THE LEGISLATIVE STABILIZATION CLAUSE

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Stabilization clauses do something quite miraculous: They stop time itself. More specifically, stabilization clauses freeze the laws and regulations applicable to the foreign investment as they existed at the time the investment was established and are thus prized by investors. While they are longstanding and ubiquitous in contracts, enterprising host states have more recently retooled stabilization clauses to include them in their legislation. Like their prototype contractual stabilization clauses, legislative stabilization clauses (LSCs) are seen by developing countries as essential instruments for attracting foreign direct investment (FDI). However, what scant commentary there is focuses on whether LSCs, given their unilateral nature, are enforceable to aid investors. Further, there has been little scholarly attention on whether LSCs in fact influence FDI inflows in host states. States are potentially liable for any subsequent regulations that violate legislative stability guarantees, and LSCs are as such a singularly poor bargain for host states should they not induce investments. To redress the imbalance, in addition to analyzing the jurisprudence on the enforceability of LSCs, this article considers various UNCTAD, OECD, and World Bank national investment case studies, parsing for any data linking LSCs and FDI. As with international investment treaties, it turns out to be difficult after the fact to isolate the impact of any LSC on FDI levels. What evidence the study has looking backward is generally inconclusive on whether LSCs influence FDI inflows.

LSCs are not born equal. Certain LSCs are more forward-looking than others. In particular, what this article calls Contractual LSCs allow a governmental mechanism to recognize, track, and monitor the stability obligations created under the LSC. Host states, as such, are far better positioned to evaluate the utility and value of the LSC and make appropriate adjustments. From this perspective, the study reconceptualizes the LSC by proposing a new taxonomy of LSCs that divides them into three fundamental categories: Aspirational LSCs, Standard LSCs, and Contractual LSCs.

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Host states should avoid Aspirational LSCs, which contain hortatory language providing no stability guarantee and minimal purpose. Host states should also reconsider Standard LSCs, which are stock LSCs that saddle host states with stability obligations without having been shown to influence FDI inflows. In their place, host states should adopt Contractual LSCs, which grant investors stability guarantees through contracts approved by the government, often conditional on meeting particular investment profile criteria. Further, because the architecture of Contractual LSCs enables host states to better target investment projects and manage their stability obligations, governments can more confidently assess the true benefit of such LSCs and respond accordingly. Further, Contractual LSCs signal to investors a more transparent and reliable process to access enhanced stability guarantees by way of stabilization contracts generated under the legislation. In sum, a host state would do well to look to the Contractual LSC as an important tool at its disposal for recalibrating the balance of interests and rights between the state and foreign investors.

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I. INTRODUCTION

At the heart of every stabilization clause is a simple concept: to stop time. A stabilization clause in an investor-state contract effectively freezes the laws, rules, and regulations applicable to the foreign investment as they existed at the time the investment contract was concluded.[1] This means that a host state may not apply subsequent adverse changes in its domestic law to the investor and the investment, and agrees to leave the investment project unaffected by these changes.[2] The host country, however, is not prohibited from exercising its legislative power and changing its laws. The state merely promises to spare the investment from any later, deleterious regulatory changes, or else reimburse the investor for any damages incurred as a result.[3]

In its contractual form, the stabilization clause is ubiquitous in the world of foreign investment.[4] Contractual stabiliza-

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1. *See generally* PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY 68–69 (1st ed. 2010) (noting that stabilization clauses seek to provide assurance that the investment terms remain the same over the life of the agreement); Prosper Weil, *Les clauses de stabilisation ou d'intangibilité insérées dans les accords de développement économique, in* MELANGES OFFERTS A CHARLES ROUSSEAU, LA COMMUNAUTE INTERNATIONALE, 301 (Charles Rousseau ed., 1974) (offering a definition of stabilization clauses as part of a broader typology of protection clauses); Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 216 (1996) (discussing how stabilization clauses limit the power of governments to change the laws governing certain projects); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 330–34 (4th ed. 2017) (discussing the role and impact of stabilization clauses as one of the "essential clauses" for contract-based arbitration, along with choice-of-law and arbitration clauses); A.Z. El Chiati, *Protection of Investment in the Context of Petroleum Agreement, in* 204 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 115–21 (1987) (providing a definition of the stabilization clause and discussing techniques of stabilization, including "freezing the law").

2. MUSTAFA ERKAN, INTERNATIONAL ENERGY INVESTMENT LAW: STABILITY THROUGH CONTRACTUAL CLAUSES 104–05 (Kurt Deketelaere ed., 2011); *see, e.g.*, Aguaytia Energy LLC v. Republic of Peru, ICSID Case No ARB/06/13, Award, ¶ 89 (Dec. 11, 2008) (interpreting an investor-state agreement's language to find that "stability of the legislative framework" has been guaranteed to investors).

3. CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 588 (2d ed. 2009); *see also*, CAMERON, *supra* note 1, at 70 (describing the legal effects of different types of freezing clauses).

4. *See* Sam Foster Halabi, *Efficient Contracting Between Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 NW. J. INT'L L. & BUS. 261, 290 (2011) (stating that "not all investment contracts include stabilization clauses, but they are common in contracts for a wide range of industries in most regions of the world") (citations omitted); Erin O'Hara O'Connor &

tion clauses (CSCs) are frequently used in investment contracts in developing countries vulnerable to political and economic crises.[5] Such potential instability leads foreign investors to seek protection of their investments, not only against overt expropriatory actions of the host state, but also against a variety of more nuanced government measures that may affect the viability of their projects.[6] More recently, various countries have even provided legislative stabilization clauses (LSCs), i.e., stability provisions in their domestic laws.[7] Although the mechanics of LSCs vary distinctly from that of CSCs, the unspoken assumption is that they both attract and promote foreign direct investment (FDI) in host states in much the same

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Susan D. Franck, *Foreign Investments and the Market for Law*, 2014 U. ILL. L. REV. 1617, 1631 (2014) (noting "the common inclusion of stabilization clauses in investment contracts"). Commentators have traced the origin of stabilization clauses all the way back to the period between World War I and World War II when U.S. companies began to include them in concessionary agreements because of nationalizations in Latin America. ERKAN, *supra* note 2, at 102–03; JOLA GJUZI, STABILIZATION CLAUSES IN INTERNATIONAL INVESTMENT LAW: A SUSTAINABLE DEVELOPMENT APPROACH 14 (2018); R. DOAK BISHOP ET AL., INTERNATIONAL ARBITRATION OF PETROLEUM DISPUTES: THE DEVELOPMENT OF A LEX PETROLEA 1158 (YCA 1998).

5. RUDOLPH DOLZER, PETROLEUM CONTRACTS AND INTERNATIONAL LAW 192 (2018) (noting in the context of petroleum contracts that "stability clauses are still widely provided in developing countries, and here to stay for the foreseeable future") (citation omitted).

6. *See* CAMERON, *supra* note 1, at 69 (noting that "[p]rotection may be sought both against unilateral modifications to the contract and against taking the rights of the investor); *see also* Andrey V. Kuznetsov, *The Limits of Contractual Stabilization Clauses for Protecting International Oil and Gas Investments Examined through the Prism of the Sakhalin-2 PSA: Mandatory Law, the Umbrella Clause, and the Fair and Equitable Treatment Standard*, 22 WILLAMETTE J. INT'L L. & DIS. RES. 223, 224 (2014) (noting that "[g]iven the capital intensive, long-term, and risky nature of oil and gas development projects in emerging markets, international oil and gas companies (IOCs) and their lenders wish to protect themselves not only against the most egregious forms of State conduct, but against a variety of government measures that fall short of impairing the viability of the investment project but still adversely affect it."); ERKAN, *supra* note 2, at 141–42 (noting that stabilization clauses are crucial for parties of state contract to achieve their aims).

7. GJUZI, *supra* note 4, at 34; *see also* Joseph E Neuhaus, *The Enforceability of Legislative Stabilization Clauses, in* PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 318 n.4 (David D. Caron et al. eds., 2015) (explaining that "[w]e have found legislative stabilization clauses in the investment laws of Armenia, Georgia (repealed), Kuwait, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, and Vietnam.").

way. The minimal scholarly debate around LSCs focuses on whether LSCs are or should be enforceable due to their unilateral nature.[8] There has been next to no discussion on the significant question of whether LSCs—as opposed to CSCs or stabilization clauses in general—facilitate FDI and are thus constructive for host states.

This conflation between CSCs and LSCs is unwarranted given the more tenuous nature of LSCs and the ability on the part of the host state to unilaterally withdraw legislation containing the LSC at any time.[9] Expecting the informed investor to rely exclusively on LSCs is unrealistic when the investor often has access to CSCs—which provide more secure stability guarantees—and investment treaties. If the LSC does not in fact attract and increase FDI, it represents a poor proposition for the host state since the state remains liable for any subsequent regulations the government passes that violate its own legislative stability guarantees. Regardless of whether there was actual initial reliance by the investor on the LSC in establishing its investment, the investor may look to the LSC post-dispute to ground or bolster its investment claims in any subsequent dispute with the host state.

To investigate the connection between LSCs and FDI, this article closely examines a number of national investment case studies and commentary that have considered the extent to which stabilization clauses in general impact FDI inflows, but parsing out to the extent possible the findings in relation to LSCs specifically. It turns out to be difficult after the fact to isolate the impact of any LSC on FDI levels, and what evidence there is looking backward is generally inconclusive on whether LSCs impact FDI inflows.

LSCs come in various stripes, however, with certain LSCs being more forward-looking than others. What this article terms Contractual LSCs allow for a governmental mechanism to recognize, track, and monitor the stability obligations created under the LSC. Host states, as such, are much better

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8. For examples of such scholarship, see Neuhaus, *supra* note 7, at 318, as well as Jarrod Hepburn, *Domestic Investment Statutes in International Law*, 112 AM. J. INT'L. L. 658 (2018).

9. CAMERON, *supra* note 1, at 62–64; Abdullah Al Faruque, *The Rationale and Instrumentalities for Stability in Long-Term State Contracts*, 7 J. WORLD INV. & TRADE 85, 105–07 (2006).

equipped to evaluate the utility and value of the LSC and make appropriate adjustments. From this perspective, this article constructs a new taxonomy of LSCs that divides them into three fundamental categories according to their structural form and utility: Aspirational LSCs, Standard LSCs, and Contractual LSCs.

Aspirational LSCs contain hortatory language about, or authorize states to provide, stability guarantees but without committing the states to grant them. An example is Article 6 of Madagascar's Investment Law (2008):

> The state *uses its best endeavours* to set up and maintain a favourable climate for investment by establishing a simple, fair and growth-conducive tax system for investors within the context of carrying out investment projects referred to in this Act.[10]

Standard LSCs are stock LSCs that promise to stabilize particular national laws or regulations applicable to foreign investments upon their establishment. An example is Article 7 of Armenia's law on foreign investment (1994):

> In the event of amendments to the foreign investment legislation of the Republic of Armenia, the legislation that was effective at the moment of implementation of investments *shall be applied, upon the request of a foreign investor*, during a five years [sic] period from that moment.[11]

Finally, Contractual LSCs grant investors stability guarantees through contracts approved by the government. This approval is often conditional on meeting investment profile criteria. One example can be found in Colombia's Legal Stability Contracts Law No. 963 of 2005:

> Article 1. Legal Stability Contracts: Legal stability contracts are established in order to promote new investments and expand existing ones in the national territory . . . *Through these contracts*, the State guarantees the investors who sign them, that if during their

10. *See infra* Appendix, pt. I (emphasis added). The Appendix includes select examples of Aspirational, Standard, and Contractual LSCs, and the reader is invited to consult the text of the LSCs in the Appendix to understand better their nature and structure.

11. *See infra* Appendix, pt. II (emphasis added).

> validity any of the regulations that have been identified in the contracts as a determinant of the investment is modified in an adverse way, the investors will have the right to be continued to apply these rules to them for the duration of the respective contract.
>
> Article 2. National and Foreign Investors: National and foreign investors be they natural or legal persons, as well as consortia, who make new investments or expand existing ones in the national territory, for an amount equal to or greater than 150,000 UVT, may be party to the legal stability contracts.[12]

Host states should on balance steer clear of Aspirational LSCs, which provide no stability guarantee and little purpose, and reconsider Standard LSCs, which have not been shown to influence FDI inflows but potentially impose onerous stability obligations on host states. In their place, this article recommends that host states adopt Contractual LSCs. Unlike Aspirational and Standard LSCs, the architecture of Contractual LSCs accommodates an administrative system to approve investment contracts. This system enables the host state to monitor the number and nature of such contracts created under the particular LSC. Further, this framework not only permits the host state to better target investment projects and manage its stability obligations, but also presents investors with a more transparent and reliable process to access enhanced stability guarantees than would be the case through individual negotiations with the government for standalone stability contracts. By going back to the LSC's contractual roots, the Contractual LSC thereby turns the unilateral paradigm of the LSC on its head, minimizes the uncertainty surrounding its enforceability, and locks down an assured, stabilized contract between the investor and host state.

Part II illustrates this article's original taxonomy of LSCs by noting the distinctive characteristics of the three categories of LSCs. This taxonomy is based on a scrutiny of the relevant jurisprudence and various national case studies. This analysis provides the foundation for the recommendation that host states avoid Aspirational LSCs, reevaluate Standard LSCs, and enact Contractual LSCs. Part III concludes by reflecting on

12. *See infra* Appendix, pt. III (emphasis added).

the analogy between LSCs and investment treaties, and on the potential benefits that Contractual LSCs in particular can provide for investors and host states alike, thereby restoring a measure of equilibrium between them.

II. A New Taxonomy of Legislative Stabilization Clauses

The proposed taxonomy of LSCs reconceptualizes the LSC based on the structural form and utility of their respective stability guarantees. This taxonomy leaves behind the traditional classification of stabilization clauses into freezing, equilibrium, and hybrid clauses, which focuses and is based on the particular operational mechanisms of contractual stabilization clauses.[13] Whatever value this differentiation may have for CSCs, it fails to address the legislative nature of LSCs. This more holistic taxonomy accounts for both the legislative and contractual form of the stability guarantees implicated, and divides the various LSCs into three categories:[14]

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13. The literature generally divides stabilization clauses into two categories based on how these clauses are drafted to protect the foreign investment: traditional stabilization clauses (freezing and intangibility clauses) and modern stabilization clauses (economic equilibrium and allocation of burden clauses). For a discussion of these categories, see Cameron, *supra* note 1, at 70–81; Abdallah Abuelfutuh Ali, *Taking Stock of the Validity and Legal Impact of Traditional Stabilization Clauses in International Investment Law*, 32 Am. Rev. Int'l Arb. 119, 135–40 (2021); Jernej Letnar Černič, *Corporate Human Rights Obligations under Stabilization Clauses*, 11 German L.J. 210, 213–14 (2010); Halabi, *supra* note 4, at 292–94. Certain scholars would even classify "good faith" as a fourth type of stabilization clauses. *See, e.g.*, Christopher T. Curtis, *The Legal Security of Economic Development Agreements*, 29 Harv. Int'l L.J. 317, 346–47 (1988) (noting the differences between a variety of stabilization clauses, including "good faith" clauses that simply note the agreement will be performed consistently by the parties).

14. We include in the Appendix select examples from each of the three categories of LSCs. *See infra* Appendix. A more extensive survey is on file with the authors.

Types of Legislative Stabilization Clauses

Aspirational LSC	An LSC that speaks in hortatory or general terms about, or ostensibly authorizes the host state to provide, stability guarantees but without committing the state to grant them.
Standard LSC	A stock LSC that promises to stabilize national laws or regulations applicable to foreign investments upon their establishment.
Contractual LSC	An LSC that grants investors stability guarantees through contracts approved by the government, often conditional on meeting investment profile criteria.

A. *Aspirational LSCs*

The host state national law may contain provisions authorizing the government to furnish a foreign investor with stability guarantees, and perhaps even aver that the government will so endeavor to provide. For instance, the Madagascar LSC states that the government will use "its best endeavours to . . . establish[ ] a simple, fair and growth-conducive tax system for investors . . . ."[15] However, if such LSCs do not require the government to provide stability guarantees, but instead grant it broad discretion on whether to award them, they cannot be relied upon to stabilize the relevant national rules. This article terms such provisions Aspirational LSCs because they often contain hortatory language that appears to promise stability. Included in this category are provisions in the investment laws of Madagascar and Papua New Guinea.[16]

In appearing to promise stability, Aspirational LSCs might also be seen as indicating that the investor's stability concerns will be safeguarded in a regulatory environment set up under the legislation. Yet, as the tribunal in *AES v. Hungary* noted, "[a] legal framework is by definition subject to change as it

15. *See infra* Appendix, pt. I.
16. *Id.*

adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts," and "any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times."[17] Aspirational LSCs do not require the government to provide stability guarantees, but instead grant it broad discretion on whether to award them, and thus cannot be relied upon to stabilize the relevant national rules. Accordingly, regional and international legal instruments like the E.U. energy directives 2005/89—which encourages Member States to create a stable environment for electricity investments, but does not impose any binding stability requirement[18]—and 2009/72—which regulates the internal electricity market but does not explicitly prevent Member States from interfering with liberalized electricity prices[19]—"fall short of providing clear and directly enforceable guarantees to investors that the regulatory framework governing their investments will remain unchanged."[20] Similarly, Article 10(1) of the Energy Charter Treaty, which directs Con-

17. AES Summit Generation Ltd. & AES-Tisza Erömü Kft v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, ¶¶ 9.3.29, .34, .35 (Sept. 23, 2010).

18. Council Directive 2005/89, art. 3, 2006 O.J. (L33) 22, 24 (Article 3 provides that "1. Member States shall ensure a high level of security of electricity supply by taking the necessary measures to facilitate a stable investment . . . 2. In implementing the measures referred to in paragraph 1, Member States shall take account of: . . . b) the importance of a transparent and stable regulatory framework . . . .").

19. Council Directive 2009/72, art. 57–59, 2009 O.J. (L 211) 55, 61 ("57. Promoting fair competition and easy access for different suppliers and fostering capacity for new electricity generation should be of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalised internal market in electricity. 58. With a view to creating an internal market in electricity, Member States should foster the integration of their national markets and the cooperation of system operators at Community and regional level, also incorporating isolated systems forming electricity islands that persist in the Community. 59. The development of a true internal market in electricity, through a network connected across the Community, should be one of the main goals of this Directive and regulatory issues on cross-border interconnections and regional markets should, therefore, be one of the main tasks of the regulatory authorities, in close cooperation with the Agency where relevant.").

20. Anatole Boute, *The Quest for Regulatory Stability in the EU Energy Market: An Analysis Through the Prism of Legal Certainty*, 37(6) EUR. L. REV. 675, 686 (2012).

tracting States to "*encourage* and create *stable*, equitable, favourable and transparent conditions for Investors,"[21] was found to provide "no specific directions on the particular elements that such conditions are to embody" and like other similar investment treaty provisions, are "far too general" to be enforceable as a stability guarantee by investors.[22]

Under these circumstances, it is difficult to imagine that Aspirational LSCs will attract and increase FDI. Rather, any weak signaling function in the market that Aspirational LSCs might serve will be undermined by their manifest lack of commitment to provide stability guarantees. Further, while a host state would appear to have little to lose in enacting an Aspirational LSC that does not bind the government but may yet draw in a less savvy investor, this would be an unwise gamble, since the line between Aspirational and Standard LSCs is not always clear. If the state attempts to strengthen the apparent promise to stabilize—as it must, in order to increase the chances of enticing the investor—the state runs the risk of crossing over and being bound by a Standard LSC. For example, some tribunals have taken a broad view of legislative promises, stating in dicta that investors are entitled to rely on representations or undertakings made "explicitly or *implicitly*" by the host state through "*legislation*, treaties, decrees, licenses, and contracts."[23] Conversely, if the state employs manifestly hortatory language in crafting its Aspirational LSC to avoid this danger, the LSC is much less likely to entice even the unsophisticated investor. In that event, an Aspirational LSC would only prove as useful as a handsome trade brochure that is discarded after it is read.[24]

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21. The Energy Charter Treaty art. 10(1), Dec. 17, 1994, 2080 U.N.T.S. 95 [hereinafter ECT] (emphasis added).

22. Stadtwerke München GmbH, RWE Innogy GmbH, and Others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, ¶¶ 196–97 (Dec. 2, 2019).

23. Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, ¶ 285 (Nov. 12, 2010) (emphasis added).

24. For a pithy take on the limits of signaling in the law, see Geoffrey Manne, *A Signaling Theory of Law* 1 (Nov. 26, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180698 [https://perma.cc/T442-EMF2].

B. *Standard LSCs*

In contrast to Aspirational LSCs, Standard LSCs promise to stabilize national laws or regulations applicable to foreign investments upon their establishment. Standard LSCs typically provide stabilization of the laws affecting the investment for a fixed duration of time from its establishment and can apply to a specific sector or area of law, such as mining, energy, commercial, tax, labor, or environmental law.[25] For example, the Georgia LSC provides: "[a] new legislative act which worsens investment conditions established under this law shall not apply to the already realized investments within ten years from the date of its entry into force . . . ."[26]

Standard LSCs can be found in the investment laws of many developing countries, including Armenia, Bosnia and Herzegovina, Cuba, Georgia, Guinea-Bissau, Kazakhstan, Kyrgyzstan, and Vietnam.[27]

1. *The Enforceability of Standard LSCs*

When a host state extends enforceable stability guarantees to investors, it renders itself potentially vulnerable to claims by investors for subsequent governmental measures that breach those guarantees and adversely impact their investments.[28] To challenge such measures, an investor may rely on an applicable investment treaty (or investment chapter of a free trade agreement) entered into between the host state and home state of the investor. In particular, the investor often looks to

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25. CAMERON, *supra* note 1, at 62.
26. *See infra*, Appendix, pt. II.
27. *See infra* Appendix, pt. II. A.F.M. Maniruzzaman, *National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective*, 8 J. WORLD INV. & TRADE 233, 236 (2007). Harder to classify are the provisions in state constitutions such as Brazil's constitution that secure contractual rights, including those derived from state contracts. These provisions can provide a high degree of stability and protection for foreign investors' contractual rights as they are insulated from ordinary legislative procedure and cannot be as readily withdrawn by state governments. For the same reasons, however, these stability provisions are not as flexible a tool for host states as other LSCs. As discussed below, however, a prime advantage of the typical LSC for the host state is that it allows the state readily to modify or even withdraw the LSC. To preserve this flexibility, states should be wary of enacting LSCs in their constitutions as opposed to statutes or regulations.
28. See, for example, the cases discussed in Part II.B.

two central investment treaty provisions: the fair and equitable treatment (FET) clause and the umbrella clause.

The FET clause requires the host state to accord fair and equitable treatment to foreign investments in its territory, and is "closely tied" to the notion of the investor's legitimate expectations.[29] While the FET standard "necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments,"[30] the protection of such a legitimate expectation under the FET standard is not absolute.[31] Rather, the FET standard protects only the investor's legitimate and reasonable expectations, which must be balanced against the host state's regulatory interest so as to preserve the state's continuing ability to regulate in the public interest.[32] As such, the investor's legitimate expectations would have to include "the real possibility of reasonable changes and amendments in the legal framework, made by the competent

29. Saluka Invs. BV (Neth.) v. Czech Republic, UNCITRAL, Partial Award, ¶ 302 (Mar. 17, 2006).

30. Eiser Infrastructure Ltd. and Energy Solar Luxembourg S.A R.I. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award, ¶ 382 (May 4, 2017). For a continued discussion of the legal obligations surrounding stable conditions, see AES Summit Generation Ltd. & AES-Tisza Erömü Kft v. Republic of Hungary, ICSID Case No. ARB/07/22, Award, ¶ 9.3.29 (Sept. 23, 2010), Mamidoil Jetoil Greek Petroleum Prods. Société S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, ¶¶ 617–18 (Mar. 30, 2015), and Novenergia II - Energy & Env't (SCA) (Grand Duchy of Luxembourg), SICAR v. Spain, SCC Case No. 2015/063, Final Award, ¶ 646 (Feb. 15, 2018).

31. AES Corp. and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16, Award, ¶ 401 (Nov. 1, 2013).

32. Saluka Invs. BV (Neth.) v. Czech Republic, UNCITRAL, Partial Award, ¶¶ 305–06 (Mar. 17, 2006); Methanex Corp. v. United States, UNCITRAL, Final Award, pt. IV, ch. D, ¶ 7 (Aug. 3, 2005) (stating that economic injury caused by bona fide regulation within the police powers of a state does not require compensation); Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 103 (Dec. 16, 2002) (stating that customary international law recognizes that "governments must be free to act in broader public interest" and must be able to undertake "[r]easonable governmental regulation"). August Reinisch & Christoph Schreuer, International Protection of Investments: The substantive Standards 344 (2020) (noting that "[b]ecause FET often concerns the conflict between private investors rights and interest, on the one hand, and those of the public intended to be protected by host state action, on the other hand, FET claims often require striking a balance between these competing interests through a proportionality test").

authorities within the limits of the powers conferred on them by the law."[33]

Should the investor be granted a firm stability guarantee whose terms provide for the freezing of applicable regulations at the time of the establishment of the investment, the investor's reasonable and legitimate expectations would be transformed: "Stability is not an absolute concept; *absent a clear stabilization clause*, it does not equate with immutability."[34]

The reasonable expectation of the investor holding a clear stability guarantee is that the investment will be categorically stabilized in line with the terms of the guarantee, and the host state violates its FET obligations if and when the government subsequently passes regulations adversely impacting the investment contrary to those terms.[35]

In addition to the FET clause, investors have also sought to rely on the so-called umbrella clause in investment treaties to enforce stability guarantees.[36] A typical formulation of the umbrella clause is found in Article 10(1) of the Energy Charter Treaty: "Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."[37]

The umbrella clause converts any independent obligations the host state has assumed with respect to the investor and investment—notably contractual obligations—into inter-

33. El Paso Energy Int'l Co v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 400 (Oct. 31, 2011).

34. RREEF Infrastructure (G.P.) Ltd. and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Republic of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 315 (Nov. 30, 2018) (emphasis added).

35. *See* the cases discussed in Part II.C.

36. Christoph Schreuer, *Travelling the BIT Route: Of Waiting Period, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 249–55 (2004). For a discussion of umbrella clauses generally, see Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and The Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 137, 152–56 (2006); Stephan Schill, *Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT'L L. 1 (2009); Anthony C. Sinclair, *The Origins of the Umbrella Clause in the International Law of Investment Protection*, 20 ARB. INT'L 411 (2004); Thomas W. W. . .lde, *The "Umbrella Clause" in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INV. & TRADE 183 (2005).

37. ECT, *supra* note 21.

national obligations under the relevant treaty.[38] A breach of the independent obligation (meaning a breach of the investment contract if that is the source of the independent obligation) represents a breach of the treaty, which allows the investor to bring a claim against the host state under the treaty through its dispute resolution provisions.[39] Investors looking to enforce stability guarantees would argue that the alleged stabilization obligations are elevated to treaty obligations by virtue of the umbrella clause, and actionable accordingly.

Whether the investor seeks to challenge subsequent legislative regulations through an FET or umbrella clause, the question remains as to whether the stabilization guarantee itself is valid. While the firmness and clarity of the asserted guarantee's language are important elements, its structural form matters as well. It is well established that contractual stability clauses are enforceable, but legislative stability clauses (LSCs) are a more recent invention and there are conflicting views as to their enforceability due in part to their unilateral nature.[40] Unsurprisingly, the relevant caselaw on the enforceability of LSCs is thinner and less coherent.

On one view, some commentators argue that LSCs standing alone should not be enforceable based on a broad reading of the state's sovereign power to legislate and regulate. For example, Thomas Wälde and George Ndi contend that a purely legislative stabilization promise does not have the character and substance of an explicit, formal, and binding stabilization agreement.[41] At least one tribunal appears to agree that Standard LSCs are inherently unenforceable, although based on the unspecific nature of legislation, even as to LSCs applicable

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38. *See* Wong, *supra* note 36, at 145 ("Its purpose is to create an inter-state obligation to observe investment agreements that investors may enforce when the BIT confers a direct right of recourse to arbitration. More specifically, the history of the umbrella clause makes clear that it was designed to allow for any breach of a relevant investment contract to be resolved under the treaty in an international forum."); *see also* Sinclair, *supra* note 36, at 413–18 (discussing the evolution of umbrella clauses in international investment treaties).

39. Sinclair, *supra* note 36, at 413–18.

40. Neuhaus, *supra* note 7, at 319.

41. *See* Waelde & Ndi, *supra* note 1, at 240. Professors Waelde and Ndi added that "[w]e would therefore consider the inclusion of a stabilization promise in national law as an invitation to dance, but not yet as the dance itself." *Id.* at 240 n.94.

only to investors in a particular sector who have met preconditions specified in the legislation. In *Charanne v. Spain*, the investor claimants contended that Spain, in reforming its renewable energy regime, had breached stability guarantees contained in prior regulations, including Royal Decrees (RD) 661/2007 and 1578/2008, by freezing remuneration rates for electricity generated by qualified renewable energy producers.[42] In rejecting the claimants' arguments, the majority of the tribunal held that:

> Even if RD 661/2007 and 1578/2008 were addressed to a limited group of investors, that does not turn them into commitments specifically addressed to each of those investors. Having a specific scope does not mean that the disputed provisions lose the general nature that characterizes any legislative or regulatory measure. Turning a regulatory provision, due to the limited number of persons that may be subject thereto, into a specific commitment entered into by the State towards each and every one of those persons would be an excessive limitation of the capacity of States to regulate the economy according to the public interest."[43]

Charanne was among the first in a similar string of cases brought against Spain under the Energy Charter Treaty in which investors sought to rely on the stability promises in RD 661/2007. While not going as far as *Charanne*, other tribunals also concluded that RD 661/2007 does not provide an enforceable stability guarantee, albeit on different grounds. One of the complications here was that the relevant provision in RD 661/2007 (Article 44.3) was ambiguously drafted, providing that:

> During the year 2010, on sight of the results of the monitoring reports on the degree of fulfilment of [certain applicable energy plans and] new targets as

42. Charanne B.V. and Construction Invs. S.A.R.L. v. Kingdom of Spain, SCC Case No. 062/2012, Award, ¶¶ 478–79, 487 (Jan. 21, 2016).

43. *Id.* ¶ 493; *see also* Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶¶ 507–08 (May 16, 2018) (noting that for the Charanne tribunal, "stabilisation provisions offered in general legislation, or political announcements, like press releases and others, cannot create legitimate expectations").

may be included in the subsequent Renewable Energies Plan 2011-2020, there shall be a review of the tariffs, premiums, supplements and lower and upper limits defined in this Royal Decree with regard to [associated costs, demand, and impact] *and a reasonable rate of profitability shall always be guaranteed* with reference to the cost of money in the capital markets.

Subsequently a further review shall be performed every four years, maintaining the same criteria as previously. *The revisions to the regulated tariff and the upper and lower limits indicated in this paragraph shall not affect facilities for which the deed of commissioning shall have been granted* prior to 1 January of the second year following the year in which the revision shall have been performed.[44]

The tribunal in *RREEF v. Spain* interpreted this language to "show that adjustments were to be envisaged" and thus determined that Article 44.3 of RD 661/2007 was not enforceable as a firm stability guarantee.[45] The tribunal emphasized that in the absence of a clear stabilization clause, the investment was not immutably stabilized.[46]

The tribunal in *Stadtwerke v. Spain* also rejected claimants' reliance on RD 661/2007. The primary legislation contemplated that the premiums, which had to generate a reasonable rate of return, would be established by regulations that had themselves been amended in the interim. As such, the *Stadtwerke* tribunal determined that "it would have been unreasonable for the Claimants to have interpreted Article 44(3) of RD 661/2007 as constituting a stabilized regime for the calculation of the premium that would be impervious to any future modification regardless of a change in the market conditions."[47]

44. Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶ 116 (May 16, 2018) (emphasis added) (quoting Article 44.3 of RD 661/2007).

45. RREEF Infrastructure (G.P.) Ltd. and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Republic of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶¶ 318–19 (Nov. 30, 2018).

46. *Id.* ¶ 315.

47. Stadtwerke München GmbH, RWE Innogy GmbH, and Others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award, ¶ 282 (Dec. 2, 2019).

As a striking illustration of how uncertain and even contorted the law is, a different tribunal in *Masdar v. Spain* decided in favor of investor claimants seeking to rely on RD 661/2007. The decision was not made on the basis of Article 44.3, but rather of letters issued by the government to investors that expressly affirmed the application of RD 661/2007 to the investments for their operational lifetime.[48] The *Masdar* tribunal first acknowledged that there were different schools of thought on the enforceability of LSCs, including the view expressed in *Charanne* that the unspecific legislative nature of RD 661/2007 rendered its stability promise unenforceable.[49] The tribunal, however, distinguished the facts in *Masdar*, stating that because of the "specific commitments" provided by the government in the letters, "and irrespective of whether the general provisions of RD661/2007 would be sufficient . . . the Tribunal concludes that, in any event, Claimant had legitimate expectations that the benefits granted by RD661/2007 would remain unaltered."[50]

National courts may also independently rule LSCs to be invalid, thereby deepening the uncertainty over their enforceability. For example, the Federal High Court of Nigeria determined that the stabilization clause (Standard LSC) in the Nigeria Liquefied Natural Gas Act of 1990 was unconstitutional and therefore invalid. The court found that the LSC restricted Nigeria's power to regulate and was inconsistent with the Nigerian constitution, which empowered the legislature to enact laws for the good of all Nigerian citizens.[51]

Apart from *Charanne,* the tribunals in the arbitral cases discussed above appear to allow for the possibility of enforcing Standard LSCs provided there is sufficient firmness and clarity of the stability guarantees in the relevant legislation.[52] There is

48. Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, ¶¶ 516–22 (May 16, 2018).

49. *Id.* ¶¶ 490, 507–08.

50. *Id.* ¶ 521.

51. For commentary on this issue, see Bayo Adaralegbe, *Stabilizing Fiscal Regimes in Long-Term Contracts: Recent Developments From Nigeria*, 3 J. WORLD ENERGY L. & BUS. 239 (2008); GJUZI, *supra* note 4, at 195 n.45. For the text of the Nigeria LSC, *see infra* Appendix, pt. II.

52. *See, e.g.,* Ioan Micula v. Romania, ICSID Case No. ARB/05/20, Award ¶ 677 (Dec. 11, 2013) (determining that "the legislative framework in Romania between the years 1998–2002 . . . together with [Permanent Inves-

case law affirmatively holding that investors may reasonably and legitimately rely on the stability guarantees in LSCs. For example, tribunals have upheld the stability guarantee in Article 6(1) of Kazakhstan's 1994 Foreign Investment Law (FIL), which provides that:

> Should a foreign investor's position be adversely affected as the result of change in legislation and/or the enactment and/or amendment of the terms and conditions of international treaties, the legislation which was in effect at the moment of the investment was made shall apply to foreign investments for a period of 10 years, and with respect to investments made under long-term contracts (more than 10 years) with authorized state agencies, until the expiration of the term of the contract unless the contract stipulates otherwise . . . [t]hese requirements shall not apply to changes in the legislation . . . in the area of ensuring defense potential, national security, ecological safety and public health and morals. If a change in legislation adversely affects the position of a foreign investor in these areas, the foreign investor must be paid immediate adequate and effective compensation in the currency of the investment or in the foreign currency established by the foreign investor's agreement with the Republic of Kazakhstan.[53]

The tribunal in *AES Corporation and Tau Power B.V. v. Kazakhstan* determined that the claimant investors could reasonably rely on the guarantee in Article 6(1) to stabilize their investment for ten years:[54]

> At the time claimants made their investment, the 1994 FIL was effective, and claimants were therefore entitled to expect to be granted the protection afforded by the 1994 FIL and that . . . such protection

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tor Certificates issued by the relevant agency to investors who qualified for benefits under the LSC], instilled in the Claimants a legitimate expectation that they would be entitled to the [stability guarantees in the LSC] in substantially the same form as when they received their [Permanent Investor Certificates], until [the end of the promised stabilization period]").

53. Foreign Investment Law, Dec. 27, 1994 (Kaz.), *translated in* AES Corp. and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16, Award, ¶ 161 (Nov. 1, 2013).

54. *See id.* and accompanying text.

> could not simply be revoked unilaterally without due regard to claimants' expectations as raised under such law.[55]

The tribunal in *Rumeli Telekom AS v. Kazakhstan* took the same view, noting that "Article 6(1) grants foreign investors protection against adverse changes in legislation for a period of ten years from the date they made their investment . . . ."[56]

Comparing the respective stabilization provisions in Kazakhstan's and Spain's legislation, Article 6(1) of the 1994 FIL articulates its stability promise far more concretely than Article 44.3 of RD 611/2007, both in specifying a time duration for the stabilization ("period of ten years") and in its scope of protection (against any "change in legislation" that "adversely affected" the investor).[57] Whether a Standard LSC is enforceable may turn on the firmness, clarity, and scope of the stability promise in the applicable legislation.

Given its potential enforceability, a state should provide a Standard LSC and thereby circumscribe its regulatory freedom only if the Standard LSC positively influenced FDI inflows. Otherwise, without the *quid pro quo*, the investor is a free rider at the host state's expense.

2. *Standard LSCs and FDI: Kazakhstan Case Study*

Since gaining independence in 1991, the new Republic of Kazakhstan has prioritized establishing a legal and commercial framework aimed at attracting FDI.[58] In that process, Kazakhstan has introduced, and subsequently repealed, legislation containing Standard LSCs. This presents a unique opportunity to study the potential impact of Standard LSCs on FDI levels. All else being equal, if LSCs attract FDI, one would expect in-

55. AES Corp. and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16, Award, ¶ 253 (Nov. 1, 2013).

56. Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No ARB/05/16, Award, ¶ 333 (July 29, 2008).

57. For the text of Article 44.3 of RD661/2007, see *supra* note 44 and accompanying text.

58. Org. for Econ. Co-operation and Dev. [OECD], *Investment Policy Reviews: Kazakhstan* 39 (1998) [hereinafter OECD, *Kazakhstan 1998*], https://read.oecd-ilibrary.org/finance-and-investment/investment-guides-kazakhstan-1998_9789264163546-en#page40 [https://perma.cc/G9GP-M2P3] (last visited June 9, 2022).

bound FDI levels to fall upon the withdrawal of the LSCs, just as one might anticipate that FDI inflows would increase on the introduction of the LSCs.

In the mid-1990s, the Kazakhstani government enacted several basic laws containing Standard LSCs: the Foreign Investment Law in 1994 (1994 FIL), the Tax Code in 1995, and the Petroleum Law along with a Subsoil Law in 1996. Through these laws, Kazakhstan provided a range of legislative stability guarantees.[59] Most prominently for investors across the board, Article 6(1) of the 1994 FIL, as discussed above, shields otherwise "adversely affected" investors from any "change in legislation" for at least ten years.[60]

Article 57 of the Petroleum Law 2350[61] and Article 71 of the Subsoil Law[62] also provided similar general stability guarantees against subsequent changes in the regulatory framework adopted after the conclusion of state contracts.[63] Similar to Article 6(1) of the 1994 FIL, these LSCs apply by their terms to relevant state contracts. They do not appear to introduce or else require stabilization clauses in the contracts themselves, unlike the LSCs in Chile, Peru, and Colombia. Kazakhstan has

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59. CAMERON, *supra* note 1, at 320.

60. Foreign Investment Law, Dec. 27, 1994 (Kaz.). For a more extensive excerpt of Article 6(1), see *supra* note 53 and accompanying text.

61. Article 57 of the Petroleum Law provides that the "[c]ontractor is guaranteed the protection of his rights in accordance with the legislation of the Republic of Kazakhstan. Changes and additions to legislation that worsen the position of the Contractor shall not apply to Contracts concluded before such changes and additions. The guarantees established by this article do not apply to changes in the legislation of the Republic of Kazakhstan in the field of ensuring defense capability, national security in the field of environmental safety, as well as healthcare." [unofficial translation]. Law No. 2350 of 1996 (Petroleum Law), June 28, 1996 (Kaz.).

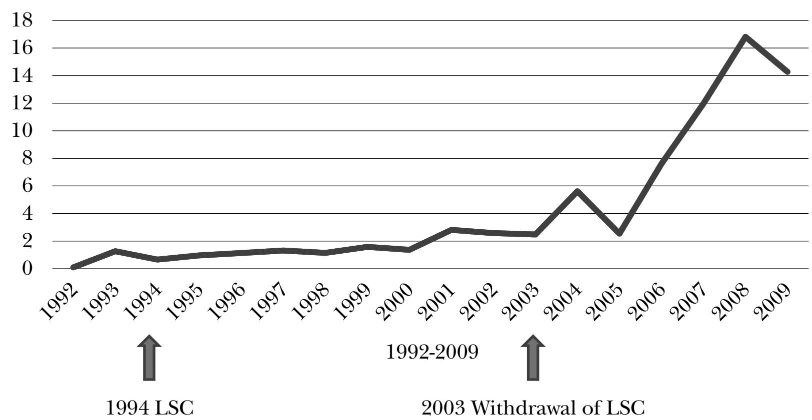
62. Article 71 of the Subsoil Law provided that "[s]ubsurface Users shall be guaranteed the protection of their rights in accordance with legislation. Amendments and additions to legislation, which deteriorate the position of Subsurface Users, shall not apply to the Licences and [. . .] Contracts which were issued and concluded prior to such amendments and additions. contracts concluded prior to the introduction of such amendments and additions.[. . .] The guarantees established by this Article shall not apply to changes in the legislation of the Republic of Kazakhstan concerning providing for the defence capacity, National security, concerning the ecological safety and health protection." [unofficial translation]. Law No. 2828 (Law on Subsoil and Subsoil Use), Jan. 27, 1996 (Kaz.).

63. Law No. 2350 (Petroleum Law), June 18, 1996 (Kaz.); Law No. 2828 (Law on Subsoil and Subsoil Use), Jan. 27, 1996 (Kaz.).

also offered stabilization clauses in their petroleum production sharing agreements with foreign investors.[64] Additionally, between 1995 and 2003, Kazakhstan signed international investment agreements (IIAs) with over thirty countries including the U.S., the U.K., France, Germany, and Italy.[65] Kazakhstan is also a party to the Energy Charter Treaty.[66]

Despite these efforts, as the chart below reflects, Kazakhstan's FDI levels remained low in the years following the spate of legislation, although it did pick up slightly at the end of the decade.[67]

FIGURE 1: FDI NET INFLOWS (US$-BILLIONS)-KAZAKHSTAN



64. CAMERON, *supra* note 1, at 320.

65. U.N. Conference on Trade and Development [UNCTAD], *Investment Policy Hub - Kazakhstan,* https://investmentpolicy.unctad.org/international-investment-agreements/countries/107/kazakhstan [https://perma.cc/9UTB-MEKF] (last visited June 9, 2022).

66. For details about the signing and ratification of the ECT, see The Energy Charter Treaty, https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/ [https://perma.cc/GD4G-WHZR] (last visited June 9, 2022).

67. *See* Kubat Umurzakov, *Investment Climate in Kazakhstan Country Report, United Nations Economic and Social Commission for Asia and the Pacific, Regional Round Table on Foreign Direct Investment for Central Asia*, 4 (Feb. 2003) (stating that "[r]eal GDP declined severely during the 1990-1995 period in all CIS economies – GDP fell by about 40-60 per cent in Kazakhstan, Kyrgyzstan and other Central Asian countries. In the latter half of the 1990s, growth rebounded, but Kazakhstan was negatively impacted by the Asian and Russian crises and fluctuations in prices for export commodities such as energy and metals in 1998-1999").

Source: The World Bank[68]

Beginning in 1999, Kazakhstan's GDP increased due to growth in the petroleum sector, and increased prices on world markets for oil, metals, and grain, which are Kazakhstan's leading exports.[69] Starting in 2003, to protect national and economic interests, Kazakhstan began to dismantle many legislative investor protections, including the LSC in the 1994 FIL.[70]

Instead of inbound FDI levels falling off, as one might expect, between 2004 and 2009, the rate of FDI inflows into Kazakhstan increased by about 25% a year.[71] Sotonye Frank argues that this result indicates that the stabilization guarantees provided by Kazakhstan, including the LSC in the 1994 FIL, did not play any significant role in attracting FDI.[72] Along those lines, one might point conversely to the relatively flat FDI levels in the years following the introduction of the Standard LSC in the 1994 FIL as evidence supporting the same conclusion.

While it may be tempting to draw conclusions from any fluctuation (or the lack thereof) in the state's overall FDI levels at the time Kazakhstan's LSC was introduced and then withdrawn, respectively, the reported FDI levels could have been impacted by any number of governmental measures in addition to the LSC, or by external market events. For example, the flat FDI levels through the 1990s might be better at-

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68. The World Bank, *Foreign Direct Investment, Net Inflows (Bop, Current US$) - Kazakhstan* https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2009&locations=KZ&start=1992&view=chart [https://perma.cc/9TEG-WHV9] (last visited June 9, 2022).

69. *See* Umurzakov, *supra* note 67, at 4–5 (noting that Kazakhstan's GDP "grew 9.6 per cent in 2000, up from 1.7 per cent in 1999. Rising oil production supported by the official opening of the Caspian Pipeline Consortium (CPC) in November 2001 and surge of FDI inflows, despite decline in world prices on mineral resources, drove growth in 2001 to 13.2 per cent. GDP growth in 2002 was expected to again be close to 10 per cent").

70. CAMERON, *supra* note 1, at 321; Sotonye Frank, Stabilisation Clauses and Sustainable Development in Developing Countries, 79–80 (July 2014) (Ph.D. dissertation, University of Nottingham) http://eprints.nottingham.ac.uk/14466/1/PhD_Thesis.pdf.

71. Org. for Econ. Co-operation and Dev. [OECD], *Competitiveness and Private Sector Development: Kazakhstan 2010 (Sector Competitiveness Strategy),* at 19 (May 5, 2011); Frank, *supra* note 70, at 81.

72. Sotonye Frank, *Stabilisation Clauses and Foreign Direct Investment: Presumptions versus Realities*, 16 J. WORLD INV. & TRADE 88, 113–14 (2015).

tributed to "low domestic and export energy prices, [Kazakhstan's] transport constraints and the inability to diversify export markets, and the lack of commercial orientation of energy companies."[73] Additionally, there was an acute problem of non-payment by end-users as the previous exchange mechanisms of the country and the purchasing power of consumers collapsed. "This non-payment proved detrimental to the finances of the gas sector with Kazakhgas, the largest gas pipeline company, reported being owed 24 billion tenges at the beginning of 1997."[74] Conversely, the jump in FDI levels beginning in 2004 might be better explained by the surge in both oil production and prices during that period.[75]

For good measure, Frank also points to a survey of a small group of foreign investors in Kazakhstan conducted in 2010.[76] The survey found that the government's removal of fiscal stability from petroleum contracts had sent a negative signal to investors.[77] The survey also found that, notwithstanding the challenges encountered in Kazakhstan's business environment, 81% of the mere forty-one investors surveyed had indicated they would still have invested if they had a chance to reconsider their investment decision.[78] In Frank's view, this

73. OECD, *Kazakhstan 1998*, *supra* note 58, at 108 (noting that low energy prices and Kazakhstan's infrastructure deficiencies led to "a strong decline in the size and quality of [Kazakhstan's oil and gas] production and consequent inadequate cash generation for maintenance and replacement investment'").

74. *Id.* at 108–09.

75. *See* Serik Orazgaliyev, *State Intervention in Kazakhstan's Energy Sector: Nationalisation or Participation?* 9 J. EURASIAN STUD. 143, 146 (2018) ("Following the privatisation reforms in the 1990s, Kazakhstan's economy prospered, and between 2000 and 2007 the annual GDP growth was consistently above nine percent. This remarkable economic growth was attributed to increased oil exports, which coincided with high oil prices. Oil production doubled within ten years from under 0.8 million barrels per day in 2000 to just over 1.6 million bpd in 2011 (EIA, 2012). This was due to the progress in the development of the two largest fields, namely Tengiz and Karachaganak.").

76. Frank, *supra* note 72, at 114.

77. *See* Ernst & Young's Investor Opinion Survey, *Kazakhstan Investment Attractiveness*, at 6, 8, 13 (2011) [hereinafter Ernst & Young's Investor Opinion Survey, *Kazakhstan 2011*], https://www.mpo.cz/assets/dokumenty/43916/49303/577174/priloha001.pdf [https://perma.cc/R6GJ-UUQH] (last visited June 9, 2022).

78. *Id.* at 6.

statistic supports his conclusion that stabilization clauses play little if any role in influencing the decision to invest.[79]

Such an inference is overstated, as it would recognize stabilization clauses as a factor only if it were always determinative of the decision to invest. As the survey itself indicates, any investment decision is impacted by a complex host of factors such as the state of the country's transport and telecommunications infrastructure, the transparency of the administrative and legal regime, and the cost and skills of local labor, with the security and stability of contracts being but one element.[80] None of these factors—significant as they all may be—are determinative of the decision to invest. According to the survey, in addition to the removal of fiscal stability of petroleum contracts, the investment conditions in Kazakhstan that were perceived to have deteriorated included the increase in the administrative bureaucratic burden, the disproportionate penalization of non-compliance with tax laws, growing nationalization tendencies, corruption, lack of flexibility in the labor market in terms of the ability to bring in qualified foreign labor, and the critical lack of relevant skills in the local workforce.[81] But because most of the small group of forty-one foreign investors surveyed would nonetheless have invested, all of these factors would, by Frank's calculations, have little bearing on their decision to invest.[82] Yet, as reflected by the fact that the survey flags these factors as concerning to the investors, they are important considerations for any foreign investor.

Ultimately, where one is unable to desegregate the impact of the LSC from other factors on FDI levels, it is not possible to reliably draw categorical conclusions on the relationship between the two. After all, it is possible that Kazakhstan's FDI levels might have been even lower than they were in the 1990s had the state not introduced its LSC in 1996, or conversely even higher than they were in the 2000s had the same LSC not been withdrawn in 2003.

79. Frank, *supra* note 70, at 82–83.

80. Ernst & Young's Investor Opinion Survey, *Kazakhstan 2011, supra* note 77, at 8.

81. *Id.* at 13.

82. Frank, *supra* note 70, at 82–83.

3. *The Uncertain Bargain of Standard LSCs*

It is unclear whether the Standard LSC increases FDI, even as it constrains the state's regulatory powers and exposes the state to the risk of attracting liability for adversely impacting foreign investment in its territory. As such, the Standard LSC may be a poor deal for the host state, which could end up bargaining away stability benefits with little proof of return.

In comparison, consider international investment treaties, far more established legal instruments relied upon by states to attract foreign investment. As of 2020, there were nearly 3,300 international investment agreements in place and over 1,000 treaty-based investor-state arbitration cases that have been initiated.[83] In 2019 alone, arbitral tribunals rendered seventy-one substantive decisions in investor–state disputes.[84] Notwithstanding this impressive body of law and the sprawling jurisprudence it has generated, there is little consensus on whether investment treaties attract FDI. The many empirical studies conducted on the question have notoriously yielded inconsistent results.[85] If it is unclear, despite their ubiquity and familiarity, whether investment treaties increase FDI, how likely are LSCs, international investment treaties' exotic cousins, to be known and appreciated by investors? Even if investors were fully apprised of LSCs, it is doubtful that they would be advised to rely solely on Standard LSCs given their limited legal provenance, and the thin and uneven case law on their enforceability. Investors looking to obtain stability guarantees would seek out a more reliable way to access those guarantees, namely

83. U.N. Conference on Trade and Development [UNCTAD], *World Investment Report 2020*, xii (June 16, 2020), https://unctad.org/webflyer/world-investment-report-2020 [https://perma.cc/5BZ3-BZ8J].

84. *Id.*

85. *See, e.g.*, Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397, 399 (2011) (noting that "the results of these various statistical exercises are inconsistent"); Christopher M. Ryan, *Meeting Expectations: Assessing the Long-Term Legitimacy and Stability of International Investment Law*, 29 U. PA. J. INT'L L. 725, 741 (2008) (noting that "empirical studies have found mixed results regarding the link between the BITs and FDI"); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 5 n.11 (2007) ("The literature on [the issue of whether BITs increase FDI] is mixed.").

through the time-tested mechanism of contracting.[86] Contractual LSCs provide one such vehicle for securing stability contracts.[87]

C. *Contractual LSCs*

The proposed taxonomy characterizes a Contractual LSC as an LSC that grants investors stability guarantees through contract, often conditional on meeting particular investment profile criteria set out in the legislation. The Contractual LSC dates back to at least 1974, when Chile introduced its first LSC in Decree-Law 600.[88] The LSC did not, however, gain traction until the 1990s after Chile revised and updated Decree-Law 600.[89] Around the same time, Peru, Ecuador, Panama, Venezuela, and later, Colombia, enacted legislation containing Contractual LSCs.[90] Halfway across the globe, Azerbaijan was also including Contractual LSCs in its legislation. To reassure investors after its post-communist transition, the Azerbaijan government provided petroleum agreements with stability provisions to be submitted to and approved by its parliament in certain cases.[91] Following in Azerbaijan's footsteps, Sierra Leone introduced LSCs, which stabilized major petroleum and mining agreements that were submitted to its parliament for approval.[92] These examples show that a broad range of developing countries have experimented with Contractual LSCs, providing insights into their success.

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86. *See infra* Appendix, pt. III and accompanying text.

87. *See infra* Part II.C.

88. *See infra* Part II.C.2.(ii).

89. *Id.*

90. Peter D Cameron, *Stability of Contract in the International Energy Industry*, 27 J. ENERGY & NAT. RES. L. 305, 312 (2009). *See also supra* Part II.A.

91. Al Faruque, *supra* note 9, at 106 n.56 (noting that "Azerbaijan has no legislation on investment law on the energy sector and PSCS do not have the legal status of a contract, but each agreement signed requires approval of the Parliament prior to its implementation and has the status of the law of Azerbaijan. An important provision for the ratification law for each PSC is that specific guarantees are given regarding the precedence of the PSC over any future amendments or new legislation").

92. *Id.*

1. *The Enforceability of Contractual LSCs*

The core distinction between Contractual and Standard LSCs is that the former grants stability guarantees through investment contracts, which must typically be authorized or granted by the government. For example, in Chile, contracts with stabilization provisions were generated under Decree-Law 600, which contained a Contractual LSC, predicated on the relevant investments being reviewed and approved by the Foreign Investment Committee (FIC), an agency established under the legislation.[93] Stability guarantees provided under a Contractual LSC are not just promised in the legislation, but are expressed in the resulting investment contract itself. The Contractual LSC thus leads to a contractual stabilization clause, a familiar and reassuring concept to investors.

Stability contracts are ubiquitous, and far more familiar to both investors and states than LSCs.[94] Indeed, when presented with LSCs, investors will often still reach for stabilization clauses in their contracts. For instance, UNCTAD noted in its discussion of Columbia's LSC that "[m]ajor investors in regulated industries (including oil and gas, mining, power generation and infrastructure concessions) will seek to negotiate development or concession agreements with the government in any event."[95] This makes eminent sense since "arbitral practice has explicitly and repeatedly confirmed the validity of stabilization clauses in the past" in relation to "modern contracting practice" and "contractual stabilization techniques."[96] As the tribunal in *Aguaytia v. Peru* noted of the contractual stabilization clause generated by the Peru LSC:

> It freezes the laws, rules and regulations applicable to it, as they were in existence at the time the Agreement was concluded. This means that no new law may be passed which would state that [certain rules

93. *See infra* note 135 and accompanying text.

94. Halabi, *supra* note 4, at 290; O'Connor & Franck, *supra* note 4, at 1631; DOLZER, *supra* note 5, at 192 (2018).

95. U.N. Conference on Trade and Development [UNCTAD], *Investment Policy Review: Colombia*, 23 (July 2006) [hereinafter UNCTAD, *Colombia 2006*], https://unctad.org/system/files/official-document/iteipc200511_en.pdf [https://perma.cc/5JQG-2BAK] (last visited June.9, 2022).

96. Gaetan Verhoosel, *Foreign Direct Investment and Legal Constraints on Domestic Environmental Policies: Striking a "Reasonable" Balance Between Stability and Change*, 29 LAW & POL'Y INT'L BUS. 451, 455–56 (1998).

in existence then] would no longer apply to the Claimant.[97]

The legislative blessing of stability contracts through Contractual LSCs may elevate the stability guarantees in the resulting contracts above those in standalone stability contracts. Some commentators have even offered that the deliberate legislative approval of these contracts means that they "enjoy a stronger legal platform than stabilisation clauses."[98]

Consistent with such layered protection, tribunals have found Contractual LSCs valid because of the reinforcing effect of the various expressions of stability commitment by host states. In *Greentech Energy v. Italy*, the claimants initiated arbitration under the Energy Charter Treaty (ECT) against Italy for enacting measures they claimed diminished the incentives, including premium tariffs, that the government had previously provided to Photovoltaic (PV) facility operators pursuant to Legislative Decree No. 387.[99] The tariff incentives were operationalized through a series of "Conto Energia" (Energy Account) ministerial decrees, and paid by GSE, a state-owned company that confirmed the right to a specific tariff rate in both a letter and a contract entered into with the qualified investor.[100] Claimants alleged that their expectation that the tariff incentives would be stabilized for twenty years were legitimately premised on various state representations, including in:

(i) the *Conto Energia* decrees, each of which specified certain tariff rates for a twenty-year period;
(ii) the GSE Agreements, which also specified certain tariff rates for certain PV facilities for a twenty-year period;

97. Aguaytia Energy LLC v. Republic of Peru, ICSID Case No ARB/06/13, Award, ¶ 95 (Dec. 11, 2008).

98. Cameron, *supra* note 90, at 312 (quoting D E Vielleville & B S Vasani, *Sovereignty over Natural Resources Versus Rights under Investment Contracts: Which One Prevails?*, 5(2) Transnat'l Disp. Mgmt. 1, 14 (2008)). *But cf.* Al Faruque, *supra* note 9, at 106. Of course, since LSCs may be withdrawn unilaterally by the state at any time, only investments established while the Contractual LSC is in place would benefit from the added protection. The investor may not necessarily be able to rely on Contractual LSCs for its future investments.

99. Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy, SCC Case No. V 2015/095, Final Award (Dec. 23, 2018).

100. *Id.*

(iii) the GSE letters informing PV operators of their eligibility under particular *Conto Energia* decrees;
(iv) declarations of and publications by Italian national and regional authorities and officials regarding the *Conto Energia* regime; and
(v) the declared purposes and policies underlying the *Conto Energia* regime.[101]

The *Greentech* claimants compared their circumstances to *Masdar*, discussed above, in which the tribunal unanimously held that Spain made a specific commitment that investors' plants would benefit from certain incentives throughout their operating lives.[102] The *Greentech* claimants argued that "Italy's commitments to PV investors are '*significantly stronger and more specific*' than those which the Masdar tribunal found Spain to have made" in part because "*Spain did not use contracts* under its incentive regime, whereas each eligible PV producer benefitting from the *Conto Energia* regime entered into GSE Agreements providing for an exact tariff rate, fixed for twenty years."[103]

The *Greentech* claimants also highlighted that notwithstanding there being "*no specific contractual arrangement* like the GSE Agreements," the tribunal in *Micula v. Romania* had found that Romania defeated legitimate expectations by offering a ten-year tax holiday to investors only to revoke them after less than five years.[104] The claimants argued "that their case presents an even stronger showing of legitimate expectations."[105] A majority of the *Greentech* tribunal agreed, noting that given the specificity and contractual nature of the assurances Italy offered, "those assurances bear the hallmarks of . . .

101. *Id.* ¶ 408. To illustrate the specificity of the representations, the claimants pointed to the GSE agreements as an example, one of which provided that "[f]or a 20-year period as of 9 February 2011, the incentive tariff, in regular installments in the applicable currency, to be recognized to the photovoltaic plant mentioned in this Agreement, is equal to 0,3460 Euro/kWh." *Id.* ¶ 410 (citations omitted).

102. *Id.* ¶ 412; *see* Masdar Award, *supra* notes 43 and 48 and accompanying text.

103. Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy, SCC Case No. V 2015/095, Final Award, ¶ 413 (Dec. 23, 2018) (emphasis added).

104. *Id.* ¶ 411 (emphasis added).

105. *Id.*

'an agreement, in the form of a stabilisation clause or otherwise.' "[106] The tribunal concluded that Italy had breached its obligation to provide fair and equitable treatment (FET) of foreign investments under the ECT.

The contractual form of the stability guarantee may also bolster the investor's claims under an umbrella clause (and not just the FET clause) in an investment treaty. Recall that the umbrella clause in the ECT extends to "any obligations [the host state] has entered into with an Investor or an Investment of an Investor of any other Contracting Party."[107] The *RREEF* tribunal opined that:

> the phrase 'it has entered into' seems to refer exclusively to bilateral relationships existing between the Respondent and the Claimants, to the exclusion of general rules; and the Spanish . . . or French [articulations of the umbrella clause] . . . lead to the conclusion that the last sentence of Article 10(1) ECT *only applies to contractual obligations*.[108]

Likewise, the tribunal in *Noble Ventures v. Romania* held, with respect to a similarly-worded umbrella clause, that "it is difficult not to regard this as a clear reference to investment contracts."[109] Other tribunals, like the *Greentech* tribunal, choose instead "to interpret 'obligations' referred to in the ECT's umbrella clause as sufficiently broad to encompass not only contractual duties but also certain legislative and regulatory instruments that are specific enough to qualify as commitments to identifiable investments or investors."[110] The point remains that while all tribunals upholding the umbrella clause would apply it to contractual obligations, not all will apply it to legislative promises.

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106. *Id.* ¶ 453.

107. *See* ECT, *supra* note 21 and accompanying text (quoting umbrella clause in Article 10(1) of the ECT).

108. RREEF Infrastructure (G.P.) Ltd. and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Republic of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 284 (Nov. 30, 2018) (emphasis added).

109. Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award ¶ 51 (Oct. 12, 2005), 16 ICSID Rep. 216 (2012).

110. Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR, and NovEnergia II Italian Portfolio SA v. Italy, SCC Case No. V 2015/095, Final Award, ¶ 464 (Dec. 23, 2018).

For all of these reasons, then, Contractual LSCs are far more likely to be welcomed by investors than Standard or Aspirational LSCs.

2. *The Forward-Looking Nature of Contractual LSCs*

Contractual LSCs enable host states to put in place an administrative system for approving the resulting stability contracts promised in legislation. This system permits the host state to monitor and keep precise track of the number and value of the stability contracts generated under—and therefore the investments associated with—the Contractual LSC. The unique ability to gather such specific data provides the host state with pertinent information to evaluate the utility and desirability of the Contractual LSC. The tracking of these investments also enables the host state to better anticipate potential investor claims against future legislation. A host state may also target certain kinds of investments by specifying the criteria for eligible investments in legislation. Taken together, these features of the Contractual LSC empower the host state to make a much more informed decision on whether to maintain, adjust, or even repeal the LSC.

It is true that a host state could put in place a similar administrative system for Standard LSCs, and further that the increased stabilizing effect of Contractual LSCs would expose the state to greater liability risks. Even so, Contractual LSCs' enhanced stability represents a stronger draw for investors, and best defuses the threat of disingenuous investors relying *ex post facto* on LSCs in disputes with host states.

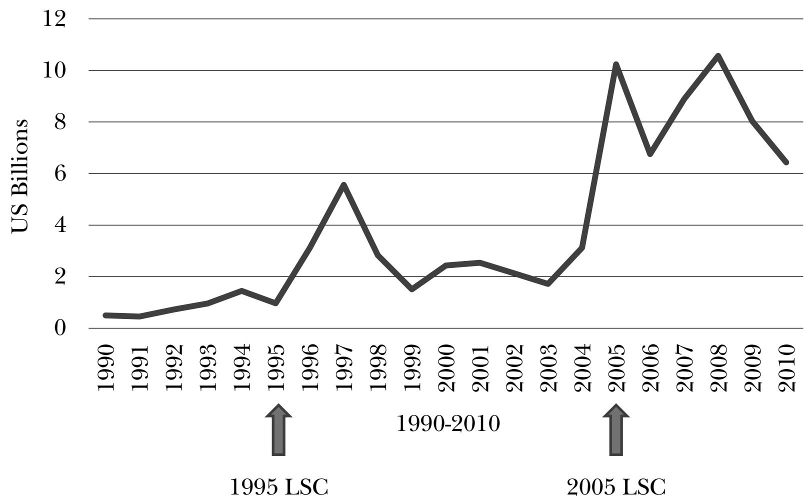
a. *Contractual LSC Case Studies*

The case studies of Columbia, Chile, and Peru highlight Contractual LSCs that extend stability guarantees through government-approved stability contracts with specified investment criteria. The concomitant system for governmental approval in each state may, in turn, offer direct evidence on the relationship between the Contractual LSCs and the foreign investments established under them.

i. *Colombia*

Colombia first experimented with LSCs in 1995 in a limited way. Article 169 of Law 223 authorized the government to enter into contracts with investors to stabilize tax regulations.[111] Law 223 constituted part of the national tax regime and was enacted to facilitate deep tax collection in Colombia.[112] This LSC was unsuccessful in attracting investment. Fewer than ten stability contracts were executed over the five years the LSC was in force, even as FDI levels rose over the period as a result of an extensive national privatization program.[113]

FIGURE 2: FOREIGN DIRECT INVESTMENT, NET INFLOWS (US$-BILLIONS)-COLOMBIA



Source: The World Bank[114]

When the former president Álvaro Uribe Vélez assumed office in 2002, he prioritized increasing FDI inflows through a

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111. *See* Alvaro Pereira, *Legal Stability Contracts in Columbia: An Appropriate Incentive for Investments: Historical Causes and Impact Analysis of Law 963 of 2005*, 12 RICH. J. GLOBAL L. & BUS. 237, 254–55, 255 n.104 (2013).

112. *Id.*

113. *Id.* at 255–56; *see also* UNCTAD, *Colombia 2006*, *supra* note 95, at 4 (illustrating the FDI growth of Colombia during its privatization program in the mid-to-late 1990s).

114. The World Bank, *Foreign Direct Investment, Net Inflows (Bop, Current US$) - Colombia [hereinafter The World Bank, Columbia FDI]*, https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2019&locations=CO&start=1976 [https://perma.cc/TA7P-K2LY] (last visited June 9, 2022).

policy he called "Convianza Inversionista" (Investors' Reliance).[115] The following year, a survey conducted by UNCTAD of foreign investors in Colombia indicated that the high level of legal instability arising from the frequent issuance of regulations and administrative rulings impacting day-to-day business, was the most important FDI determinant after the potential local market size.[116] To address such instability concerns, the Colombian government enacted Laws 962 and 963 in 2005. Law 962 simplified administrative procedures for foreign investors. Law 963 introduced an LSC authorizing stabilization clauses but through contract.[117] Under Law 963, investments of over U.S. $1.2 million could obtain contractual protection from adverse changes in national legislation through CSCs. Law 963 designates particular sectors as eligible for such treatment, although any activity outside these sectors could be approved by a special committee convened for this purpose.[118] Law 963 also adopts a negative approach, meaning that the Colombian government is authorized to stabilize any regulation, unless excluded by law.[119]

In contrast to the 1995 LSC, the 2005 LSC (Law 963) generated sixty-six stability contracts, between 2006 and 2010 worth over U.S. $12.731 billion, with the vast majority (91%) established between 2008 and 2010, according to an OECD study.[120] A separate study reported even more elevated numbers, stating that the 2005 LSC (Law 963) generated an average of twenty-five stability contracts a year between 2006 and 2012, with the vast majority (88%) established between 2008 and 2010.[121] Also, overall FDI inflows increased from $3.1 billion in 2004 to a peak of $10.6 billion in 2008, with the average

115. Pereira, *supra* note 111, at 250, 258–59.

116. UNCTAD, *Colombia 2006*, *supra* note 95, at 46, 67.

117. *Id.* at 39.

118. *Id.* at 22–23.

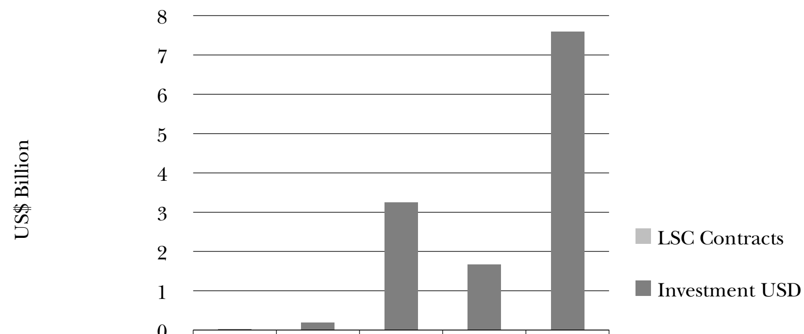
119. *Id.* at 23 n.31

120. *See* Org. for Econ. Co-operation and Dev. [OECD], *Investment Policy Reviews: Colombia*, at 90–91 (2012) [hereinafter OECD, *Colombia 2012*], https://read.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-colombia-2012_9789264167742-en#page1 [https://perma.cc/PQ2D-Z956] (last visited June 9, 2022).

121. Pereira, *supra* note 111, at 264, 271.

FDI level from 2006–2010 going up by 105% as compared to that from 2001–2005 (Figure 2).[122]

FIGURE 3: COLOMBIA'S 2005 LSC (NUMBER OF CONTRACTS & INVESTMENT US$-BILLIONS)



	2006	2007	2008	2009	2010
LSC Contracts	1	5	20	22	18
Investment USD	25,300,0	195,100,	3,253,20	1,667,50	7,591,10

(2006-2010)

Source: OECD Investment Policy Review: Colombia (2012)[123]

Other measures have been credited with increasing FDI inflows into Colombia towards the end of that decade, including the Colombia Productive Transformation Program adopted in 2008 to accelerate growth of value-added sectors, and the initiatives undertaken by Proexport (Colombia's investment promotion agency) to streamline administrative procedures in 2009 and to produce a comprehensive guide on "doing business and investing in Colombia" in 2010.[124]

Over this time period, there were only a handful of international investment agreements in force, namely the Andean Community Treaty, the Treaty on Free Trade between Colombia, Mexico, and Venezuela (G-3 treaty), the bilateral investment treaties (BITs) Columbia concluded with Spain in 2005

122. As discussed below, overall FDI figures may, however, be of limited utility in determining whether LSCs are successful in attracting foreign investment. *See infra* notes 124-25 and accompanying text.
123. OECD, *Colombia 2012, supra* note 120, at 91.
124. *Id.* at 92–97.

(replacing a 1995 BIT), and with Chile in 2000, and the Central America Northern Triangle (Guatemala, Salvador, and Honduras) Free Trade Agreement.[125]

Against this background, foreign investors in Colombia entered into at least sixty-six stability contracts relying on the 2005 LSC between 2006 and 2010 constituting investments worth over U.S. $12.7 billion.[126] More critically for this article's purposes, there is meaningful investment data here that is tied directly to the 2005 LSC. Indeed, consider the revealing granularity of the data on these sixty-six stability contracts:

125. UNCTAD, *Colombia 2006*, *supra* note 95, at 22; *see also* OECD, Colombia 2012, *supra* note 120, at 99 (listing the free trade agreements concluded by Colombia).

126. OECD, *Colombia 2012*, *supra* note 120, at 90–91.

TABLE 1: LEGAL STABILITY CONTRACTS 2006-10 (COLOMBIA)

Year	Economic Sector	Number of Contracts	Investment (U.S.D. million)
2006	Manufacturing industry	1	25.3
2007	Wholesale and retail trade	2	165.1
	Manufacturing industry	3	30.0
2008	Real estate, leasing and business activities	2	556.3
	Wholesale and retail trade	1	49.2
	Construction	1	38.0
	Mining and quarrying	1	9.8
	Hotels and restaurants	3	91.3
	Manufacturing industry	8	927.7
	Other community, social, and personal services	1	27.7
	Electricity, gas and water supply	2	1253.2
	Transport, storage and communications	1	300.0
2009	Wholesale and retail trade	2	48.0
	Construction	1	78.0
	Manufacturing industry	12	241.2
	Financial intermediation	4	622.4
	Social and health services	1	0.0
	Electricity, gas and water supply	1	38.8
	Transport, storage and communications	1	603.1
2010	Real estate, leasing and business activities	1	20.6
	Wholesale and retail trade	2	46.3
	Mining and quarrying exploitation	1	2762.5
	Manufacturing industry	9	243.0
	Financial intermediation	1	797.5
	Electricity, gas and water supply	2	2655.2
	Transport, storage and communications	2	1066.0
Total		66	12731.9

Source: OECD Investment Policy Review: Colombia (2012)[127]

127. *Id.* at 91.

A comparison of the 2005 LSC-specific FDI (Figure 3) with Colombia's overall FDI (Figure 2) yields additional insights. While the latter reflects overall FDI declining from 2008 to 2010, and to levels well below that in 2005, the 2005 LSC-specific FDI data indicates that FDI levels associated with the LSC increased from 2006 to its highest level in 2010. Although there was a slight dip in LSC-associated FDI in 2009 from 2008, the LSC-associated FDI level in 2009 remained well above those in 2006 and 2007.

The contrast between overall and LSC-associated FDI levels illustrates how ill-advised it is to look to the former as a proxy for the latter. Sotonye Frank relied on overall FDI levels in Colombia (in Figure 2) to conclude that stability contracts did not impact FDI levels given that between 2005 and 2010, with the exception of 2008, FDI inflow into Colombia was at its highest level in 2005 before the first stability contract was signed.[128] In contrast, the 2005 LSC-associated FDI data (in Figure 3) indicates that, consistent with the ramp-up time expected with any new initiative, FDI levels attributable to the stability contracts rose between 2006 and 2010, peaking at the end of the stretch in 2010.[129] From the latter and more germane perspective, the 2005 LSC presents a far more successful initiative in Colombia's efforts to attract FDI.

Likewise, the LSC-associated data more reliably indicates that more investors relied on the 2005 LSC than the 1995 LSC. This contrast between the performance of what appears to be two similarly-structured LSCs brings home the point that the complicated business of attracting foreign investment turns on a complex interaction of multiple factors. Further, even an LSC that is successful at one point in time may well be regarded as unnecessary later when investments in that host state stabilize. In 2012, the Colombian Congress approved Law 1607 (tax reform), which expressly repealed Law 963 of 2005 and apparently did away with stability contracts.[130] In explaining this course of action, commentators have offered that the Co-

128. Frank, *supra* note 72, at 111.

129. *See supra* Figure 3.

130. Francisco Azuero Zúñiga et al., *Legal Stability Contracts in Colombia: An Analysis from Information Economy and Political Economy*, 27 INNOVAR, no. 63, 2017, at 125, http://www.scielo.org.co/scielo.php?script=Sci_abstract&pid=S0121-50512017000100125 (last visited June 9, 2022).

lombian government had established the 2005 LSC with the aim of "maximizing investment levels in the short term by offering tax stability, though it was known this measure could not be sustainable over time, which can be understood as a problem of intertemporal consistency of the tax authority."[131]

Ultimately, for a host state to make an informed decision on whether and when to offer and maintain LSCs, it cannot just look to overall FDI levels. Evaluating the merit of any LSC requires the kind of targeted information provided through the governmental approval mechanism accompanying Contractual LSCs.

ii. *Chile*

Inbound FDI in Chile virtually came to a halt after the government nationalized major copper transnational corporations in the early 1970s with little or no compensation.[132] In 1974, the government enacted Decree-Law 600 (DL 600), which opened the door again to foreign capital and provided foreign investors the right to non-discriminatory treatment and to transfer capital and net profits overseas.[133] Among other features, the law contained innovative LSCs that furnished stabilization guarantees via contract. Article 7 authorized state contracts fixing the corporate income tax rate at 42% (which was higher than the then standard 35% rate that might fluctuate) for ten years. Article 8 also permitted state contracts stabilizing the VAT and charges for imported machinery and equipment, pending the establishment of the investment.[134] Foreign investors were permitted to enter into such contracts upon the review and approval of their proposed investments by the Foreign Investment Committee (FIC), an

131. *Id.* Also, Colombia's overall FDI levels increased dramatically in 2011 and stayed at around those elevated levels for a few years. The World Bank, *Columbia FDI*, *supra* note 114. That fact might perhaps additionally explain why Colombia no longer saw the LSC as necessary.

132. U.N. Conference on Trade and Development [UNCTAD], *Best Practices in Investment for Development: How to Attract and Benefit from FDI in Mining: Lessons from Canada and Chile,* 89 (2011) [hereinafter UNCTAD, *Chile 2011*], https://unctad.org/system/files/official-document/diaepcb2010d11_en.pdf [https://perma.cc/EA7X-N2CV] (last visited June 9, 2022).

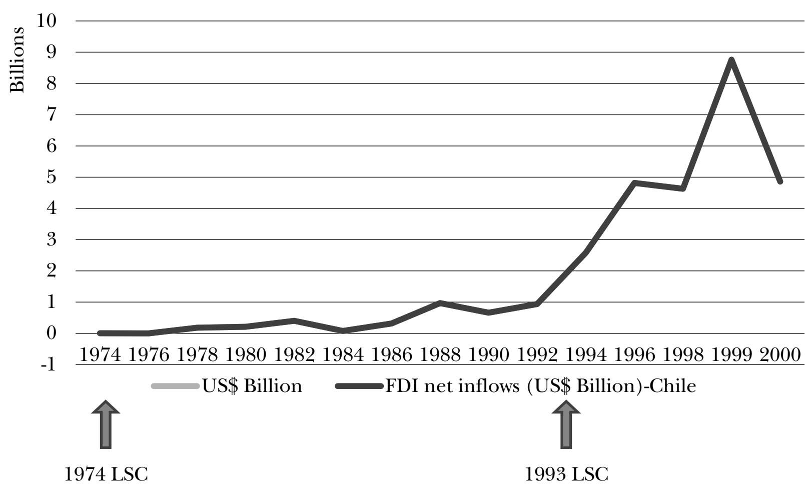
133. *Id.* at 62.

134. *Id.* at 65.

agency established under Decree-Law 600.[135] Notwithstanding the passage of Decree-Law 600, FDI did not pick up until the late 1970s, and even then only in a limited fashion.[136]

Things took a positive turn soon after 1993, when DL 600 was amended to offer additional benefits to foreign investments over U.S. $50 million pursuant to a new Article 11 bis. For the mining industry, such benefits included permission to hold accounts in foreign currency, an extension of the 42% fixed income tax under Article 7 for a period of twenty years, and the stabilization of other tax incentives also for up to twenty years.[137] FDI levels increased in the latter half of 1990, going from U.S. $1.034 billion in 1993 to U.S. $4.815 billion in 1996, to its peak of U.S. $8.761 billion in 1999.[138]

FIGURE 4: FDI NET INFLOWS (US$-BILLIONS)-CHILE



Source: The World Bank[139]

135. Rodrigo Polanco Lazo, *Legal Framework of Foreign Investment in Chile*, 18 LAW & BUS. REV. AM. 203, 210 (2012).

136. UNCTAD, *Chile 2011*, *supra* note 132, at 56; *see also supra* Figure 1.

137. UNCTAD, *Chile 2011*, *supra* note 132, at 65.

138. The World Bank, *Foreign Direct Investment, Net Inflows (Bop, Current US$) - Chile* [hereinafter The World Bank, *Chile FDI*], https://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2000&locations=CL&start=1973&view=chart [https://perma.cc/8J9N-NHKU] (last visited June 9, 2022); *see also infra* Figure 4.

139. The World Bank, *Chile FDI, supra* note 138.

FDI once again became the dominant driver of development of Chile's mining industry, the success of which is attributed in part to the amended LSCs.[140] A World Bank analysis of Zambia's copper mining industry not only reports that the Chilean 1993 LSC's "invariability guarantee is credited with the surge in FDI that took place after the law was passed," but that it also "influenced the mining companies to negotiate similar tax stability clauses in their Development Agreements with the Zambian government."[141] In 2006, DL 600 was amended again to adjust for the introduction of a new specific mining tax. As revised, Article 11 ter of DL 600 allowed investments equal or higher than U.S. $50 million to fix this new mining tax rate for fifteen years, and to avoid being subject to any increase in start-up or organizational licensing expenses. However, to be eligible, the investor had to opt out of any other stability agreements it was party to under Articles 7 and 11 bis.[142]

From 1974 until 2011, the majority of foreign investors in Chile chose to rely on DL 600.[143] One report documents that

140. UNCTAD, *Chile 2011*, *supra* note 132, at 89–90 (counting the amended LSCs as among the important policy tools used to achieve Chile's goal of attracting FDI). Another significant factor may have been the appreciable number of BITs that Chile signed with countries across the globe in the 1990s. Lazo, *supra* note 135, at 221–22. *But cf.* Frank, *supra* note 72, at 107–08. In challenging the UNCTAD study's conclusion that LSCs attract FDI, Frank states that "the study acknowledged [that] a significant number of mining investors in Chile do not have stability contracts." *Id.* However, we are not able to find any such acknowledgement in the study; it certainly is not on the page (page 62) that Frank cites to for that proposition. Frank also attributes the rise in FDI levels instead to the fact that Chile "already possesses the key determinants of FDI location in addition to its liberal fiscal regime." *Id.* However, many of these other key determinants are longtime features of Chile's investment profile that predate the 1993 amendment of Decree–Law 600, and do not explain why FDI levels rose appreciably over the period from 1994 to 1996 as compared to 1991 to 1993. *See* UNCTAD, *Chile* 2011, *supra* note 132, at 89–90 (discussing the various policy tools Chile used to increase FDI levels).

141. The World Bank, *What Would it Take for Zambia's Copper Mining Industry to Achieve its Potential?* 21 (June 2011) [hereinafter The World Bank, *Zambia 2011*], http://documents1.worldbank.org/curated/en/461971468170956129/pdf/623780ESW0Gray0e0only0900BOX361532B.pdf (last visited June 9, 2022).

142. *Id.*

143. Lazo, *supra* note 135, at 210; *Trade Policy Review: Chile, Report by the Secretariat*, WTO. WT/TPR/S/315, at 40 (May 5, 2015), https://

by 2009 FDI inflow into Chile worth nearly U.S. $75 billion had been funneled through DL 600, representing 67.3% of the foreign capital inflow into Chile during that period.[144] Chile had the ability to monitor the investments directly relying on DL 600—and thus evaluate the utility of DL 600—because of the centralized administrative system set up under the legislation. All investments under DL 600 required prior approval from the FIC, "the only agency authorized to accept the entry of foreign capital received under this decree."[145] The FIC established the terms and conditions of the respective contracts, including their stability provisions, and if the investment was approved, a foreign investment contract would be executed with the Republic of Chile. The oversight of these investments took place at a high level, with "the FIC comprised of the Minister of Economy, Development and Reconstruction (who chaired the Ministry of Finance), Minister of Foreign Affairs, the Minister for Planning and Cooperation, the President of the Central Bank of Chile, and the Minister of respective sector, in the case of investment applications linked with ministries not represented on the committee."[146]

Although the procedure under DL 600 involved additional bureaucracy and costs for investors, its framework allowed foreign investors to make investments in the country under a stable tax regime, which not only encompassed income tax and VAT but also mining tax and customs duties on imports of capital goods for the development of mining projects.[147] That framework also yielded the important benefit of allowing the government to track the investments arising under DL 600, giving unusual insight into their status, and thereby a unique ability to adjust its stability incentives accordingly. Like Colombia, Chile's first stab at the LSC in 1974 led to less than inspired results, and in 1993, the government retooled DL 600 with revised stability guarantees that are

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www.wto.org/english/tratop_e/tpr_e/tp415_e.htm [https://perma.cc/3YBE-9X7Z] (noting that until 2011, over US$82 billion constituting 56.5 percent of Chile's capital inflow entered Chile under the DL 600 regime).

144. Lazo, *supra* note 135, at 210.

145. *Id.*

146. *Id.*

147. Juan Pablo Menna, *Tax Stability in the Mining Industry*, LEXOLOGY (Nov. 29, 2021), https://www.lexology.com/library/detail.aspx?g=56b017b7-5bbb-4473-8aea-594dddde69c9 [https://perma.cc/CEC8-EQ45].

credited by both UNCTAD and World Bank Reports with helping to boost FDI levels in the years that followed.[148] Also like Columbia, when Chile determined that DL 600 had run its course and was unnecessary given its strengthened and stable investment conditions,[149] it withdrew the LSC. In 2014, the Chilean government enacted Law No. 20,780, a comprehensive tax reform that abrogated DL 600.[150] The next year, the government enacted Law 20,848 (the New Regime), establishing a new legal framework for FDI in Chile starting January 1, 2016.[151]

Chile's experience with its Contractual LSC parallels Colombia's in presenting a complex investment portrait of a non–linear relationship between the LSC and FDI that ranges over time. At the height of its success, Chile's Contractual LSC appeared not only to exert a considerable pull on investors and investments, but also inspire other developing host states to offer similar hybrid stability guarantees. At the same time, the ability the government had through FIC to monitor the quantity and quality of investments established under DL 600 put Chile in a better position to make the necessary adjustments to its LSC, including both the successful enhancement of the instrument in 1993 and its retirement in 2014 when the country's investment profile stabilized.

148. *See supra* notes 142–44.

149. *See* Martín Aylwin Fernández, *Regulating Foreign Direct Investment in Chile: Is the New Regime a Step towards the Right Track? A Comparative Analysis after a Year of Application*, 33 ICSID REV. no. 3, 2019, at 702, 712. Fernandez also refers to a statement in the legislative record indicating that the stability incentive available under Article 7 was accessed by only one company, offering it as the second reason for the repeal of DL 600. *See id.* at 711. The authors are unable to verify the authority cited by Fernandez, but note that the statement is contrary to the findings in UNCTAD's 2011 Chile report, which notes that "[m]any foreign investors opted for this regime [under Article 7], paying a slight premium in corporate tax rates to protect themselves against future taxes or royalties and to secure the use of accelerated depreciation and other tax incentives." *UNCTAD, Chile 2011*, *supra* note 132, at 65. At any rate, the stabilization regime under DL 600 ranged far beyond Article 7, turning significantly on Articles 8, 11 bis and 11 ter.

150. Menna, *supra* note 147.

151. *Id.* Under the new foreign investment law, foreign investors continued to enjoy the rights and obligations granted in existing contracts under the DL600 until January 1, 2016. After January 1, 2016, foreign investors would have had the opportunity to enter into four–year contracts with the Chilean government as outlined in the DL 600 with limited benefits. *Id.*

iii. *Peru*

In the 1980s, Peru experienced economic turmoil, civil upheavals, and political instability. When the former president Alberto Fujimori assumed office in 1990, he adopted extensive structural reforms as a part of his economic reform program to attract and increase FDI in–flows.[152] In that decade alone, the government aggressively privatized its economy and divested most of its holdings in the fisheries and financial sectors as well as more than two thirds of its holdings in mining, oil, and telecommunications.[153] To eliminate any legal or administrative hurdles hampering private initiatives, the Peruvian government in 1991 enacted two laws: Legislative Decree 662 (the Law to Promote Foreign Investment) and Legislative Decree 757 (the Framework Law for Growth in Private Investment).[154] Under Law 662, the Peruvian government may enter into a contract with an investor that assures national treatment and stabilizes for ten years sectoral regulation, foreign exchange matters, and income tax payable on dividends or other forms of profit–sharing. To qualify for such a stability agreement, an investor must invest at least (i) U.S. $2 million; or (ii) U.S. $500,000 and either create twenty jobs or generate U.S. $2 million worth of exports over the first three years.[155] Unlike the LSC in Colombia,[156] Law 662 adopts a predetermined list of favorable matters, and there is no negotiation of the contract's provisions, drafting, or duration.[157]

Between 1991 and September 1998, Law 662 generated 230 tax stabilizing contracts.[158] From an annual average of U.S. $30 million in the 1980s, FDI inflow rose to around U.S.

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152. *See* Suzanne Wilhelm, *Peru and the Myth of Independent Statehood,* 15 THIRD WORLD LEGAL STUD. 153, 160 (1999) (noting that Fujimori's program for economic reform involved three phases: first, 'shock therapy' to stabilize the economy; second, structural reforms to attract foreign investment; and third, massive privatization and debt restructuring).

153. U.N. Conference on Trade and Development [UNCTAD], *Investment Policy Review*: *Peru,* 3 (2000) [hereinafter UNCTAD, *Peru 2000*], https://unctad.org/system/files/official-document/iteiipmisc19_en.pdf [https://perma.cc/2YJ8-T4GQ] (last visited June 9, 2022).

154. Wilhelm, *supra* note 152, at 162.

155. UNCTAD, *Peru 2000, supra* note 153, at 21.

156. *See supra* Section II.C.2.a.i.

157. UNCTAD, *Colombia 2006, supra* note 95, at 23.

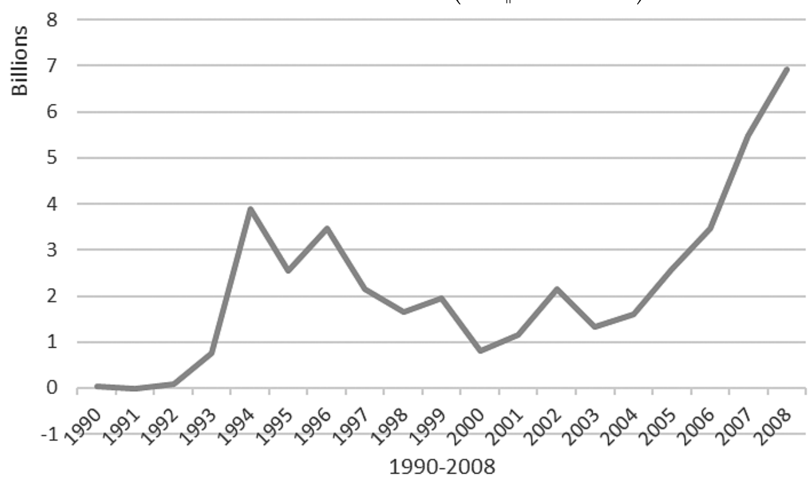
158. Wilhelm, *supra* note 152, at 162.

$2 billion per annum in the second half of the 1990s.[159] By 1996, Peru was one of the top ten recipients of FDI among developing states, and in 1998, the FDI inflows into Peru were the sixth largest in Latin America.[160] Overall, some thirty-five percent of registered FDI inflows into Peru in the 1990s came in through the government's privatization program.[161]

In September 2000, a new law (Law No. 27341) covering the stability agreements established under DL Nos. 662 and 757 was enacted that stabilized the income tax payable on dividends at two percentage points above the applicable rate. In addition, to qualify for a stability agreement, an investor now had to invest at least U.S. $5 million (U.S. $10 million in mining and hydrocarbons), as opposed to the earlier U.S. $2 million threshold.[162] Following its revision in 2000, and as Peru's policy framework has stabilized, investors' interest in the LSC waned, although Law 662 continued to generate stability contracts, albeit at a slower pace.[163] Between 2000 and 2008, investors relied on Law 662 to establish 174 stabilizing contracts for investment projects worth over U.S. $5.2 billion.[164] In total, more than 400 stability contracts were generated under Law 662 between 1991 and 2008. The fact that such a significant number of tax stabilization contracts were concluded pursuant to Law 662 suggests that the LSC played an instrumental part in promoting foreign investment in Peru.

159. UNCTAD, *Peru 2000*, *supra* note 153, at 3.
160. *Id.* at 3.
161. *Id.*
162. *Id.* at 21.
163. *See* Org. for Econ. Co-operation and Dev. [OECD], *Investment Policy Reviews: Peru* 29 (2008), https://read.oecd-ilibrary.org/finance-and-investment/oecd-investment-policy-reviews-peru-2008_9789264053755-en#page1 [https://perma.cc/3D3F-EWWT] (last visited June 9, 2022).
164. *Id.*

FIGURE 5: FDI NET INFLOWS (US$-BILLIONS)–PERU



Source: The World Bank[165]

As with Colombia and Chile, the framework of the stabilization regime established under the Contractual LSC in Law 662 allows the Peruvian government to better survey and monitor the investments generated under Law 662. That has better positioned Peru to evaluate the utility of its LSC and to make any necessary adjustments to the stability commitments it provides to foreign investors.

D. *Recalibration and Recommendations*

The particular construct of the LSC impacts the validity and potential appeal of the clause. The Contractual LSC should be preferred over the Standard LSC (and the Aspirational LSC) by both the investor and the host state since it is operationalized by and leads to a stability contract. The mutually reinforcing effect of the contract and legislation renders the Contractual LSC more reliably enforceable than the Standard LSC or a standalone stability contract.

The administrative system that a host state would institute for approving stability contracts under a Contractual LSC also provides the state with the means to closely monitor those foreign investments that it is obligated to stabilize under the LSC. Such information places the host state in a superior position to

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165. *Id.*

evaluate the value and utility of the LSC in real time, and thus to react promptly in making any necessary adjustments to the LSC. As reflected in the case studies above, an LSC may enjoy varying degrees of success over its lifetime, and its appeal may dim over time. Critically, the state must thus be able to respond swiftly based on data specific to the LSC. Rather than looking to overall FDI levels—which may not correspond to the FDI levels attributable to the LSC—a host state can gather and act on the more reliable data available under a Contractual LSC.

It is true that a host state could conceivably put in place a similar administrative system for Standard LSCs, and further, that the increased stabilizing effect of Contractual LSCs would expose the state to greater liability risks. However, the enhanced stability provided by Contractual LSCs is precisely what would draw the investor and is therefore necessary if the LSC is to serve a useful function for the host state. Otherwise, regardless of whether the LSC had a role in inducing the investor to invest, the investor may rely *ex post facto* and disingenuously on LSCs in subsequent disputes with host states to prop up their investment claims. This would leave the host state to bear the cost but not reap the benefit of an LSC in a lopsided bargain. Separately, as compared to privately-negotiated contractual stabilization clauses, Contractual LSCs perform an important and public signaling role, and present investors with a more transparent and reliable process to access fortified contractual stability guarantees.

III. Conclusion

This Article urges a radical reorientation of LSCs. To get there, one must look beyond questions of their validity to ask if LSCs are meeting their purpose for all stakeholders. For the investor, an LSC should stabilize the investment against adverse changes to the governing legal regime, particularly in an economically and politically volatile environment. For the host state, an LSC should attract and increase FDI. This relationship works best when it is mutually beneficial. In the case of a Standard LSC, however, the state cannot confidently evaluate the utility of the LSC with the limited information available. At the same time, the state remains liable for violating the stability guarantees promised under the legislation due to their ambiguous language. The persistent threat of incurring liability may, in turn, result in regulatory chill. Under these opaque circumstances, the host state may well decide that the Standard LSC is not worth the candle. In this regard, the backlash against investor-state treaty arbitration, known popularly as Investor State Dispute Settlement (ISDS), provides a cautionary tale.

Amid public outcries over outsized arbitral awards issued against them, Bolivia, Ecuador, and Venezuela have withdrawn from ICSID, the primary forum for investor–state treaty arbitration.[166] Meanwhile, in backing away from ISDS, Indonesia, India, South Africa, and Bolivia have been extensively reviewing their investment treaties, and allowing them to lapse or even terminating them.[167] In 2016 alone, at least nineteen investment treaties were effectively abrogated.[168] A central determinant in these decisions is the troubled cost–benefit analysis of investment treaties that each state must undertake in light of the mixed data on whether such treaties increase FDI.[169] Ecuador, for instance, formed a commission to evaluate the costs, benefits, and risks involved with participation in ISDS. In recommending Ecuador's withdrawal from investment treaties, the commission expressed skepticism that its investment treaties influenced foreign investment flows, while noting that the U.S. $13.4 billion in claims pending against Ecuador amounted to over half of the state's general budget for 2017.[170]

In contrast to the Standard LSC, the Contractual LSC is forward–looking by virtue of its governmental approval mechanism. This approval system allows the host state to monitor the investments it must stabilize under the LSC and thus to make

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166. Maria Laura Marceddu & Pietro Ortolani, *What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments*, 31 EUR. J. INT'L L. 405, 410 (2020).

167. Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 147–48 (2019).

168. U.N. Conference on Trade and Development [UNCTAD], *World Investment Report*, 3 (2017), https://unctad.org/en/PublicationChapters/wir2017_KeyMessage_en.pdf [https://perma.cc/62Q4-79F5] (last visited June 9, 2022).

169. *See supra* note 85 and accompanying text.

170. Tom Jones, *Ecuador Bids Goodbye to BITs*, GLOBAL ARB. REV. (May 17, 2017), https://globalarbitrationreview.com/article/1141801/ecuador-bids-goodbye-to-bits [https://perma.cc/M25V-GDLZ].

informed decisions about adjusting or even terminating the legislation. The approval mechanism also gives the host state the enhanced ability to anticipate, and therefore, avoid any violation of the stability guarantees. Further, an analysis of existing caselaw suggests that the stability contracts generated under Contractual LSCs are more enforceable than either Standard LSCs or standalone stability contracts, bolstering the likelihood that Contractual LSCs will prove more adept than Standard LSCs in influencing FDI inflows. Investors will benefit from the more robust stability contracts generated under Contractual LSCs along with the transparency afforded by the legislation relative to private contracting with the government. In short, Contractual LSCs provide a way to restore some equilibrium between investors and host states in the context of legislative stability guarantees. In the long run, Contractual LSCs may provide a way for LSCs to escape the fate of the growing numbers of investment treaties put to grave.

Appendix

This Appendix includes select examples of Aspirational, Standard, and Contractual LSCs. Unless otherwise indicated, the texts of the LSCs are accessible at UNCTAD, Investment Laws Navigator, at https://investmentpolicy.unctad.org/investment-laws [https://perma.cc/JJW8-SEJ3]. The complete list of LSCs surveyed by the authors is on file with them.

I. Aspirational LSCs

Madagascar: Investment Law (Law No. 2007-036 of 2008)

Article 6. Stability: The state uses its best endeavours to set up and maintain a favourable climate for investment by establishing a simple, fair and growth-conducive tax system for investors. . ..

Papua New Guinea: Resource Contracts Fiscal Stabilization Act (Act No. 33 of 2000).

Article 2. Fiscal Stability Guarantee: The State may . . . guarantee[ ] the fiscal stability of the project . . . in respect of: (i) applicable taxes, duties, fees . . ..
http://www.paclii.org/pg/legis/consol_act/rcfsa2000409.pdf (last visited June 9, 2022).

II. Standard LSCs

Armenia: The law of foreign investment (Law No. AL-115 of 1994)

Article 7. Guarantee in the event of amendments to the legislation of the Republic of Armenia.

In the event of amendments to the foreign investment legislation of the Republic of Armenia, the legislation that was effective at the moment of implementation of investments shall be applied, upon the request of a foreign investor, during a five years [sic] period from that moment.

Bosnia and Herzegovina: Law on the Policy of Foreign Direct Investment (No. 17/98)

Article 20. The rights and benefits of foreign investors granted, and obligations imposed, by this Law cannot be terminated or eliminated by the subsequently passed laws and regulations. If such subsequently passed laws and regulations shall have been more favourable to foreign investors, they shall have the right to choose under which regime the respective foreign investment will be governed.

Cuba: Foreign Investment Act (Law No. 118 of 2014)

ARTICLE 3. The Cuban State shall see to it that the benefits granted to foreign investors and their investments are maintained throughout the entire period for which they were granted.

Georgia: Law on the investment activity promotion and guarantees. (Law No. 473-10 of 1996)

ARTICLE 15. GUARANTEES DURING AMENDMENT OF LEGISLATION.

1) A new legislative act which worsens investment conditions established under this law shall nor apply to the already realized investments within ten years from the date of its entry into force. In such a case an investor shall conduct his activities in accordance with legislation being in force before the new legislative act has been effected.

2) Later on, Articles 7, 8 and 16 shall not be subject to the legislation amendment.

Guinea-Bissau: Investment Code, (Law no. 3/2011)

ARTICLE 22 (STABILITY): The rights and guarantees of investors under this Code shall remain valid and will be respected in the event of transfer of the investment in any form, provided that the conditions set forth herein for obtaining and enjoyment are present and remain stable.

Kazakhstan: Law on Investments (Law No. 373-II of 2003, amended 2014)

ARTICLE 4. GUARANTEE LEGAL PROTECTION OF INVESTORS IN THE TERRITORY OF THE REPUBLIC OF KAZAKHSTAN

3) The Republic of Kazakhstan guarantees the stability of the agreements concluded between the investors and the public authorities of the Republic of Kazakhstan . . . This warranty does not apply to . . .changes . . . [regarding] conditions of import, production, sales of excisable goods . . . [and] to ensure national and environmental security, health and morality.

ARTICLE 18.3. GUARANTEES FOR STABILITY AT CHANGE OF THE LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN
Legal entities realizing priority investment projects are guaranteed stability at change of the tax legislation of the Republic of Kazakhstan according to the Code of the Republic of Kazakhstan "On taxes and other obligatory payments in the budget" (the Tax code); legislation of the Republic of Kazakhstan on population employment in the sphere of attraction of foreign labor. Application of a guarantee for stability of the legislation of the Republic of Kazakhstan is cancelled in case of early cancellation of the investment contract in the order established by this Law.

Kyrgyzstan: Law on Investments (2003)

ARTICLE 2. LEGISLATION OF THE KYRGYZ REPUBLIC ON INVESTMENTS
2) If any amendments are made to the investment legislation of Kyrgyz Republic . . . investors shall have the right to opt for more favourable conditions within ten years from the date of approval of such amendments.

Vietnam: Law on Investment (Law No. 67/2014/QH13)

ARTICLE 13. ASSURANCE OF BUSINESS INVESTMENT UPON CHANGES OF LAWS
2) Where a new law that provides less favorable investment incentives that those currently enjoyed by investor is promulgated, investors shall keep enjoying the current incentives for the remaining period of the incentive enjoyment of the project. 3) The regulations in Clause 2 of this Article do not apply if regulations of law are changed for reasons of national defense and security, social order and security, social ethics, public health, or environmental protection. . ..

III. CONTRACTUAL LSCs

Azerbaijan: Law on Investment Activity (Law No. 952 of 1995)

ARTICLE 17. PROVISION OF RIGHTS OF INVESTMENT ACTIVITY SUBJECTS
State ensures stability of conditions for implementation of investment activity, protection of rights and legal interests of its subjects. Terms of the contract, concluded between the subjects of investment activity remain valid during the whole pe-

riod of the given contract even at the establishment by the legislation conditions, complicating or contradicting the state of subjects, if they have not agreed about their amendments. State bodies and their executive officers cannot interfere with the affairs of subjects of investment activity . . . .

Bolivia: Hydrocarbons Law (Law No. 3058 of 2005)

ARTICLE 63 (TAX STABILITY AGREEMENTS FOR PROMOTING INDUSTRIALIZATION)
The Ministry of State Assets (. . .) and the Ministry of Hydrocarbons, . . ., may establish with the investors, . . ., tax stability agreements of the tax regime in effect at the time of the establishment of the agreements, for a period of no more than ten (10) years without extension; these agreements shall be approved by the National Congress.
See A. F. M. Maniruzzaman, *National Laws Providing for Stability of International Investment Contracts: A Comparative Perspective*, 8 J. World Investment & Trade 233, 235 (2007).

Chile: Foreign Investment Statute (Decree Law 600)

ARTICLE 7. Holders of foreign investments made under the terms of this Decree Law are entitled to include in the respective contracts a clause to the effect that, for a ten year period from the initiation of the company's operations, they shall be subject to an effective overall tax rate of 42% on taxable income, in relation to those taxes established in the Income Tax Law in force at the time the contract is executed. The tax referred to in article 64 bis of the Income Tax Law will not be considered for the determination of the effective overall tax rate on taxable income. Even if the foreign investor has opted to request this invariability regime, he may waive this right, only once, and be subject to the application of common tax legislation, in which case he shall remain subject to the general taxation scheme with the same rights, options and obligations as national investors, consequently forfeiting the contractual invariability.
ARTICLE 8. Foreign investments and companies participating therein shall be subject to the general indirect taxation regime and to the customs regulations applicable to national investments.

Notwithstanding the above paragraph, holders of foreign investment transferred into the country under the terms of this Decree-Law shall be entitled to include a clause in their contracts stating that, for the term authorized to carry out the stipulated investment, the tax regime on sales and services and customs duties in force at the time of signing the contract, applicable to the import of machinery and equipment not manufactures in the country included in the list refereed to in paragraph 10 of letter, Article 12, of Decree Law N 825 of 1974, will remain invariable. The same invariability shall apply to the companies receiving foreign investments, in which foreign investors participate, for the amount associated to such investment.

Colombia: Legal Stability Contracts Law (Law No. 963 of 2005)

ARTICLE 1. LEGAL STABILITY CONTRACTS.
Legal stability contracts are established in order to promote new investments and expand existing ones in the national territory. . .. Through these contracts, the State guarantees the investors who sign them, that if during their validity any of the regulations that have been identified in the contracts as a determinant of the investment is modified in an adverse way, the investors will have the right to be continued to apply these rules to them for the duration of the respective contract.
ARTICLE 2: NATIONAL AND FOREIGN INVESTORS.
National and foreign investors be they natural or legal persons, as well as consortia, who make new investments or expand existing ones in the national territory, for an amount equal to or greater than 150,000 UVT, may be party to the legal stability contracts.
https://www.global-regulation.com/translation/colombia/6404587/by-which-a-law-of-legal-stability-for-investors-is-established-in-colombia.html [https://perma.cc/BS6T-4HQL] (last visited June 9, 2022).

Cameroon: Investment Incentive Law (Law N° 2013/004 of 2013)

SECTION 31. (1) The State shall ensure that the incentives granted to investors are stable in accordance with this law, throughout the period provided for by the instrument or agreement granting such incentives. (2) To that end, a Joint Monitoring Committee placed under the authority of the

Prime Minister shall be responsible for the stability of the said incentives, in conjunction with the Regulation and Competitiveness Council.

Mongolia: Law on Investment (2013)

ARTICLE 6. COMMON LEGAL GUARANTEE OF INVESTMENT
1). . .2) The State shall provide an investor with a guarantee of ensuring stability of the tax rate by a way of granting a stabilization certificate to the investor or by a way of concluding an investment agreement with the investor as specified in this Law.
ARTICLE 16. CRITERIA AND DURATION FOR ISSUING STABILIZATION CERTIFICATE
1) A stabilization certificate shall be issued to the investor whose project to be carried out in Mongolia meets the following criteria: 1. the total investment amount specified in the business plan and feasibility analysis reached the amount specified in the Articles 16.2 and 16.3 of this Law; 2. to get done the environmental impact assessment if required by the law; 3. to create stable workplaces;4. to introduce high tech and technologies.

Peru - Foreign Investment Promotion Law (Legislative Decree 662 of 1991)

ARTICLE 10.- The National Competent Agency, on behalf of the State, may conclude with foreign investors, before the investment is made and the corresponding registration, agreements to guarantee the following rights;
a. Stability of the tax regime in force at the moment of execution of such agreement. The guaranteed legal stability of the tax regime, means that the foreign investor, with regard to the income tax levied on the enterprise, so as to the withholding tax, shall not be levied at a rate higher than that stated in the agreement. If the income tax levied on the enterprise is increased, the percentage of the withholding tax applied to the foreign investor will be reduced allowing the investor to receive at least a proportion of profit equal to the guaranteed in the agreement. B. Stability of the legal regime of free availability of foreign currency and of the rights considered in articles 7 and 9 of this Legislative Decree. C. Stability of the right of non-discrimination covered in article 2 herein.

ARTICLE 11.- Only investors that undertake the commitment to fulfill the following, in a maximum term of two years from the execution of the agreement, may enjoy the regime referred to in the preceding article:
A. Invest through the national financial system, to the capital of an enterprise established or to be established under peruvian law, or in joint ventures for an amount over US$2,000,000 . . .; or B. Invest through the national financial system, to the capital of an enterprise established or to be established under peruvian law, or in joint ventures for an amount over US$500,000 . . .; provided that: I. The investment generates more than twenty permanent jobs; or II. The investment generates export proceeds exceeding US$2,000,000 . . . during a three year period from the date of execution of the agreement. . ..
See English Text of Legislative Decree No 662, Foreign Investment Promotion Law, Sept. 1991, 5 INTER-AM. LEGAL MATERIALS 158, 161 (1992).

Peru: Organic Law for Hydrocarbons (Law No 26221)

ARTICLE 63. The State guarantees the Contractors that the tax and exchange systems in force at the time the Contract is entered into, shall remain unchanged during the life thereof. . .. https://cutt.ly/TkVKIKH [https://perma.cc/L69J-MR4E] (last visited June 9, 2022).

Timor-Leste: Tax Stability Act (Law No. 4/2003)

SECTION 2: TAX STABILITY AGREEMENT
1- With respect to any long-term projects . . ., for the carrying on of petroleum activities in the Joint Petroleum Development Area, the Government is authorised to enter into agreements with contractors to ensure the tax stability of the project, with reference to the laws of the Republic in force on the date of signing of the agreement, in regard to:
(a) the taxes on petroleum activities carried on by the contractor in the Joint Petroleum Development Area, or on activities related thereto, under the terms of article 5(b) of the Timor Sea Treaty; and (b) the rates of those taxes, the calculation of tax obligation and the manner in which payments and refunds shall be made. 2- Tax Stability Agreements may be entered into by the Prime Minister of the Republic or by the Desig-

nated Minister. Such Agreements may establish that disputes that are likely to arise out of their application be settled in a fashion deemed appropriate . . ., and, to this effect, the law of the jurisdiction agreed upon by the parties shall apply.
https://www.mof.gov.tl/petroleum-development-of-timor-sea-tax-stability-act/?lang=EN [https://perma.cc/5JH4-43JM] (last visited June 9, 2022).