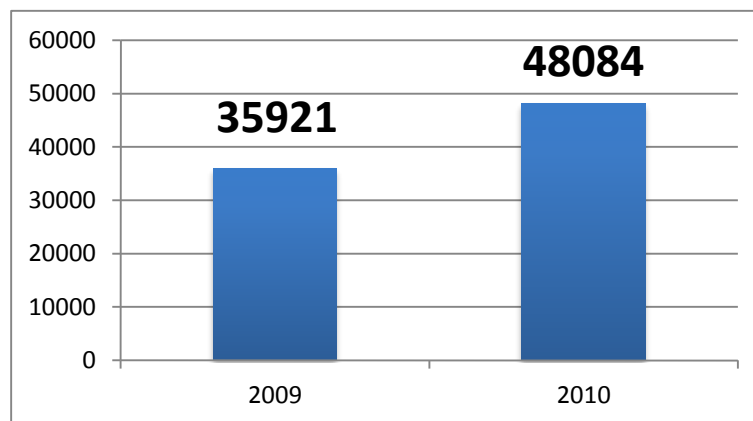
³³ Confederación de Cámaras de Comercio (CONFECAMARAS), Bogotá, 2013 (Colom.).

³⁴ This court is the Delegatura para Procedimientos Mercantiles de la Superintendencia de Sociedades.

A. National Data on SAS

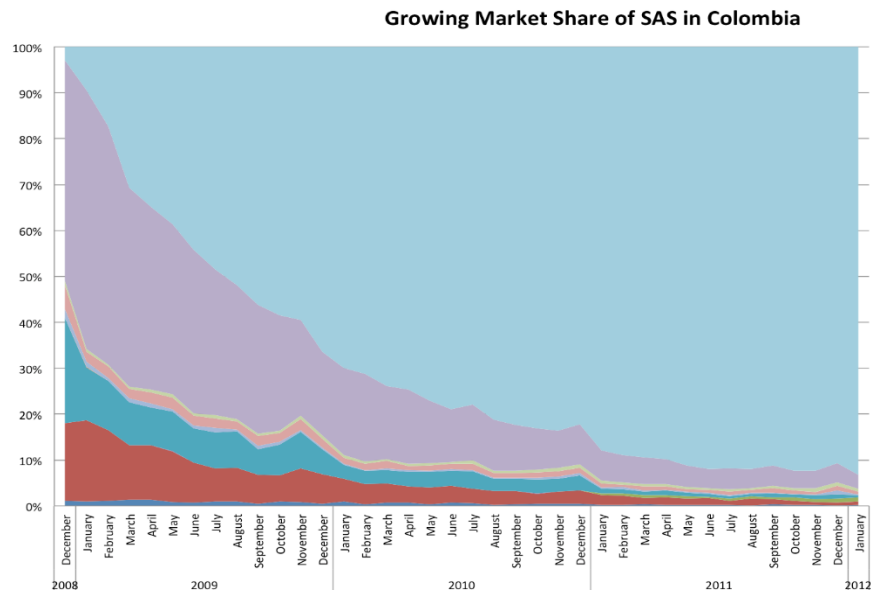
1. *Formalization of economic activities and number of SAS compared to other types of business entities.* – The SAS structure has been useful for thousands of business that today confront lower entry barriers for their regular operation. As can be observed in Graph 1, the number of incorporations filed before the Colombian Mercantile Registries has increased exponentially since the enactment of Law 1258 on December 5 of 2008.

The reaction of the business community to the new legislation on Simplified Corporations has surpassed all expectations.³⁵ As Graph 2 shows, the SAS has acquired a level of significant importance for local business associations of all dimensions. The data not only shows the impressive acceptance of the SAS during this five-year period, but also the progress made by this company type *vis-à-vis* the previously existing ones.



Graph 1. Growth in formalization of business entities between 2009 and 2010 (25.3%)

³⁵ See CONFECAMARAS, *supra* note 33 (data for this section (consolidated for the entire country) has been obtained directly from the CONFECAMARAS).



Graph 2. Evolution of the SAS Compared to Other Company Types (2008-2012).

2. *SAS incorporations.* - In the period between December 2008 and September 2013, 206,704 business associations were incorporated before Colombia's Mercantile Registries under the type of Simplified Corporations. In September 2013 alone, 5,804 business entities were incorporated before the country's Mercantile Registries. Out of this number, 5,595 were Simplified Corporations (SAS). While in December 2008 the percentage of SAS only reached 7.42% of the total registration of business associations, by September 2013 this type of business corporation represented 96.4% of all registered companies (Table 1).

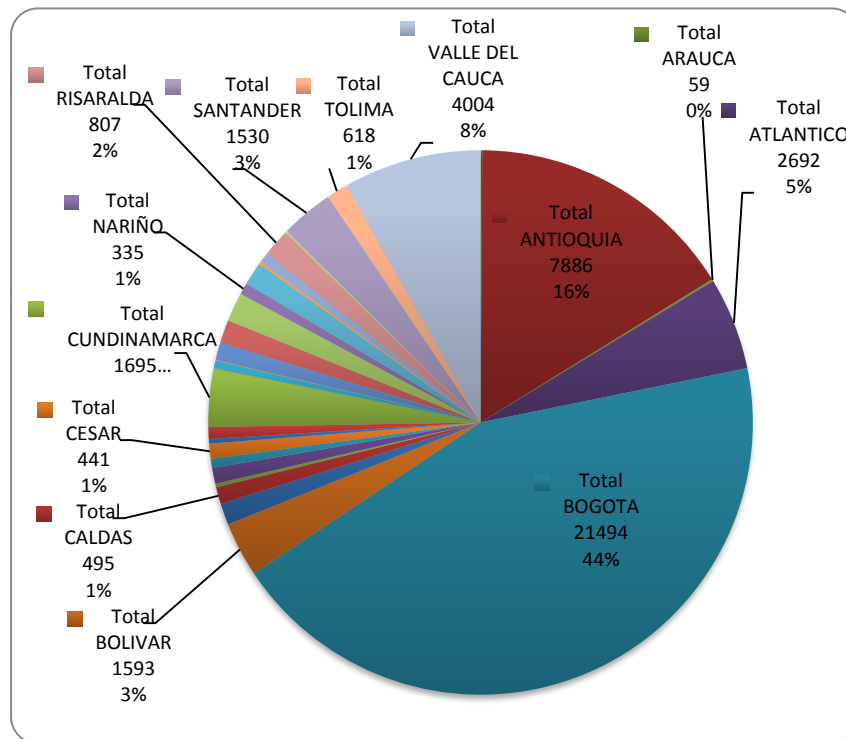
| | 2008 | | 2009 | | 2010 | | 2011 | | 2012 | | 2013 | |
|--------------|------|------|------|------|------|----|------|------|------|------|------|------|
| | Amt. | % | Amt. | % | Amt. | % | Amt. | % | Amt. | % | Amt. | % |
| Jan. | | | 293 | 11 | 2422 | 70 | 3697 | 88 | 5203 | 93 | 4846 | 95.6 |
| Feb. | | | 629 | 19.8 | 3091 | 71 | 4302 | 90 | 6224 | 93 | 5443 | 94.5 |
| Mar. | | | 1019 | 33.8 | 3364 | 74 | 5204 | 89.6 | 6875 | 94 | 4456 | 95.3 |
| Apr. | | | 1184 | 39.4 | 2817 | 74 | 4271 | 91 | 4637 | 93.7 | 5130 | 95.1 |
| May | | | 1424 | 47.6 | 2879 | 77 | 4961 | 93.5 | 4935 | 93.5 | 5358 | 95.1 |
| June | | | 1544 | 53.6 | 3069 | 79 | 4712 | 91.1 | 4509 | 93.5 | 4458 | 95.1 |
| July | | | 2052 | 59.4 | 2923 | 78 | 4318 | 91.5 | 4955 | 93.5 | 6259 | 95.7 |
| Aug. | | | 1773 | 62.4 | 348 | 81 | 4734 | 91.9 | 4692 | 94.1 | 5405 | 95.8 |
| Sept. | | | 2316 | 66.5 | 3734 | 82 | 4772 | 91.1 | 4577 | 93.7 | 5595 | 96.4 |
| Oct. | | | 2183 | 67.8 | 3414 | 83 | 4073 | 92.3 | 4665 | 93.9 | | |
| Nov. | | | 1872 | 70.2 | 3275 | 84 | 4160 | 92.4 | 4087 | 93.1 | | |
| Dec. | 160 | 7.42 | 1151 | 74.2 | 2935 | 82 | | | | | | |

Table 1. Incorporation of SAS between December 2008 and September 2013, by number and percentage.

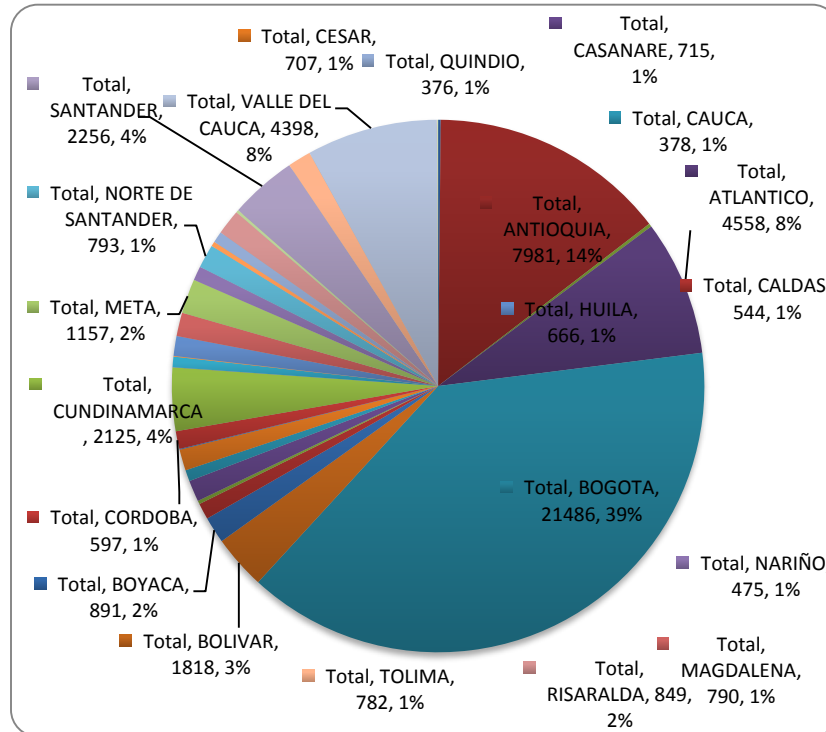
3. *SAS' regional distribution.* - Naturally, most SAS incorporations take place in regions and cities where there is a significant economic activity, such as in the capital city of Bogotá and the State of Antioquia. However, it is noteworthy that the penetration of this business entity is also noticeable in less developed areas where the economy is based on agricultural and extractive business activities, such as in Arauca.³⁶ In these less economically active regions, the increasing importance of SAS is evidenced by the growth of this type of business entity within the last two years. In fact, whereas in 2011 the SAS incorporations in Bogotá represented 44% of the total amount of business entities formally set up in Colombia (see Graph 3), in 2012, such percentage had decreased to 39%, showing a correlative increase of incorporations in the other regions (see Graph 4).

For the years 2011, 2012, and 2013, the number of Simplified Corporations has been distributed regionally according to Graphs 3, 4, and 5 below.

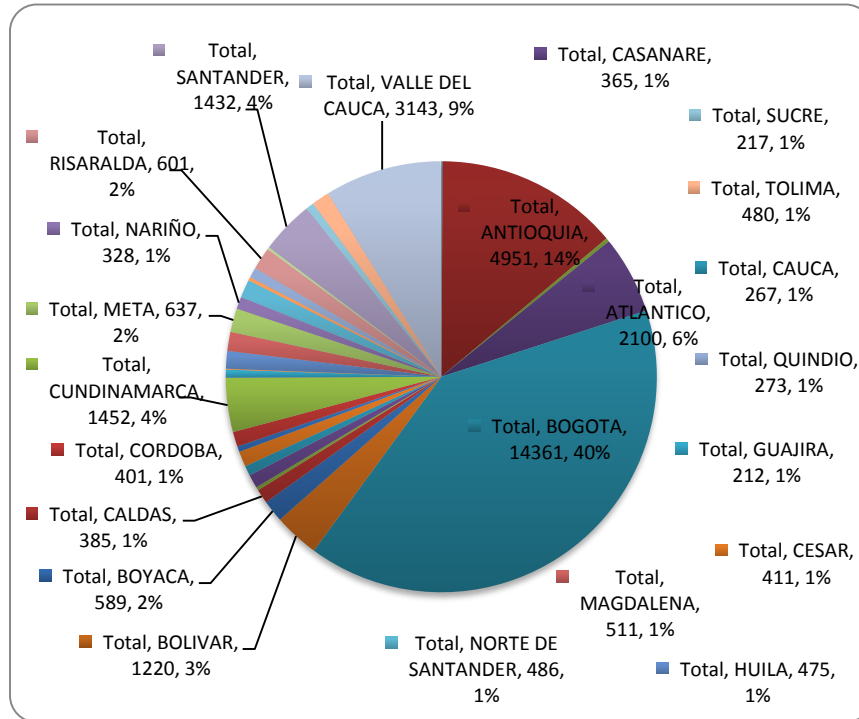
³⁶ See Graphs 3, 4, 5.



Graph 3. Regional Distribution of SAS in 2011.



Graph 4. Regional Distribution of SAS, 2012.



Graph 5. Regional Distribution of SAS 2013 (until September).

4. *Economic activities of SAS.* - Although according to the regulation governing the SAS there is no need to define any specific business purpose in the corporation's purpose clause, the Mercantile Registry keeps a record of these entities' main economic activity. The statistical data shows that the SAS model is mostly used for agricultural economic activities, manufacturing undertakings, construction business, and commercial activities (wholesale and retail) (see Table 2).

| CIIU_Sector | 2011 | 2012 | 2013 | Total |
|---|-------|------|------|-------|
| A Agriculture, cattle breeding, hunting, fish breeding | 1682 | 390 | 1050 | 3122 |
| B Mining | 927 | 294 | 540 | 1761 |
| C Manufacturing Industries | 5652 | 3474 | 4067 | 13193 |
| D Electricity, gas, steam and air conditioning | 121 | 53 | 68 | 242 |
| E Water and Sewer and environmental cleaning activities | | 180 | 297 | 477 |
| F Construction Businesses | 5203 | 3397 | 4067 | 12667 |
| G Wholesale commerce and retail; vehicle and motorcycle repair | 13100 | 7472 | 8651 | 29223 |
| H Transportation and Storage | 3047 | 1248 | 1596 | 5891 |
| I Hotels and Restaurants | 1287 | 643 | 1102 | 3032 |
| J Information and Communications | | 1146 | 1787 | 2933 |
| K Financial and Insurance Activities | 821 | 560 | 485 | 1866 |
| L Real Estate | 13733 | 1533 | 1659 | 16925 |
| M Professional, Scientific and technical Activities | | 4102 | 5390 | 9492 |
| N Administrative services and logistics | | 2356 | 2043 | 4399 |
| O Public Administration and Defense, Social Security Plans and Mandatory Health Insurance | 171 | 49 | 59 | 279 |
| P Education | 381 | 292 | 576 | 1249 |
| Q Health and Social Assistance Businesses | 1510 | 791 | 1371 | 3672 |
| R Artistic, entertainment and recreational activities | | 218 | 486 | 704 |

| | | | | |
|--|------|-------|-----|-------|
| S Other services | 1154 | 320 | 344 | 1818 |
| T Home business activities | 4 | 4 | 5 | 13 |
| Z Unlisted business activities (CIU V4) | 229 | 26837 | 234 | 27300 |

Table 2. Economic activities of SAS.

5. *Dimension of SAS undertakings in the country.* - One of the most significant observations in this empirical investigation is the success of the Simplified Corporation for all types of undertakings irrespective of the size segment to which the entrepreneur belongs. In fact, the Simplified Corporation is not only important in the micro and small business segments, but also has proven useful for large corporations.

In Colombia, as in other developing economies, Micro Small and Medium Entities are responsible for a significant number of jobs and income for the economy.³⁷ The Colombian Government has created certain criteria to define the various sizes of business enterprises.

Table 3 shows the allocation of SAS according to the size criteria described above for the period between January 2011 and September 2013. The table relates to the *number* of SAS that can be classified in each segment. These data demonstrate the significant relevance of SAS to the formalization of micro and small businesses.

³⁷ See Thorsten Beck, Asli Demircuc-Kunt, Ross Levine, *SMEs, Growth, and Poverty: Cross-Country Evidence*, 10 J. OF ECON. GROWTH 199 (2005).

| Company Size | Number of Employees | Total Assets (CLMMW) | 2011 | 2012 | 2013 |
|---------------|---------------------|----------------------|-------|-------|--------|
| Micro | 1-10 | Under 501 | 96831 | 13739 | 167061 |
| Small | 11-50 | 501-5000 | 14827 | 23341 | 31818 |
| Medium | 51-200 | 5001-30000 | 3709 | 5797 | 8073 |
| Large | Over 200 | Over 30000 | 875 | 1398 | 2008 |

Table 3. Dimension of SAS according to legal criteria.

Table 4 provides the *percentage* of SAS in each of the dimension brackets referred to above. It is noteworthy that this type of entity only represents 4.85% of the total amount of micro businesses. This is due to the fact that most entrepreneurs in this segment carry out their business activities in their individual capacity (i.e., the vast majority are natural persons). Obviously, on a different scale, the SAS represents the broad majority of “incorporated” micro-business. As can be observed in Table 4, the micro-business segment represents the broad majority in terms of the number of SAS incorporated in Colombia.

| Total No. Of Businesses | No. Of SAS | Percentage | Dimension |
|-------------------------|------------|------------|-----------|
| 2,374,086 | 115,157 | 4.85% | MICRO |
| 66,792 | 15,635 | 23.40% | SMALL |
| 15,116 | 3,928 | 25.98% | MEDIUM |
| 4,99 | 921 | 18.79% | LARGE |

Table 4. Percentage of SAS (as compared to total number of business participants including natural persons).

6. *Cancellation of SAS registrations.* - Table 5 below depicts the number of SAS cancellations for the period between January 2011 and July 2013. The empirical data show that the number of Simplified Corporations formally going out of business is very low in comparison to the ones that remain active and in good standing.

| Month | 2011 | 2012 | 2013 |
|------------------|-------|-------|-------|
| | Total | Total | Total |
| January | 165 | 232 | 324 |
| February | 172 | 277 | 383 |
| March | 389 | 562 | 545 |
| April | 214 | 302 | 496 |
| May | 177 | 275 | 354 |
| June | 186 | 295 | 425 |
| July | 174 | 274 | 511 |
| August | 173 | 322 | N.A. |
| September | 237 | 311 | N.A. |
| October | 215 | 402 | N.A. |
| November | 213 | 417 | N.A. |
| Total | 2315 | 3669 | 3038 |

Table 5. Cancellation of SAS registrations

B. Empirical Analysis of Data Obtained at the Bogota Chamber of Commerce

In the period between January 2009 and August 2 2013, 86,861 Simplified Corporations were registered before the Bogota Chamber of Commerce. Although the majority of SAS registrations correspond to new incorporations a small percentage relates to conversion of traditional business forms, which existed before the enactment of Law 1258, into simplified corporations.

1. *Franchise fees and registration taxes.* - The figures in Table 6 include two types of economic resources that are collected by the Offices of the Mercantile Register. The first is a State registration tax that was levied by Law 225 of 1995,³⁸ Decree 650 of 1996,³⁹ and Resolution No. 24 of 1997.⁴⁰ The amount collected is charged at a 0.7% rate over the value of the subscribed capital. This tax is paid to the State of incorporation. The second amount relates to a franchise or registration fee established by Decree 393 of 2002,⁴¹ and corresponds to a variable percentage that is applied to the amount of subscribed capital. This fee

³⁸ L. 225, diciembre 20, 1995, DIARIO OFICIAL [D.O.] (Colom.).

³⁹ L. 650, abril 3, 1996, DIARIO OFICIAL [D.O.] (Colom.).

⁴⁰ L. 24, 1997, DIARIO OFICIAL [D.O.] (Colom.).

⁴¹ L. 393, marzo 4, 2002, DIARIO OFICIAL [D.O.] (Colom.).

is updated every year to adjust to the legal minimum monthly wage for each year. The amounts collected through this franchise or registration fee go directly to the Chamber of Commerce that operates each Mercantile Registry.

| Amount | 2009 | 2010 | 2011 | 2012 | 2013 |
|---------------------------------------|-----------|-----------|-------------|------------|------------|
| Registry Tax | | | 440,247,089 | | |
| Franchise Fee and Registration | 1,854,524 | 5,982,308 | 12,692,596 | 20,573,988 | 23,444,806 |

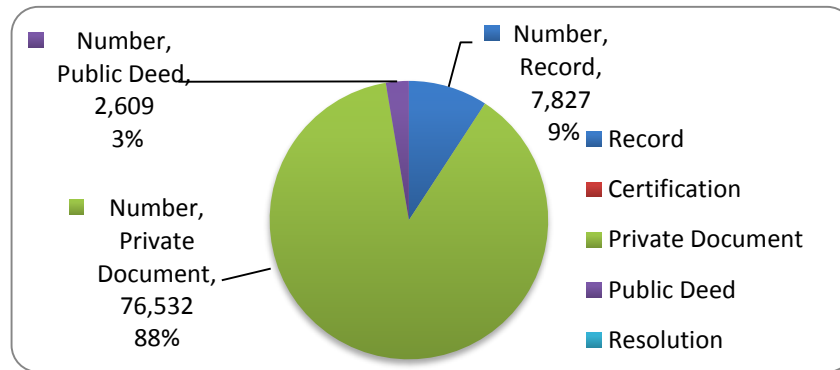
Table 6. Franchise Fees and State Registry Taxes (Figures above are in thousands of U.S. dollars)

2. *Public deed of incorporation versus private document.* - Articles 5 and 6 of Law 1258 of 2008 allow for the incorporation of SAS to be made either by private document or by public deed granted before notary public.⁴² The latter is only required where real estate is turned in as an in-kind contribution. It is not surprising that the majority of incorporations (88.12%) are undertaken through a private document. In fact, only 9% of the business parties that set up a SAS use the public deed as a means for its incorporation (see Graph 6 and Table 7). These figures also may suggest that most capital contributions in the SAS are made in assets different to real estate.

Furthermore, it is important to stress that a public deed is not needed for a business entity to convert into a SAS (see Article 31 of Law 1258 of 2008).⁴³ It is also noteworthy that according to this law, it is viable for a SAS to be incorporated online. In accordance with data provided by the same Chamber of Commerce, only for the year 2009, 1,077 corporations were incorporated online.

⁴² L. 1258, art. 5, 6.

⁴³ *Id.* at art. 31.



Graph 6. Incorporation method.

Table 7. Incorporation Method.

| Document | Number | Percentage |
|-------------------------|--------|------------|
| Record | 8,001 | 9.21 |
| Certification | 1 | 0 |
| Private Document | 76,532 | 88.12 |
| Public Document | 2,314 | 2.66 |
| Resolution | 1 | 0 |
| Total | 86,861 | |

3. *SAS' life span.* - The empirical research shows that the registration of most of the Simplified Corporations formed during the last years have not been cancelled. This data may suggest the long breadth nature of a substantial majority of the entities operating under the SAS structure. This analysis is based on two sets of data: first, the renovation of corporate registration that is made every year; and second, the filing before the Mercantile Registry of corporate decisions for the dissolution and liquidation of simplified corporations.

Table 8 shows figures concerning the annual renovation of mercantile registration for the years 2009 to 2013.

| Year of Registry Renovation | Number of SAS | PERCENTAGE |
|-----------------------------|---------------|------------|
| 2009 | 1394 | 1,60 |
| 2010 | 4246 | 4,89 |
| 2011 | 8648 | 9,96 |
| 2012 | 17750 | 20,43 |
| 2013 | 54823 | 63,12 |
| TOTAL | 86861 | 100 |

Table 8. Renovation of mercantile registration of SAS.

The data presented above implies that there is a high conservation rate for the SAS. This is supported by the fact that the registration of dissolution and liquidation proceedings for Simplified Corporations represents a very low percentage in comparison with the total amount of active SAS. In the Bogota's Mercantile Registry, only 4,031 out of 86,861 registered SAS, filed for dissolution before the Mercantile Registry (representing 4.61% of the sample). Out of the 4,031 that filed for dissolution, 2,919 (72%) registered the termination of the liquidation proceeding.

4. *Management.* - The SAS law allows for a simplified organic structure, where the board of directors is not a mandatory organ. In the absence of a clause providing otherwise, one or more managers will conduct the day-to-day affairs of the corporation.⁴⁴ The empirical research concerning the preference for a simplified organic structure

⁴⁴ Referred to in L. 1258, art. 26 as legal representatives.

in which there is no appointment of a board of directors is conclusive.⁴⁵ In fact, only 921 of the total amount of analyzed SAS registered the appointment of a board (i.e., a figure close to 1% of the total sample) (see Table 8). This finding is interesting, because the data suggests that the traditional regulation, which required a mandatory board of directors to do business under the corporate form, did not match the preferences of business people. The legal framework imposed a burden to the parties, which represented undesirable transaction costs.

A similar situation is observable concerning the appointment of fiscal auditors. The SAS law only requires an internal auditor to be appointed if the corporation surpasses certain thresholds (determined in the amount of assets or annual income). Only 3,023 fiscal auditors were appointed. This figure represents 3.5% of all registered companies in Bogota (see Table 9). The conclusion provided for the board of directors is equally applicable to the fiscal auditors. It is obvious that if businesspersons are given the opportunity to opt out of the relevant clause, they will do so.

| Shareholder managed SAS | Percentage | Board managed SAS | Percentage |
|-------------------------|------------|-------------------|------------|
| 85,949 | 98.93 | 921 | 1.07 |

Table 9. Shareholder Managed SAS versus Board Managed SAS.

| Appointment of Internal Fiscal Auditor for SAS | Percentage | Shareholder monitored SAS | Percentage |
|--|------------|---------------------------|------------|
| 83,838 | 96.50 | 3,023 | 3.50 |

Table 10. Appointment of Fiscal Auditor.

5. *Unrestricted purpose clause.* - Law 1258 does not require the parties to provide for a restricted purpose clause in the corporation's bylaws.

⁴⁵ An empirical study conducted by the Bogota Chamber of Commerce concluded that only 14% of the SAS created during the first year after the enactment of Law 1258, provided for a mandatory board of directors in their by-laws. *See* CÁMARA DE COMERCIO DE BOGOTÁ, PERFIL ECONÓMICO Y JURÍDICO DE LAS SAS EN EL PRIMER AÑO 28 (2010).

Accordingly, as a default rule, the law allows for the corporation to be set up for any lawful purpose. According to previous research conducted by the Bogotá Chamber of Commerce in 2011, most of the simplified corporations set up in the capital city prefer the flexibility afforded by the unlimited purpose clause to the rigidities of self-imposed restricted objects.⁴⁶ A smaller percentage of SAS opted for limited purpose clauses by specifying restricted business activities in the corporation's bylaws. Interestingly, during the period between January 2009 and July 2013, a total of 2,162 amended their internal rules in order to insert in their objects the phrase "any lawful activity." This move again represents a preference for flexibility and demonstrates that the traditional system was inconsistent with entrepreneurs' needs and preferences.

Dimension of SAS undertakings in the country. - As already explained the size of a business undertaking can be legally classified in four separate categories on the grounds of their employee population and aggregate assets. The following table shows the size of SAS incorporated in the city of Bogotá.

| Size of the company | Number of Employees | Total Assets (CLMMW) | 2009 | 2010 | 2011 | 2012 | 2013 |
|---------------------|---------------------|----------------------|--------|--------|--------|--------|--------|
| Micro | 1-10 | Under 501 | 86,362 | 84,776 | 81,744 | 77,954 | 75,679 |
| Small | 11-50 | 501-5000 | 443 | 1,736 | 4,095 | 7,060 | 8,508 |
| Medium | 51-200 | 5001-30,000 | 46 | 297 | 849 | 1,484 | 2,097 |
| Large | Over 200 | Over 30,000 | 10 | 52 | 173 | 363 | 577 |

Table 11. Dimensions of SAS in Colombia.

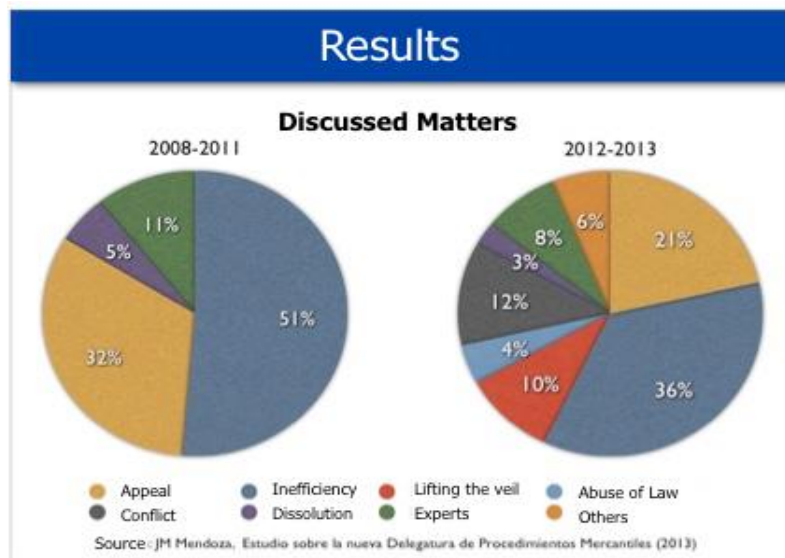
⁴⁶ See CÁMARA DE COMERCIO DE BOGOTÁ, EL PRIMER AÑO DE LA SAS (2011).

3. Empirical Observations on Enforcement

The relevance of the specialized jurisdiction created by Law 1258 of 2008 can be empirically demonstrated under several variables that measure the efficiency of the new court to adjudicate complex corporate law cases in a short period of time. The data collected by the National Office of Corporations demonstrates the increasing confidence with which private parties appear before the specialized court to litigate all kinds of legal matters.⁴⁷ It is relevant to observe that during the period from 2008 to 2011, the complaints filed before this court related exclusively to four different issues (appeals of previous decisions, intra-corporate disputes, actions to set aside resolutions of the shareholders meeting, and requests for dissolution). Alternatively, between 2012 and 2013, the types of legal disputes were significantly broadened to encompass additional matters (including, *inter alia*, processes for lifting the corporate veil, the appointment of experts to provide appraisals of shares of stock, and actions arising from the abuse of rights).⁴⁸ The increased scope of matters resolved at the Specialized Corporate Court has begun to provide credibility to the Government's ability to enforce substantive law provisions contained in the SAS legislation. It is probably the first time in which *law in the books* is very close to *law in action* in Colombia.

⁴⁷ See JOSÉ MIGUEL MENDOZA, ESTUDIO SOBRE LA NUEVA DELEGATURA DE PROCEDIMIENTOS MERCANTILES (2013).

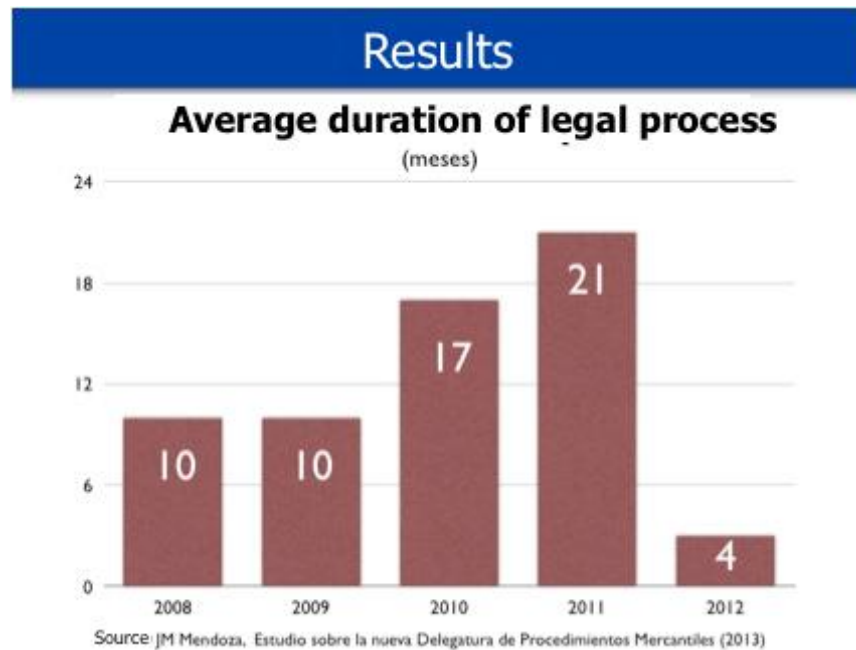
⁴⁸ See SUPERINTENDENCIA DE SOCIEDADES, vols. I and II, *supra* note 17.



Graph 7. Type of Corporate Law disputes litigated before the specialized court.

In a country accustomed to protracted litigation, endless formalities, and corruption in the judicial system, it is a great achievement to have a jurisdiction in which these vices are absent. The high quality of the decisions rendered by the Specialized Corporate Court and the short time required to obtain a final judgment are eloquent evidence concerning the great success of this legal experiment. Graph 8 shows the efficient operation of the new jurisdiction in terms of the average term employed by the court to render a final decision. As it can be observed, on average, the Deputy Superintendent produces final judgments in a reasonable four-month term.

CONCLUSION



Graph 8. Duration of legal processes at the Specialized Corporate Court.

The Colombian SAS legislation has proven to be an appropriate framework for the operation of all types of closely held corporations. The law that gave rise to this business entity was the result of a combination of common law and civil law types of modern business corporations. Five years after the enactment of Colombian Law 1258 of 2008, it seems clear that it is possible to achieve high impact changes from a relatively simple reform of outdated corporate law provisions.

The incorporation of more than 200,000 Simplified Stock Corporations in the first five years following the enactment of this law eloquently shows the usefulness of new corporate vehicles endowed with flexibility and simplified incorporation features. Through the SAS, Colombia has achieved higher levels of economic formalization, access to credit and investment, increased collection of taxes, and the creation of new jobs.

The SAS experiment may be beneficial in other countries if appropriately transplanted. It could be particularly useful in developing and emerging economies where there is an increasing need for flexible and user-friendly corporate vehicles. The success of the SAS clearly suggests that business people prefer flexibility to old-fashioned, misguided paternalism.

Welfare enhancement reforms such as the introduction of the Simplified Corporation would require, however, breaking up path dependence and overcoming certain pressure groups and backward looking legal traditions. For this purpose it would be extremely useful to prepare and promote a model act on Simplified Corporations. An instrument such as this could serve as a starting point in legislative processes for the amendment of corporate laws in several countries.