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LEGAL STABILITY CONTRACTS IN COLOMBIA: AN APPROPRIATE INCENTIVE FOR INVESTMENTS?

Historical Causes and Impact Analysis of Law 963 of 2005

*Álvaro Pereira**

ABSTRACT

Current global economic order is openly dependent on foreign direct investment (FDI). At least since the 1990's, developing countries have competed to attract FDI because it is considered the best source of technology, employment, and financial resources. Colombian Law 963 of 2005, which is a response to said competition, allows the signature of Legal Stability Contracts (LSCs) between the State and investors for the purpose of stabilizing the rules guiding investment decisions, for up to 20 years. Legal stabilization has successfully proven to increase FDI inflows. Nevertheless, incentives for FDI have been subject to several critiques that stress the excess of benefits for foreign investors in exchange for weak commitments.

Wanting to examine the suitability of Law 963 in attracting FDI to Colombia and in increasing its positive impact, I studied the "state of art" of FDI and legal stabilization, the historical causes of incentives in Colombia, and the LSCs signed in the light of said Law. The results of my study reveal that the law successfully met the expectations of increasing investments. However, there is also evidence that early reforms and a deficient application of the law prevented it from increasing the positive social impact of investments.

Key words: Legal Stability Contracts, Foreign Direct Investment, Investment Incentives, Stabilization Clauses, Colombia, Latin America.

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* I would like to thank Professor René Urueña for his constant support and appropriate suggestions on the research process. I am also grateful for the interviews of César Cermeño and of Committee of Legal Stability's expert consultant, who requested to remain anonymous. Furthermore, my gratitude goes to my lifelong friend Iván Espinosa, Professor Amos Jones and my fellow Masters of Law at Universidad de Los Andes for their comments on earlier drafts, and, especially, to Professors Helena Alviar, Marcela Castro and Isabel Cristina Jaramillo, who have accompanied me since my first years as a law student and have motivated me to continue contributing to legal thinking. All translations are mine unless otherwise stated.

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LIST OF ABBREVIATIONS

CAN .... Comunidad Andina (*Andean Community*)

COP .... Colombian Pesos

FDI .... Foreign Direct Investment

GDP .... Gross Domestic Product

ISI .... Import Substitution Industrialization

LSC .... Legal Stability Contract

TNC .... Transnational Corporation

UN .... United Nations

UNCLAC .... United Nations Economic Commission on Latin America and the Caribbean

UNCTAD .... United Nations Conference on Trade and Development

INTRODUCTION

On July 8, 2005, the Congress of Colombia approved Law 963, which created Legal Stability Contracts ("LSCs"). The purpose of LSCs is to attract foreign and local investments[1] by having the State commit to stabilize rules that were determinant for the investment decision for up to twenty years.[2] Investors, in turn, are required to invest a minimum of approximately USD $1.5 million and to comply with other specifications related to the type of project and their economic and social impact.[3]

LSCs are part of a wider national policy aimed at attracting foreign direct investment ("FDI").[4] FDI is important due to its generation, *inter alia*, of technology, employment, and financial resources.[5] Consequently, less industrialized countries can acquire amounts and qualities of assets that would otherwise be impossible to achieve without FDI.[6] This also explains the fierce competition between states for FDI, which is described as *"both intense and widespread."*[7]

Colombia began the 21st century with major social and economic challenges, some of which could be resolved with FDI's contributions. These challenges, such as the country's internal armed conflict and legal instability, were a few of the main forces preventing an increase in foreign investments.[8] After other states in the region successfully implemented incentives, the Colombian government quickly encouraged LSCs with the purpose of raising FDI inflows despite the nation's deficiencies.

Law 963 of 2005 has been subject to critiques since it entered into force. It is often condemned for, among other things, violation of competition standards, for restricting legislators' constitutional pow-

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[1] Juliana Castaño & Paola Galeano, *Los Contratos de Estabilidad Jurídica en Colombia: ¿Una verdadera Herramienta Para la Protección de los Intereses del Inversionista Extranjero y del Estado Colombiano?*, 2 EAFIT J. OF INT'L L. 68, 69 (2011).
[2] L. 963, julio 8, 2005, DIARIO OFICIAL [D.O.] art. 6 (Colom.).
[3] *Id*. art. 2; MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO, 1 GUÍA LEGAL PARA HACER NEGOCIOS EN COLOMBIA, no. 3, Jun. 2011, at 13.
[4] Castaño, *supra* note 1, at 69.
[5] *See* Robert E. Lipsey, *Foreign Direct Investment and the Operations of Multinational Firms: Concepts, History, and Data* 8-9 (Nat'l Bureau of Econ. Research, Working Paper No. 8665, 2001).
[6] *See* Gordon Hanson, *Should Countries Promote Foreign Direct Investment?* 11 (U.N. Conference on Trade & Dev., G-24 Discussion Paper Series No.9, Feb. 2001).
[7] CHARLES OMAN, ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, POLICY COMPETITION FOR FOREIGN DIRECT INVESTMENT 77 (2000), *available at* http://www.oecd.org/mena/investment/35275189.pdf.
[8] *See* CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, CONSIDERACIONES TÉCNICAS PARA LA EVALUACIÓN DE SOLICITUDES DE CELEBRACIÓN DE CONTRATOS DE ESTABILIDAD JURÍDICA 1 (Documento Conpes, No. 3366, Aug. 1, 2005).

ers, and for long-term stabilizations that do not guarantee a significant impact. Incentives for FDI, particularly the ones contemplating legal stability, are per se controversial because they enlarge investors' powers and require major sacrifices by host economies.[9]

The main purpose of my study was to evaluate whether Law 963 effectively addresses its own purposes (increasing investments and their social impact) and to identify the causes of possible flaws. Results will also contribute to the discussions on the suitability of incentives for FDI and of agreements for stabilization.

My research integrates three types of analysis to accomplish this purpose. The first form of analysis consists of a review of literature on FDI and development, and of both Colombian and Latin American economic history. The aim is to identify general and specific causes behind investment incentives in Colombia and the region. The second method of analysis concerns the study of all available signed contracts. I studied the sixty-four LSCs that were signed as of September of 2010 with the intent of evaluating the impact of the law and the ways it has been applied. I chose these particular contracts because they are publicly accessible. However, the number of signed contracts has not significantly increased since then (68 as of December of 2012), which validates the results and the inferences based on them. The last group of resources consists of two interviews with key players in the negotiation of LSCs, with the purpose of identifying patterns in the application of the law and perceptions of the reforms.

Hence, the first section of the text briefly introduces FDI and why it is increasingly important in both the global and the Colombian economy. The second and third sections, respectively, explain the role of FDI within Colombia during the 20th and 21st centuries, with particular emphasis on the policies that affected it, since that history was the basis for current incentives. The fourth section introduces the relation between legal stability and investment, and concludes with a comparative analysis of the different instruments that address it. Section five presents Law 963 of 2005 and all relevant information related to the establishment of LSCs, while the sixth and seventh segments examine results and conclusions.

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[9] The biggest controversy arises from the confrontation between developing countries in need of capital and investors' interests in profitability, a relation in which evidence shows the host States to be weaker. Recent studies have found that alternatives like strengthening negotiation skills and capacity, and pressure on multinational corporations to comply with environmental and social standards can significantly improve the negotiation of stabilization clauses in favor of the host economy. *See* U.N. Secretary-General, *Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development*, § 41, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), *available at* http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf.

I. FOREIGN DIRECT INVESTMENT

Foreign Direct Investment is the transfer of assets from one country to another "for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets."[10] Investors who own 10 percent or more of the equity stake, ordinary shares, or voting power of a company, are generally considered to have control or management authority.[11] Emphasizing this control is not anecdotic because it reflects "lasting interest," which is a positive element of FDI that refers to the host country's aptitude for permanency.[12] This characteristic also differentiates it from other types of foreign investments, such as portfolios, in which the interest is solely on a future return like dividends or capital.[13]

FDI is noteworthy because, by definition, it is expected to generate wealth in the receiving country. It is not restricted to the transfer of financial resources, but is considered a source of technology, know-how, employment, and generally everything needed to make the investment profitable.[14] All of these in turn are considered to have positive social impact.[15]

FDI's increasing importance to the world's economy,[16] especially for developing countries,[17] might be related to that positive social impact. As Jensen explains, the lasting interest inherent in FDI suggests a long-term relation with the host country, which maximizes its benefits and its impact in economic growth and development.[18]

The participation of transnational corporations ("TNCs") could be another cause for the proliferation of FDI. These enterprises, also known as multinational corporations, have operations in different

[10] *See* MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 8 (3d ed. 2004).

[11] United Nations Conference on Trade & Development [UNCTAD], WORLD INVESTMENT REPORT 2012 – METHODOLOGICAL NOTE 3 (2012), *available at* http://unctad.org/en/PublicationChapters/WIR2012MethodologicalNote_en.pdf.

[12] *See* SORNARAJAH, *supra* note 10, at 8 n.19.

[13] IMAD A. MOOSA, FOREIGN DIRECT INVESTMENT: THEORY, EVIDENCE AND PRACTICE 1 (2002).

[14] *See* Lipsey, *supra* note 5, at 8-9.

[15] *Contra* Hanson, *supra* note 6, at 13 ("This interpretation, however, is subject to the same concerns about omitted variables and endogeneity bias. . .").

[16] According to 2011 World Investment Report, FDI represents 5% or more of the GDP in most countries. *See* UNCTAD, WORLD DEVELOPMENT REPORT - NON-EQUITY MODES OF INTERNATIONAL PRODUCTION AND DEVELOPMENT 2-38 (2011) [hereinafter WORLD DEVELOPMENT REPORT]; *see also infra* p. 11, Chart 1.

[17] WORLD DEVELOPMENT REPORT, *supra* note 16, at 21.

[18] NATHAN M. JENSEN, NATION-STATES AND THE MULTINATIONAL CORPORATION 32-39 (2006).

countries,[19] a particularity that has changed the traditional notion of FDI, which was composed primarily of firms.[20] Their dominant position in FDI flows worldwide is so apparent that recent studies have found FDI "in virtually every nation in the world."[21] It is common for governments to seek to attract TNC investments and to give these enterprises wide negotiation powers because TNCs typically are leaders in innovation and have millions of dollars in resources.[22]

According to contemporary economic theory, FDI is the most effective engine for development when compared to previous alternatives such as aid or credit.[23] The main reason is that it is a good source of financial resources,[24] new jobs,[25] and technology,[26] all of which are linked to improving export competitiveness.[27]

Nevertheless, there is an increasing contention that FDI has an uncertain impact on development.[28] One line of argument asserts that for FDI to have a positive impact it is necessary to direct FDI through policy. Alternatives like promoting FDI for specific sectors[29]

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[19] *See* S. Lall & P. Streeten, *TNCs and Welfare of Host Countries: Analytical Considerations*, *in* U.N. LIB. ON TRANSNAT'L CORP., TRANSNATIONAL CORPORATIONS AND ECONOMIC DEVELOPMENT 43, 43-45 (Sanjaya Lall ed., 1993).

[20] *See* FOREIGN DIRECT INVESTMENT AND THE MULTINATIONAL ENTERPRISE 2-3 (Steven Brakman & Harry Garretsen, eds., 2008).

[21] *See* JENSEN, *supra* note 18, at 1; s*ee also* UNCTAD, *supra* note 11.

[22] *See* JENSEN, *supra* note 18, at 32-33.

[23] Economic theory highlights that, compared to other forms of finance, FDI has certain advantages. These advantages include providing capital inflows that may exceed the domestic savings capacity of least developed countries, and the aptitude to do so without submitting to fixed interests. *See* Hanson, *supra* note 6, at 10-11.

[24] *Id.* Financial resources are also crucial to economic growth since they have a direct effect on production capacity. *See* Eliana Cardoso & Rudiger Dornbusch. *Foreign Private Capital Flows*, *in* 2 HANDBOOK OF DEVELOPMENT ECONOMICS 1388, 1388 (H. Chenery & T.N. Srinivasan eds., 1989).

[25] *See* David Greenway & Holger Görg, *Much Ado About Nothing? Do Domestic Firms Really Benefit from Foreign Direct Investment?*, 19 WORLD BANK RESEARCH OBSERVER 171, 174 (2003) (discussing how FDI not only increases employment rates, but improves the skills and capabilities of workers).

[26] *See* Katherin Marton, *Technology Transfer to Developing Countries via Multinationals*, 9 THE WORLD ECON. 409, 409 (1986).

[27] *See* THEODORE H. MORAN, FOREIGN DIRECT INVESTMENT AND DEVELOPMENT 20 (1998).

[28] *See* Helen V Milner & Tim Büthe. *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?*, 52 AM. J. POL. SCI. 741, 741 (2008).

[29] *See* Diana Bozhilova. *When Foreign Direct Investment is Good for Development: Bulgaria's Accession, Industrial Restructuring and Regional FDI* 6-9 (The Hellenic Observatory, The Euro. Inst., GreeSE Working Paper No. 33, Apr. 2010), *available*

and improving human resources[30] have increased capabilities to absorb FDI benefits. Although complementary, incentives have also contributed to increasing FDI inflows in a variety of economies.[31]

Another series of more critical studies argue that FDI is not an engine for development, but a source of economic crisis.[32] An even more radical position holds that FDI is a strategy for developed countries to control the resources and markets of developing nations.[33]

Regardless of these critiques, development projects have transformed since the mid-1980s from aid or credits to the promotion of market-oriented legal reforms in which FDI is essential.[34] The idea that it was necessary to transform protectionist economies into market economies to allow the flow of technologies and capital, and to eventually increase savings to comply with past credits, advanced these legal reforms.[35] The evident failure of closed economies in Latin America and the former Soviet Union, compared to the success of open ones in southeastern Asia and in emergent economies like Chile, reaffirms that idea.

In this new strategy, FDI is both desirable and necessary for developing countries in that it represents new capital, technology, and employment that would otherwise be unachievable. The results are de-

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at http://www2.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/GreeSE/GreeSE33.pdf.

[30] *See* DIRK WILLEM TE VELDE, OVERSEAS DEV. INST., FOREIGN DIRECT INVESTMENT AND DEVELOPMENT - AN HISTORICAL PROSPECTIVE 2 (2006), *available at* http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/850.pdf.).

[31] WORLD DEVELOPMENT REPORT, *supra* note 16, at 97, Box III.2 (referring to the Report on Non-Equity Modes).

[32] *See* David Woodward, *Financial Effects of Foreign Direct Investment in the Context of a Possible WTO Agreement on Investment* 19 (Third World Network Trade & Dev. Ser. No. 21, 2003) ("FDI flows may be seen as equivalent to borrowing at an interest rate of 16-18% p.a. for developing countries as a whole, and 24-30% in sub-Saharan Africa, so that net outward resource transfers can only be avoided by allowing inward FDI stocks to grow at this rate. This implies a rapid expansion relative to the ability to meet the foreign exchange costs.").

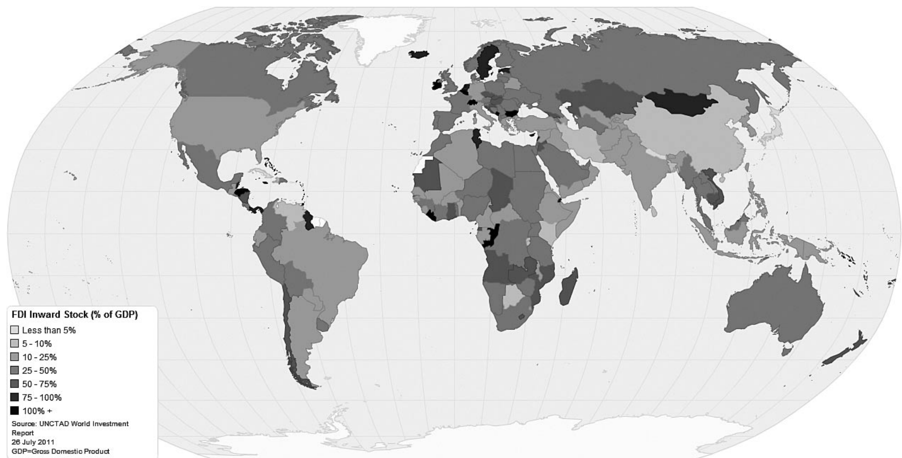
[33] Tandom explains that profitability crisis is inherent to the capitalist system and responds to the tension between labor and capital. To counter these effects, one might lower worker wages and deny their demands, or export capital to reduce production costs. *See* Yash Tandon. *What is Foreign Direct Investment (FDI)?*, SEATINI (Sept. 2004), http://www.seatini.org/publications/factsheets/fdishort.htm.

[34] Ashoka Mody, *Is FDI Integrating the World Economy?*, 27 THE WORLD ECON. 1195, 1195 (2004); Andrew Sumner, *Is Foreign Direct Investment Good for the Poor? A Review and Stocktake*, 15 DEV. IN PRACTICE no. 3/4, June 2005, at 269, 269.

[35] JORGE REINEL PULECIO, LA APERTURA EN COLOMBIA, COSTOS Y RIESGOS DE LA POLÍTICA ECONÓMICA 19-20 (1991).

cisive: FDI has increased even after the 2009 global economic crisis. It currently represents at least 5 percent of the GDP in more than half of the countries in the world, and at least 50 percent of the GDP in an increasing number of states.[36] In 2010, developing economies absorbed close to half of global FDI inflows.[37]

CHART 1. FDI INWARD STOCK AS A PERCENTAGE OF GDP (GLOBAL)



Source: ChartsBin (2011)

As shown in Chart 2, FDI has represented more than 20 percent of Colombian GDP since 2002 with an average growth of 1 percent between 2002 and 2007.[38] Furthermore, recent studies show that companies with FDI invest more in research and development, which in turn allows them to pay better salaries.[39]

To reach these rates, Colombia has implemented a series of reforms to improve the investment environment. The reforms promoted by former president Álvaro Uribe Velez deserve special attention since some established incentives for FDI.

To understand the causes, purposes, and expectations for creating incentives, it is important to briefly summarize the changing role of FDI in Colombian economic history. After concluding said summary and performing a comparative analysis of instruments for legal stabil-

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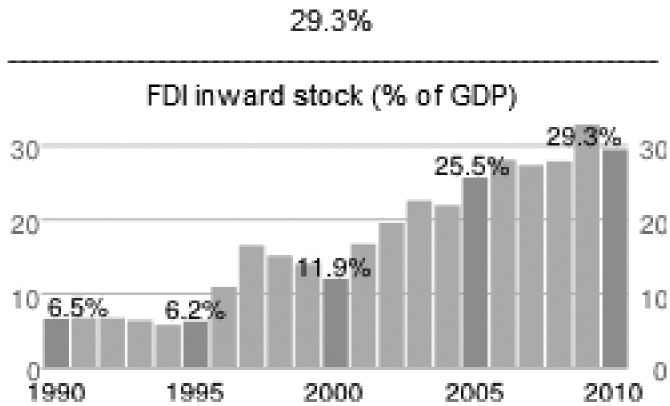
36 *See infra* Chart 1.

37 WORLD DEVELOPMENT REPORT, *supra* note 16, at x.

38 Mauricio Reina, *Impacto de la Inversión Extranjera en Colombia*, presented for Fedesarrollo Centro de Investigacion Econ. y Social (Apr. 28, 2009), *available at* http://www.probarranquilla.org/documento/Presentaci%C3%B3n%20Mauricio%20Reina%20-%20Fedesarrollo.pdf.

39 *Id.*

CHART 2. FDI INWARD STOCK AS A PERCENTAGE OF GDP (COLOMBIA)



Source: ChartsBin (2011),
with information from UNCTAD World Investment Report (2011)

ity, I will present the LSCs, a key incentive for FDI in Colombia and the purpose of this text. I will then conclude with an analysis of the law that established them and its impact.

II. FDI IN COLOMBIA – 20TH CENTURY: *FROM AN ISI STRATEGY TO A MARKET ECONOMY*

The industrialization process in Colombia took place at the beginning of the 20th century, decades after it started in other Latin American countries.[40] Some argue that this industrialization process is related to the major crisis of the 1930s, which also occurred in some other economies of the region.[41] In any case, the consensus is that little attention was paid to foreign investment at that time and that dependency theories[42] increasingly influenced policies toward national investment.

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[40] *See generally* Decsi Arévalo, *Misiones Económicas Internacionales en Colombia 1930-1960*, 14 HISTORIA CRÍTICA 7 (1997).

[41] *See* Mauricio Villamizar & Juan José Echavarría, *El Proceso Colombiano de Desindustrialización* 3 (Banco de Republica de Colombia, Borradores de Econ. No. 361, 2006).

[42] Dependency theory refers to a series of theories supporting the idea that resources flow from the "periphery" (least developed states) to the "core" (wealthy states). It played a major role in discussions on development, industrialization and economic growth. In the second half of the 20th century "[t]he Latin American '*dependentistas*' produced a knowledge that criticized the Eurocentric assumptions of the cepalistas, including the orthodox Marxist and the North American modernization theories." Ramon Grosfoguel, *Developmentalism, Modernity, and Dependency Theory in Latin America*, 1 VIEWS FROM SOUTH 347, 347 (2000).

From the end of World War II until the late 1980s, Colombia adopted a protectionist development model[43] based on an import substitution industrialization strategy ("ISI"). Under ISI, foreign investments should be restricted and replaced with domestic production.[44] Its goal is to avoid dependency and to reach development through local industry.[45] As in many other countries, Colombia followed the development ISI strategy promoted by the United Nations Economic Commission on Latin America and the Caribbean ("UNCLAC") in the 1960s.[46]

Regional agreements also influenced national legislation. For instance, the Comunidad Andina ("CAN"), a regional international organization created in 1969 by Colombia, Chile, Bolivia, and Ecuador,[47] released Decision 24 of 1971, which prohibited FDI to strategic sectors. Decision 24 of 1971 was introduced through national legislation, that strengthened protectionist regulation (*e.g.* Decreto Ley 444, 1967).[48] Hence, foreign investments were allowed only for specific and limited sectors. Legislation in other related topics have included interventionist measures to restrict FDI flows.[49]

In 1987, CAN decisions 220 and 244 established a new regional development strategy that relaxed foreign investment restrictions, particularly in the industrial sector. This period right before the 1991 Constitution of Colombia, frequently known as *transition*, was characterized by timid changes in the regulation that allowed foreign investments while maintaining rigid interventionist measures as well as control over inflows.[50] There was flexible regulation, but no incentives for FDI.

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[43] María Claudia Uribe Pineda, *Colombia: Política de IED,* Comisión Económica para América Latina y el Caribe – Ministerio de Comercio Exterior (2002), http://www.eclac.org/ddpe/noticias/noticias/7/9067/Colombia.pdf.

[44] *See* Werner Baer, *Import Substitution and Industrialization in Latin America: Experiences and Interpretations*, 7 LATIN AM. RES. REV., No. 1, Spring, 1972, at 95, 95.

[45] *See* Jinwoo Kwon, Import Substitution at the Regional Level: Application in the United States 9 (Oct. 26, 2010) (unpublished manuscript) (on file with the Fed. Reserve Bank of Atlanta), *available at* http://www.frbatlanta.org/documents/news/conferences/10smallbusiness_kwon.pdf.

[46] *See* Mario A. Gutterrez, Eonomic Growth in Latin America: The Role of Investments and Other Growth 14 (U.N. Econ. Comm'n for Latin Am. & the Caribbean, Macroeconomía del Desarrollo Serie No. 36, June 2005).

[47] Venezuela adhered to it in 1973 and was a member until 2006. Chile retired in 1976.

[48] *See* L. 1900, agosto 19, 1990, DIARIO OFICIAL [D.O.] (Colom.).

[49] *See* JANG-YUNG LEE, STERILIZING CAPITAL INFLOWS 6-7 (Int'l Monetary Fund, Econ. Issues No. 7, 1997).

[50] *See* LUIS JORGE GARAY, COLOMBIA: ESTRUCTURA INDUSTRIAL E INTERNACIONALIZACIÓN 1967-1996 (2004).

Most countries in the world had to make transcendental economic reforms during the 1980s to integrate into the newborn global economy as a consequence of the failure of previous development strategies (*e.g.* ISI, aid, and credit).[51] Latin America in particular did not experience significant economic growth.[52] In Colombia, low growth was accompanied by high fiscal and external deficits. The World Bank also pressured Colombia to make structural economic changes.[53]

In this context, ISI was inexorably seen as an obstacle of economic development. Traditional protection strategies were proving to be ineffective and Chile's success was evidence that market-oriented reforms were the panacea.

Consequently, Colombia began a gradual liberalization of commerce in 1985 that concluded with important tariff reductions in 1990 and 1991.[54] The 1991 Constitution was the final and definitive turn in the country's development from protectionism to a small government. In this sense, a series of profound reforms took place, with impact, among others, in commerce, labor regulation, taxation, and in the institutional frame.[55]

With respect to commerce, trade tariffs were reduced on average between 10 percent and 27 percent from 1984 to 1998.[56] Regarding labor, it was clear that the purpose was to reduce unemployment from the economic perspective because the Constitution gave special treatment to social rights. Reforms were thus twofold: reduction of labor

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[51] *See* REINEL PULECIO, *supra* note 35, at 21.

[52] The "lost decade" of the 1980s had a devastating impact in the region. With the exception of Chile, the average growth was below 2%, which contrasts with the average 5% between 1950 and 1980. *See* JOSÉ ANTONIO OCAMPO, UN FUTURO ECONÓMICO PARA COLOMBIA 6 (2001).

[53] "The decade of 1980 meant to Colombia a strong deceleration of growth and high fiscal and external deficit (. . .) In April of 1989 the World Bank published the study of the Colombian economy denominated 'Commercial Policy Survey 1986-1987', in which it points out the necessity to make this structural change, which was evaluated and defined by the government of the president Virgilio Barco (. . .)" (own translation). ÁLVARO ALBAN MORENO & JORGE ALBERTO RENDON VELEZ. CRECIMENTO, DESAROLLO DEMOCRACIA EN COLOMBIA: LOS CONTRAPESOS DE UN PROCESO INCOMPLETO 120 (2009); *See, e.g., Support for Adjustment in Colombia,* THE WORLD BANK GROUP (2012), http://lnweb90.worldbank.org/oed/oeddoclib.nsf/DocUNIDViewForJavaSearch/EDB98EFC8A6C8286852567F5005D8378.

[54] Eduardo A. Hadad et al., *Efectos Regionales de una Mayor Liberación Comercial en Colombia* 1 (Banco de la Republica – Sucursal Cartagena, Documentos de trabajo sobre Econ. Reg. No. 104, Aug. 2008), *available at* http://www.banrep.gov.co/documentos/publicaciones/regional/documentos/DTSER-104.pdf.

[55] *See* César Gaviria Trujillo, *Prólogo, in* UNA APERTURA HACIA EL FUTURO ix (Rudolf Hommes et al. eds., 1994).

[56] Hadad et al., *supra* note 54.

costs and relaxation of the structure on one hand, and growth of the non-salary costs as a proportion of the payroll on the other.[57]

Tax reforms were also encouraged and implemented with the foreseeable intention of increasing collection, which declined in the 1980s, fairly called the *lost decade*.[58] Different reforms of the same nature were required during the 1990s for identical purposes because the Constitution enlarged the demand for services.[59]

Colombia became progressively more dependent on international trade and financial transactions as it entered the global economy, which made FDI crucial.[60] This is why the reforms that accompanied the 1991 Constitution included important modifications to promote FDI. For example, the issuance of an exchange regime with the passage of Ley 9 in 1991 liberalized determinant rights such as return capital.

The regime included FDI principles (fair and equitable treatment, universality, and automatic approval of investment), a guarantee of stability of exchange rights,[61] and full access to local credit.[62] Colombia also became part of different treaties that provided protection to investments against political risk.[63]

Despite these efforts, liberalization of the economy injured the local industry, the country's competiveness, and formal employment.[64]

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57 *See* Alan Gilbert, *Globalization and Latin America: Understanding the Global Links of Colombia's Capital*, in GLOBALIZATION AND URBAN DEVELOPMENT – ADVANCES IN SPATIAL SCIENCE 165, 170 (Harry W. Richardson & Chang-Hee Christine Bae, eds, 2005).

58 *See* Fabio Sánchez & Silvia Espinosa, *Impuestos y Reformas Tributarias en Colombia, 1980-2003* at 11 (CEDE – Uni. de los Andes, Documentos CEDE 2005-11, Feb. 2005).

59 Francisco Azuero et al., *Contratos de Estabilidad Jurídica en Colombia (CEJ): ¿Información Asimétrica, Inconsistencia Intertemporal o Captura de la Autoridad Tributaria?* 4 (Uni. de los Andes – Facultad de Admin., Galeras de Admin. No. 31, 2011).

60 Rudolf Hommeset et al., *Reformas Estructurales – Política de Inversión Extranjera*, *in* UNA APERTURA HACIA EL FUTURO 70 (1994).

61 L. 9, enero 17, 1991, DIARIO OFICIAL [D.O.] art. 15 (Colom.).

62 *See* Sebastián Nieto-Parro & Mauricio Olivera, *Making Reform Happen in Colombia: The Process of Regional Transfer Reform* 3 (Fedesarrollo – Centro de Invest. Econ. y Social, Working Paper No. 57, Dec. 2011), *available at* http://www.fedesarrollo.org.co/wp-content/uploads/2011/08/WP-No.-57-Making-reform-happen-in-Colombia.pdf.

63 *See* MAURICIO REINA & SANDRA ZULUAGA, CTR. FOR HEMISPHERIC POLICY, THE IMPACT OF GLOBALIZATION ON LATIN AMERICA: THE CASE OF COLOMBIA 4 (2012), *available at* https://umshare.miami.edu/web/wda/hemisphericpolicy/Task_Force_Papers/Reina-GlobalizationTF.pdf.

64 *See* Carlos Enrique Londoño Rendón, *La Apertura Económica en Colombia*, 4 PENSAMIENTO HUMANISTA 41, 49 (1998).

The internal armed conflict sparked by drug traffic[65] and the global financial crisis at the end of the decade also negatively impacted the economy and FDI inflows.[66] In an effort to increase FDI implementation, former president Andrés Pastrana promoted Acto Legislativo 001 (1999) to reform the Constitution and subsequently issued Decreto 2080 (2000), a presidential decree with binding character.[67] The first Act eliminated the possibility of expropriation without compensation. The second established a new regime for foreign investments and for Colombians' investments abroad.

The aforementioned reforms created economic growth and propitiated the signature of investment treaties, but their social impact did not meet expectations. Key indictors of development, such as employment and wealth distribution, are still waiting for relevant improvements. Hence, investments in the 21st century are not only important, but necessary. Those circumstances are where incentives that matter for this study appear.

III. FDI IN COLOMBIA – 21ST CENTURY: *NECESSITY OF INCENTIVES, CONTEXT FOR LEGAL STABILITY CONTRACTS*

In the context of investment, incentives are governmental measures from which foreign investors can benefit,[68] "in order to encourage them to behave in a certain manner."[69] Even though the

[65] Colombia has experienced an internal armed conflict for more than 40 years. The situation began in the middle of the 20th century when socialist guerrillas, influenced by Communist ideas and following the example of the Cuban Revolution, fought for a change in the distribution and use of the land. In the 1980s, violence intensified due to the increasing power of drug cartels and of a dangerous *joint venture* between the two "forces". With time, as cartel and guerrilla leaders have diminished, political ideas have evaporated and the structure of violence has gotten complex. *See* Nazih Richani, *The Political Economy of Violence: The War-System In Colombia*, 39 J. OF INTERAMERICAN STUD. & WORLD AFF. 37, 37 (1997).

[66] *See* Bruce Michael Bagley, *Narcotráfico, Violencia Política y Política Exterior de Estados Unidos hacia Colombia en los Noventa*, 49-50 COLOM. INTERNACIONAL 5, 24 (2000).

[67] *See* Pres. Andrés Pastrana, Address at the 13th Andean Presidential Council (June 23, 2001) (transcript available at http://www.comunidadandina.org/ingles/press/speeches/pastrana23-6-01.htm).

[68] *See* Jean-Yves P. Steyt, Comparative Foreign Direct Investment Law: Determinants of the Legal Framework and the Level of Openness and Attractiveness of Host Economies (May 2006) (unpublished LL.M. Graduate Research Papers, Cornell University), *available at* http://scholarship.law.cornell.edu/lps_LLMGRP/1/.

[69] United Nations Conference on Trade & Development, Geneva, Switz., *Tax Incentives and Foreign Direct Investment: A Global Survey*, 11, UNCTAD/ITE/IPC/Misc.3 (2000), *available at* http://unctad.org/en/Docs/iteipcmisc3_en.pdf.

literature and UNCTAD consider them complementary to other determinants for investment like market size or access to raw materials,[70] most emerging economies rely on incentives to compensate the areas in which they are less competitive to attract FDI. In Colombia, former president Álvaro Uribe Velez (2002-2010) insisted on the necessity of increasing foreign investment despite the internal armed conflict and ever-changing tax legislation. That partially explains why his government was a pioneer in the effective implementation of investment incentives in the country.

Still, there are three main causes for creating incentives for investment in Colombia: legal instability, a new global economic order (with subsequent international financial institutions' pressure and competition for attracting FDI), and the negative consequences of a newborn development model based on a market economy.

At least since the 1980s, the literature recognizes the importance of a stable legal and political structure for an investment environment.[71] Diverse studies have found that political volatility reduces FDI inflows[72] and that legal stability is crucial in an investment decision.[73] The negative impact of an unstable legal framework in investment (especially tributary-related) can only be compared to internal violence, which makes it one of the main deficiencies for FDI in Colombia.[74]

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[70] *See id*. at 3. *See generally* Rafaelita M. Aldaba, *FDI Investment Incentive System and FDI Inflows: The Philippine Experience* 14 (Phil. Inst. for Dev. Studies, Discussion Paper Ser. No. 2006-20, Nov. 2006), *available at* http://www.eastasiaforum.org/testing/eaber/sites/default/files/documents/PIDS_Aldaba_2006.pdf (discussing foreign investors' use of tax credits on raw materials).

[71] *See* William H. Davidson, *The Location of Foreign Direct Investment Activity: Country Characteristics and Experience Effects*, 11 J. OF INT'L BUS. STUDIES, No. 9, Autumn 1980, at 9.

[72] *See* Bruno S. Frey & Friedrich Schneider, *Economic and Political Determinants of Foreign Direct Investment*, 13 WORLD DEV. 161, 173 (1985); Zhen Quan Wang & Nigel J. Swain, *The Determinants of Foreign Direct Investment in Transforming Economies: Empirical Evidence from Hungary and China*, 131 WELTWIRSTSCHAFTLICHES ARCHIV 359, 370 (1995).

[73] Amanda Perry-Kessaris, *Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence*, 49 INT'L & COMP. L. Q., No. 4, Oct. 2000, at 779, 779 ("There are well developed theoretical arguments why the effectiveness of legal systems should be a determinant of FDI.").

[74] *See* Hernán Felipe Trujillo Quintero, Decisiones de Inversión de las Empresas Transnacionales: Un Caso para Colombia 11-12 (Aug. 2009) (unpublished manuscript) (on file with Consejo de Ciencia y Technologia del Estado de Guanajuato), *available at* http://www.concyteg.gob.mx/formulario/MT/MT2009/MT6/SESION2/MT62_HTRUJILLO_099.pdf; CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 1.

The competition for FDI and pressure from the international financial system have also urged the creation of incentives,[75] which are seen as a necessary tool to compete. According to a study by Agarwal, "[t]he evidence on the influence of incentives on the inflow of FDI is clearer than that on the influence of political instability."[76]

Colombia competed with similar economies in the region while simultaneously having to mitigate the adverse effects of liberalization, such as low wages and unemployment.[77] Incentives thus gained acceptance, especially considering the assertion that FDI is the most effective source of capital and new jobs.[78]

As clear as it might have been, policymakers must take into account all available options when planning to implement an incentive since there is no one-size-fits-all formula. In the late 1980s and during the 1990s, developing countries implemented a variety of strategies to attract FDI. Although subject to the specific needs of each economy, reducing taxation and cutting import tariffs have been the main responses to globalization.[79]

With respect to security, insurance instruments quickly adapted to the specific needs of countries and projects, to the point that insurance is now almost a prerequisite for investing in certain regions.[80] The Multilateral Investment Guarantee Agency ("MIGA"), an entity member of the World Bank offering insurance to foreign investors against losses caused by "noncommercial risks,"[81] is involved in virtually all big investment projects worldwide and has more than 170 member States, including Colombia.[82]

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[75] *See* OMAN, *supra* note 7, at 3.

[76] *See* Jamuna P. Agarwal, *Determinants of Foreign Direct Investment: A Survey*, 116 WELTWIRTSCHAFTLICHES ARCHIV 739, 761 (1980).

[77] *See generally* RICARDO ARIAS TRUJILLO, HISTORIA DE COLOMBIA CONTEMPORÁNEA (1920-2010) at 181 (2011) (exploring the history of Colombia's modernization efforts).

[78] *See* ORG. FOR ECON. CO-OPERATION & DEV. (OECD), FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT - MAXIMISING BENEFITS, MINIMISING COSTS 122 (2002) ("[T]he major impact of FDI on human capital appears to have occurred not so much through the efforts of individual MNEs (multinational enterprises) as from government policies designed to attract FDI via enhanced human capital.").

[79] *See generally* Eduardo Lora, *Trends and Outcomes of Tax Reforms*, *in* THE STATE OF STATE REFORM IN LATIN AMERICA 185, 185 (Eduardo Lora ed., 2007).

[80] *See* Hadiza Tijjani Mato, *The Role of Stability and Renegotiation in Transnational Petroleum Agreements*, 5 J. POL. & L. 33, 34 (2012).

[81] *See* Convention Establishing the Multilateral Investment Guaranty Agency (MIGA), *Preamble* (Apr. 12, 1988), *available at* http://www.miga.org/documents/miga_convention_november_2010.pdf.).

[82] *See MIGA Members*, WEB.WORLDBANK.ORG (Sept. 6, 2012), http://go.worldbank.org/76NJ98JCM0 (providing an updated list of members and noting that, as of May 2012, the MIGA had 176 member States).

Among the incentives for FDI, the ones providing stabilization (like LSCs) vary not only in shape, but also in purpose, object, conditions, parties, and effects.[83] In fact, plenty of instruments allowing investors to stabilize legislation are not part of a strategy to attract FDI, but rather are risk-management mechanisms used by foreign investors mainly in the primary sector.[84]

In view of the latter, I will introduce the relationship between investment and legal stability in the next section. Keeping in mind that instability was directly related to Colombia's low FDI flows, and with the purpose of providing a spectrum in which to locate *Law 963 of 2005*, I will conclude with a comparative chart of similar legislation in the region that sheds some light for the analysis in section 5.

IV. LEGAL STABILITY: *LAW 963 OF 2005 IN THE STABILIZATION SPECTRUM*

Legal stability is almost a prerequisite for investment decisions in long-term projects.[85] That is why foreign investors seek countries that minimize the risks associated with unpredictable changes in their legislation. However, that risk is always a variable since it is part of the sovereign right of a state to set up the rules that it considers appropriate.[86] Hence, although the threat is higher in undeveloped economies, legal stability is a shared concern for all countries intending to attract FDI.

Foreign investors experienced the threat of political and legal instability before the topic was an issue for states and even before FDI was an accepted development tool.[87] The matter was particularly important in the primary sector where these types of projects generally require years to produce beneficial results.[88] A wave of nationalizations of foreign projects in oil and mining during the 1960s and 1970s

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[83] *See infra* Table 2.

[84] *See* Tijjani Mato, *supra* note 80, at 34 (describing private investors using stabilization clauses in petroleum agreements).

[85] *See* Davidson, *supra* note 71, at 1; *see also* Frey, *supra* note 72, at 161; Wang, *supra* note 72, at 359; Perry-Kessaris, *supra* note 73, at 781-84.

[86] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 531-32 (2005).

[87] *See generally* Samuel K. B. Asante, *International Law and Foreign Investment: A Reappraisal*, 37 INT'L & COMP. L.Q. 588 (1988) (exploring the status of foreign investments in light of ongoing political disputes).

[88] *See* UNCTAD, WORLD INVESTMENT REPORT 2012 OVERVIEW – TOWARDS A NEW GENERATION OF INVESTMENT POLICIES 6 (2012), *available at* http://unctad.org/en/PublicationsLibrary/wir2012overview_en.pdf.

was the main reason to include a clause protecting investors from legal reforms annulling or limiting their rights.[89]

The Special Representative of the Secretary General of the UN on business and human rights, John Ruggie, carried out a global study on such provisions and found that they are currently "widespread across industries and regions of the world."[90] "Stability clauses," as they are commonly known, address changes in the host country's legislation and attribute different effects to it. Ruggie's report, submitted in 2008, identifies three types of stability clauses, which can also appear in a "restricted version." Table 1 summarizes findings on the most common clauses.

TABLE 1. TYPES OF STABILIZATION CLAUSES

Full Freezing Clauses freeze both fiscal and non-fiscal law with respect to investment for the duration of the project. Exemptions are required.	**Limited Freezing Clauses** freeze more limited sets of legislative actions. Exemptions are required.
Full Economic Equilibrium Clauses protect against the financial implications of *all changes of law*, by requiring compensation or adjustments to the deal to compensate the investor when any changes occur.	**Limited Economic Equilibrium Clauses** protect against financial implications of some *limited set* of changes of law or after specified costs are incurred. They require compensation or adjustments to the deal to compensate the investor only when the covered changes occur.
Full Hybrid Clauses protect against the financial implications of *all changes of law*, by requiring compensation or adjustments to the deal, including exemptions from new laws, to compensate the investor when any changes occur.	**Limited Hybrid Clauses** protect against the financial implications of *some limited set* of changes of law or after specified costs are incurred. They require compensation or adjustments to the deal, including exemptions from new laws, to compensate an investor only when the covered changes occur.

Source: Andrea Shemberg (2009)

In spite of the differences between them, stability clauses clearly address a traditional concern for foreign investors after the 1960s: the threat that legal instability presents for their profits. Even though said clauses are still used in a variety of agreements, develop-

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[89] ANDREA SHEMBERG, INT'L FIN. CORP., STABILIZATION CLAUSES AND HUMAN RIGHTS 4 (2009), *available at* http://www.oecd.org/investment/globalforum/40314647.pdf.

[90] *See* INT'L FINANCE CORP., STABILIZATION CLAUSES AND HUMAN RIGHTS – A RESEARCH PROJECT CONDUCTED FOR IFC AND THE UNITED NATIONS SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON BUSINESS AND HUMAN RIGHTS at vii (2009), *available at* http://www1.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES&CACHEID=9feb5b00488555eab8c4fa6a6515bb18.

ing countries have found a stabilization mechanism to improve their investment environment when competing for FDI.[91]

Chile was one of the first countries in the world to openly offer stabilizing tax laws to virtually any foreign investor. Decreto 600, which has been in force since 1974, is a binding presidential decree that established a national regime for foreign investments that stabilizes income tax for up to 10 years.[92] This legislation separated the country from others in the region,[93] but efficiently attracted foreign investments that had positive impacts on development and growth.[94]

Decreto 600 requires foreign investors, and any foreign capital in general, to sign a contract with the State that authorizes the entrance of investments into the country.[95] Investments that meet the requirements (transnational money transfer for a project in Chile) are entitled to include a provision stabilizing the income tax for up to 10 years.[96] A committee, created by the same decreto and integrated by ministers and the president of the Central Bank, ultimately decides whether these requirements are met.[97] The resulting agreement is known as a Contrato de Estabilidad Tributaria (Contract for Tax Stability). Its committee creation process distinguishes it from other contracts merely authorizing the investment and from the aforementioned stability clauses.

The practice changed in the 1990s with the introduction of new stabilizing instruments, despite Chile's proven success at attracting quality FDI during a period in which most countries of the region were avoiding it.[98] That is the case in Panama where stabilization of different types of legislation was permitted without subjecting them to the approval of a reviewing entity. For example, according to Panamanian Ley 54 (1998), any foreign or non-foreign investment with $2 million Panamanian Balboas[99] (which is equivalent to US dollars)[100] or more has the right to stabilize national and municipal legislation in areas

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[91] *See generally* David A. Jodice, *Sources of Change in Third World Regimes for Foreign Direct Investment, 1968–1976*, 34 INT'L ORG. 177, 177 (1980).
[92] Decreto Ley 600, julio 13, 1974 [Presidential Decree] art. 7 (Chile).
[93] *See supra* pp. 12-17 (noting that Chile retired from the CAN and left the import substitution industrialization strategy behind two years later).
[94] *See* Raphael Bergoeing et al., *A Decade Lost And Found: Mexico and Chile in the 1980s*, 5 REV. OF ECON. DYNAMICS 166, 198 (2002) (finding that, compared to Mexico, Chile experienced a faster recovery from the economic crises of the 1980s, due to its reforms toward an open market and the attraction of FDI).
[95] *See* Decreto Ley 600, *supra* note 92, art. 3.
[96] *Id*. art. 7.
[97] *Id*., arts. 3, 12; *see also infra* Table 3.
[98] Bergoeing, *supra* note 94, at 1-2.
[99] L. 54, julio 22, 1998, art. 16 (Pan.).
[100] *See* L. 84, junio 28, 1904, art. 1 (Pan.).

such as labor, tax, and customs.[101] In this case, the benefit is also granted for up to 10 years[102] and does not require the signing of a contract. Ecuador has implemented this model as well.[103]

It is important to mention that the Contracts for Tax Stability were issued as a deep tax reform collection in Colombia in 1995. The article allowing their subscription was included in the national Tax Regime[104] and was quite similar to Chilean legislation. However, it was applied only during its five years in force.[105] Additionally, there are three main reasons not to include them in the incentive analysis or to even consider them an incentive for FDI:

Context

As stated in section II, Colombia adopted a new development model based on a market economy in the 1990s. This required a set of reforms to mitigate the adverse effects of such a change and to increase its capacity to compete in a global market.[106] Ley 223 (1995) was part of the body of legislation designed to increase collection through changes in existing taxation and the introduction of new taxes.[107] With respect to investment, the concern was with improving the legal base for national enterprises and making them more competitive, rather than attracting FDI.

Purpose

Contrary to the 2005 LSCs, the contracts created in 1995 did not have the purpose of incentivizing the entrance of FDIs, but of allowing existing legal entities to secure the profitability of their enterprises by "postponing" the application of future reforms regardless of the type of project or its life.

Experience

Although attributable to a restricted interpretation imposed by the national tax authority,[108] the National Tax and Customs Office

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[101] L. 54, julio 22, 1998, art. 10 (Pan.).
[102] *Id.*, art. 10, § 2.
[103] In Ecuador, investors are automatically entitled to stabilization when they register their investment in the Central Bank. However, the legislation also allows the signature of contracts, but with the same content. *See* Decreto Ejecutivo 1525, June 24, 1998, arts 19, 30 (Ecuador).
[104] L. 223, diciembre 22, 1995, Diario Oficial [D.O.] art 169 (Colom.).
[105] *See* L. 633, diciembre 29, 2000, Diario Oficial [D.O] (Colom.).
[106] *See* Trujillo, *supra* note 55, at ix-x.
[107] *See* L. 223, diciembre 20, 1995, Diario Oficial [D.O.], art. 169 (Colom.).
[108] According to the dominant interpretation applied by the national tax entity, stabilization could only be granted for 1 year. *Consejo de Estado*, the highest judi-

(DIAN), less than ten contracts were signed, most of which aim to prevent the application of a tax on the movement of funds.[109]

It is thus evident that legal stabilization responds to multiple needs, such as the threat from stabilization, the need to attract FDI, the promotion of all types of investments, or even the intent to increase collection. The evolution into instruments with diverse purposes and effects is also apparent. Table 2 shows some of these differences and Table 3 compares relevant legislation in the region.[110] Table 4 illustrates fundamental differences in the two types of contracts for stability in Colombia, and the reasons not to consider the ones created in 1995 as FDI incentives.[111]

TABLE 2. LEGAL STABILITY FOR INVESTMENTS

	Stabilization *Clauses*	**Stability *Contracts***	**Stabilization *Laws***
Definition	Clauses in private contracts that address changes in legislation.	Agreements between a state and an investor providing the stabilization of legislation, subject to specific requirements.	Laws that guarantee the stability of certain legislation to investments that comply with pre-established requisites.
Parties	Investor (generally foreign) and state.	Investor (generally foreign) and state.	No.
Purpose	To guarantee the profitability of a project (risk-management).	To attract foreign investments and to promote investments in long-term projects.	To attract foreign investments and to promote investments in long-term projects.
Term	Life of the project.	Established by the parties, subject to limits imposed by the state.	Established in the law. Generally not negotiable.
Dispute Resolution	Generally, international investment arbitration.	International investment arbitration, national conciliation, and arbitration.	National administrative proceedings, conciliation, and arbitration.

Source: *Author*

cial entity for public law, abolished said approach, perhaps too late. The text of the decision provides a summary of the subject. *See* Sentencia de 24 de agosto del 2001, Exp. 11636, C.P. Dr. Germán Ayala Mantilla.

[109] *See supra* note 105.

[110] *See infra* Table 2, Table 3.

[111] *Infra* Table 4.

TABLE 3. Legislation for Legal Stability in the Region[112]

	Chile	**Peru**	**Panamá**	**Ecuador**	**Venezuela**
Legislation	Decreto 600 (1974) Ley 27342 (2000)	Decreto Ley 662 (1991)	Ley 54 (1998)	Ley 46 (1997) Decreto Ejecutivo 1525 (1998)	Decreto Ley 356 (1999)
Mechanism or Instrument Granting the Stability	Contract. (Art. 3)	Contract. (Art. 10, DL 662)	Law. (Art. 6)	Law. (Art. 19, DE 1525) Contract. (Art. 30, DE 1525)	Contract. (Art. 17)
Beneficiaries	Foreign investments and investments from Chilean nationals residing abroad. (Art. 3)	Foreign investments. (Art. 10, DL 662)	Foreign and national investments. (Art. 1)	Foreign and national investments. (Art. 22, Ley 46)	Foreign and national investment. (Art. 18)
Minimum Amount of Investment	Not required. US$50 million, for investments in the primary sector. (Art. 3)	US$5 million. US$10 million for the primary sector. (Art. 2, Ley 27342)	US$ 2 million. (Art. 16)	US$ 500,000. (Art. 23, Ley 46)	Not required.
Sector of the Economy	All. (Art. 3)	All. (Art. 11, DL 662)	All. The law provides a wide list of activities and adds "*any approved by the Committee*" (Art. 5)	All. (Art. 22-27, Ley 46)	All. (Art. 17)
Entity in Charge of Applying the Law	Special Committee, integrated by Ministers and the president of the Central Bank. (Art. 3 and 12.)	National entity, depending on the sector in which the investment is made. (Art. 43, DL 757)	Special entity, attached to the Ministry of Commerce, but integrated by representatives of private entities, such as Commerce Chambers and Labor Unions. (Art. 14.)	None stabilization is automatic. (Art. 19, Ley 46) If the investor decides to sign the contract, the Ministry of Commerce. (Art. 30, Ley 46)	National entity, depending on the sector in which the investment is made. It must have the approval of the national tax agency and Congress. (Art. 17)

[112] Some of cited states have more laws regulating foreign investment and establishing benefits for its attraction, even related to legal stability. The legal instruments chosen for this table are the ones that more specifically deal with the topic. *See infra* Table 3.

Object of Stabilization	Income tax. (Art. 7)	Income tax, exchange regime and the guarantee of equal treatment. (Art. 10, DL 662)	National and local tax legislation, labor and customs. (Art. 10)	Income tax. (Art. 24, Ley 46)	Export tax. (Art. 17)
Term	3 years. For the primary sector, 8 years that can be extended to 12 with authorization of the Committee. (Art. 7)	10 years. (Art. 15, DL 662)	10 years. (Art. 10)	10 years for reinvestments not directed to increase production. 20 years for new projects or investments to enlarge existing ones. The Counsel can authorize an addition of 5 years to the term, depending on the sector. (Art. 24, Ley 46)	10 years. (Art. 17)
Dispute Resolution	Not specific. Administrative proceedings are available.	International investment arbitration. (Art. 16, DL 662).	National conciliation and, alternatively, arbitration. (Art. 20)	International investment arbitration. (Art. 32, Ley 46)	National commercial arbitration. (Art. 18)

Source: *Author*

V. LEGAL STABILITY CONTRACTS: *TO ATTRACT NEW INVESTMENTS OR TO ENLARGE EXISTING ONES*

In the beginning of the 21st century, the Colombian government knew that the country's ever-changing tax legislation limited the possibility of attracting foreign investments.[113] Additionally, other countries in the region had successfully mitigated those effects with legislation allowing for stabilization.[114]

Former president Álvaro Uribe Velez prioritized attracting FDI from his first day in office and deemed it one of the three main policies of his government.[115] He named this policy "Confianza Inversionista" (Investors' Reliance), which he justified with the saying: "la inversión

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[113] Azuero, *supra* note 59, at 2.

[114] *See supra* Table 3.

[115] *See* V. Meija & Jose Manuel, *Santos Cerca de la Independencia: Preámbulo a la Desintegración de la Unidad Nacional, 1 Revista Andina de Estudios Pol., No. 5, Apr. 2011, at 5.*

TABLE 4. CONTRACTS FOR TAX STABILITY (1995) VS. LEGAL STABILITY CONTRACTS (2005)

	Ley 223 de 1995 Contracts for Tax Stability (Contratos de Estabilidad Tributaria)	**Ley 963 de 2005 Legal Stability Contracts (Contratos de Estabilidad Jurídica)**
Context	Deep tax reforms and internal security problems.	Improve national security and commercial relations with other states, and proliferation of treaties for the protection and promotion of FDI.
Purpose	To allow legal entities not to be subjected to new taxes or interpretations established in further reforms.	To attract new investments or to enlarge existing ones.
Beneficiaries	All legal entities.	Investments that meet two requirements: certain amount of money, payment of a prime.
Entity in Charge of Applying the Law	National tax entity.	Special Committee.
Object of Stabilization	Income tax and to prevent the application of new taxes.	All national legislation, with few exceptions.
Term of Stabilization	10 years.	Between 3 and 20 years.
Number of Signed Contracts	Less than 10.	More than 60.

Source: *Author*

fluye a donde hay confianza" (investments flow where there is reliance).[116]

Open exchange legislation (Ley 9, 1991), a competitive foreign investment regime (Decreto 2080, 2000), and a successful military strategy[117] were the basis for increasing investors' reliance through incentives. Given this, the government presented the project for the

[116] *See "Colombia Quiere Ser Lider Mundial en Confianza Inversionista," Afirma el Presidente Uribe*, SECRETARÍA DE PRENSA – SP – Noticias (May 7, 2009), http://web.presidencia.gov.co/sp/2009/mayo/07/16072009.html.

[117] *See* Alejandro Santos, *El año que volvió la esperanza,* REVISTA SEMANA (July 27, 2003), www.semana.com/nacion/articulo/el-ano-volvio-esperanza/59576-3; *See also Victories, but No Waterloo*, THE ECONOMIST (July 15, 2004), www.economist.com/node/2926049 (describing the Colombian army's growing military successes over the Revolutionary Armed Forces of Colombia).

promotion of "Investors' Reliance," and LSCs were introduced to Congress in 2003.

The project provided stabilization for new investments and compensation in case of non-compliance.[118] Congress partially modified the text to allow both national and foreign investments. It also amended the text to reaffirm its right to maintain the application of the rules stipulated in the contract, leaving compensation as a last resort, and not as a right of the state.[119]

It is important to note that Congress' inclusion of national investments reaffirmed FDI's fair and equitable treatment standard.[120] It also motivated local investments to have a similar social impact and capital as FDI.[121] This in turn maintained the incentive appearance that was vital to attracting FDI. It also maximized the Law's possibilities for increasing economic and social benefits in that it was not restricted to FDI, but was also available to local investors. In a nutshell, this resulted in more investments with high positive impact on development.

After these modifications, the project became a law of the Republic (Ley 963) on July 8, 2005.[122] The purpose of Ley 963 is to promote new investments and to enlarge existing ones.[123] Some contend that its ulterior intent is to stimulate national and foreign investments.[124] This position is consistent with the problems identified

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[118] *See* Proyecto de Ley 15 de 2003, "Por la cual se instaura una Ley de Estabilidad Jurídica para los inversionistas en Colombia [Ley de Estabilidad Jurídica para inversionistas]", julio 20 de 2003, *available at* http://congresovisible.org/proyectos-de-ley/por-la-cual-se-instaura-una-ley-de-estabilidad-juridica-para-los-inversionistas-en-colombia-ley-de-estabilidad-juridica-para-inversionistas/3223/#tab=2.

[119] According to specialized literature, renouncing to the right to modify the law (with compensation) is less protective of the State's sovereignty. *See* Christoph Schreuer & Rudolf Dolzer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 75-77 (2008) (finding that renouncing to the right to modify the law (with compensation) is less protective of the State's sovereignty).

[120] *See id.* at 139-48 (Equitable treatment is a standard of protection according to which foreign investors should not be treated in a discriminatory manner, with respect to national investors. In this sense, it includes elements such as due process, good faith and freedom from coercion.).

[121] Within the requirements to benefit from the law, it establishes a minimum amount of approximately 1.5 million dollars (significant amount of financial resources) and a description of the project with its expected economic and social impact (another difference between FDI and other type of investments), which constituted the basis for approval or disproval. Additionally, long-terms of stabilization guarantee permanency.

[122] L. 963, julio 8, 2005, DIARIO OFICIAL [D.O.], art. 1 (Colom.)

[123] *Id.*

[124] Castaño, s*upra* note 1, at 70.

above, as well as with the rationale of attracting FDI and local investments with similar characteristics.

With regards to Legal Stability Contracts, the law states:

"[T]he Nation guarantees to investors that subscribe it, that if there is any adverse modification in certain rules specifically included in the contract, whose stability was identified in it as determinant for the investment, the right to keep the application of the rules during the term of the contract."[125]

LSCs thus provide investors with the right to keep the application of any rule determinant for their investment[126] on the condition that they comply with two prerequisite conditions. First, the investment has to be more than 5000 Colombian Minimum Monthly Legal Wages,[127] which is equivalent to approximately USD $1.5 million.[128] Second, the investor has to pay the government a premium equivalent to 1 percent of the investment made every year or 0.5 percent in the unproductive phases of the investment.[129]

An investor meeting these requirements then has to present a submission to the Comité de Estabilidad Jurídica (Committee of Legal Stability),[130] which was specially created by the law and is composed of ministers and national authorities responsible for economic affairs.[131] Within the next four months, the minister in charge of the sector in which the investment is going to be made must sign the contract or provide reasons not to approve the application.[132]

In making this decision, the minister and the Committee must follow general criteria established in the instruments that created the law.[133] Most of these instruments do not establish clear criteria,[134] which gives the Committee wide negotiation power to guarantee – if

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125 L. 963, julio 8, 2005, DIARIO OFICIAL [D.O.] art. 1 (Colom.)

126 Excluded legislation: labor, emergency tax regulation, indirect taxes (regional), prudential regulation of the financial sector and public services tariff regime. *See id.*, art. 11.

127 L. 1111, diciembre 27, 2006, DIARIO OFICIAL [D.O.], art. 51 (Colom.) (replacing the wages standard with a fixed value that can be actualized periodically).

128 *See* MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO, *supra* note 3, at §1.1.

129 *See* L. 963, julio 8, 2005, *Diario Oficial* [D.O.] art. 5 (Colom.).

130 *Id.*, art. 4 (b).

131 *Id.*

132 *See id*., art. 4(f).

133 Some of these documents are *Plan Nacional de Desarrollo* (a national development program for each presidential period), documentos CONPES (released by the highest State organ for the coordination of the economy of the country) and the law. *See* CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 1-2.

134 *See* CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 3 (establishing that economic and social impacts were an important criterion for approving a submission, but did not mention how decisive these criterion would be).

applied correctly – an increase in investments and in their social impact.

Even though the Committee had the power to decide whether social commitments were binding obligations or not, obligations in LSCs were limited to the investment before the first contract was signed.[135] This ruling providing that LSCs are only binding in capital-related aspects was subsequently further reaffirmed.[136]

The law was also the subject of constitutionality exams. The Colombian Constitutional Court considered the new law to be adjusted to the Constitution in cases concerning equality before the law,[137] separation of powers,[138] conflicts regarding the application of the law, and dispute resolution.[139]

Despite these successes in court, the criteria to approve submissions have become more and more specific. For instance, the Committee prohibited the stabilization of certain taxes and deductions in 2009. It also established that only quantifiable obligations, both social and financial, were to be analyzed in submissions.[140] The Committee and other national economic authorities have introduced a variety of criteria since the law entered into force, mainly to prevent the signature of disproportional LSCs.[141]

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[135] *See* Azuero, *supra* note 59, at 13; Juliana Castaño & Paola Galeano, *Los Contratos de Estabilidad Jurídica en Colombia: ¿Una Verdadera Herramienta Para a Protección de los Intereses del Inversionista Extranjero y Del Estado Colombiano?*, 2 EAFIT J. INT'L L. 68, 89 (2011), *available at* http://www.eafit.edu.co/revistas/ejil/Documents/ejil-jan-jun-2011/Los-Contratos-de-Estabilidad-Juridica-en-Colombia.pdf.

[136] L. 14, octubre 30, 2009, Comité de Estabilidad Jurídica.

[137] *See generally* Corte Constitucional [C.C.] [Constitutional Court], marzo 29, 2006, Sentencia C-242, Gaceta de la Corte Constitutcional art. 12 (Colom.).

[138] *See* Corte Constitucional [C.C.] [Constitutional Court], 2006, Sentencia C-320, Gaceta de la Corte Constitutcional at preamble (Colom.).

[139] *See* Corte Constitucional [C.C.] [Constitutional Court], Noviembre 22, 2006, Sentencia C-961, Gaceta de la Corte Constitutcional (Colom.) (reaffirming that LSCs are governed by Colombian law).

[140] *See* L.13, septiembre 25, 2009, Gaceta de la Corte Constitucional [G.C.] § IV (Colom.).

[141] Interview with anonymous consultant, Comm. of Legal Stability, (Feb. 2012). An expert consultant for the Committee who required anonymity, believes that it is necessary to have objective criteria to empower the Committee with the capacity to deny LSCs to projects that do not need it or that may not have a significant impact in development. He stresses the importance of applying the law specifically for what it was created: to attract investments that would not otherwise be executed. With vague criteria, he insists, the Committee would have to keep signing LSCs to most submissions, with direct negative effects on collection and commerce (equality).

On the other hand, some modifications were actually issued without the appropriate publicity. For example, Cesar Cermeño, Manager of the Litigation & Dispute Resolution Department of Deloitte in Colombia, stresses the negative impact of the legal instrument Acta No. 11 (September 7, 2009). Acta No. 11, which had binding effects on the Committee, established, *inter alia*, that only investments that represent more than 75 percent of the fixed assets of the investing enterprise were to benefit from a 20-year stabilization regardless of other criteria or the types of projects. Cermeño insists that the lack of publicity prevented the execution of important projects with proven positive social impact for which the term of stabilization was determinant.[142]

The instrument has now been adjusted notwithstanding the discussions on criteria. Ley 963, for example, recently experienced two important modifications.[143] The National Development Program for 2010-2014,[144] which is a type of legislation that is issued in every presidential period,[145] introduced these modifications. The first change was in the criteria for new investments, which originally included all projects starting operations *after the law entered into force*.[146] Since reform became binding, new investments refer only to projects starting operations *after the contract is subscribed*.[147]

This legal instrument also eliminated the static 0.5 percent and 1 percent prime standard by giving the Ministry of Finance and Public Debt (Hacienda y Crédito Público) the authority to issue a new methodology defining their amount, in view of the risk for the nation and taking into account each specific submission.[148]

These modifications were made through a law with temporary effects that left the possibility of permanent incorporation uncertain.

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[142] One of Cermeño's clients was a national energy corporation with operations in different cities and with high fixed assets. One of its projects consisted in the installation of street lights in some of the poorest populations of the north coast. The submission, presented prior to the issuance of the cited Acta, was approved with one quarter of the stabilization term required, even though it complied with all other criteria and proved to have a direct positive impact in society and in the development of the region *See* Interview with César Cermeño, Manager of Litigation & Dispute Resolution Dept., Deloitte - Colom. (Nov. 24, 2011).

[143] *See* L. 1111, art. 21 (indirectly reforming Ley 963 by modifing the Tax Regime's measurement from the traditional minimum monthly legal wages to a new concept known as unit of tributary value (UVT, for the Spanish *Unidad de Valor Tributario*).

[144] *See* L. 1450, junio 16, 2011, DIARIO OFICIAL [D.O.] art. 1 (Colom.).

[145] *See* CONSTITUCION POLITICA DE COLOMBIA [C.P.] art. 339-342; *see also* L. 152, julio 15, 1994, DIARIO OFICIAL [D.O.] arts. 13, 14, 25 (Colom.).

[146] *See* L. 963, julio 8, 2005, DIARIO OFICIAL [D.O.] art. 3 (Colom.).

[147] *See* L. 1450, art. 49.

[148] *Id.*, art. 48.

Their orientation, however, makes it reasonable to infer that Juan Manuel Santos' current government is not in favor of incentives. Whether a consequence of a turn in the policies toward FDI or a change in the Committee's agenda and methodology for analyzing submissions, the truth is that the number of approved contracts has decreased and submissions have been suppressed since the end of 2009.[149] Up to May, 2011, 160 submissions were pending and some accusations for uneven competition practices were presented to the competent authorities.[150]

The impact of the introduced reforms is not conclusive however, as only one contract was signed in 2011. Additionally, the reprisal of submissions, some of which have been pending for more than one year, shows the Committee's inefficiency and how reprisal deteriorates the investment environment.

In light of the above, the following analysis will emphasize the Committee's activity in particular. The intent of my analysis is to identify explanations to possible flaws of the law or its application.

VI. IMPACT ANALYSIS: HAVE LSCS MET EXPECTATIONS? *PROS AND CONS OF THE LAW AND ITS APPLICATION*

I analyzed the 64 Legal Stability Contracts that were in force at the end of 2010. The first was EJ-01 of 2006, which was subscribed between the Ministry of Commerce, Industry, and Tourism, and the corporation Alpina Productos Alimenticios S.A. on January 24, 2006. The last studied LSC was EJ-16 of 2010, which was subscribed between the Ministry of Information Technologies and Communication, and the corporation Telmex Colombia S.A. on September 15, 2010. According to the last report published by the government, two additional contracts were signed at the end of 2010, and one contract was signed per year in 2011 and 2012.[151]

1. General Data

Since Law 963 of 2005 entered into force, an average of 25 LSCs have been signed each year, although the majority were subscribed in the 2008-2010 period.[152] With respect to stabilization terms, the most common period (65 percent) was 20 years. Only approxi-

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149 *See O Todos en la Cama. . .*, DINERO.COM (May 11, 2011), http://www.dinero.com/edicion-impresa/negocios/articulo/o-todos-cama. . ./118985.
150 *Id.*
151 *See Contratos de Estabilidad Jurídica-Firmados. Resumen de Contratos de Estabilidad Jurídica Firmados*, MINISTERIO DE COMERCIO, INDUSTRIA Y TURISMO (2013) https://www.mincomercio.gov.co/minindustria/publicaciones.php?id=17145 These four agreements were only included in the statistics concerning contracts per year.
152 *See infra* Figure 1.

mately 3 percent of analyzed LSCs had stabilization terms of less than 10 years.[153]

Investments were generally considerably larger than the minimums required by law. Only 12 percent of the studied contracts had amounts close to the minimum.[154] Contrary to press critiques that contend that the primary sector benefited most under the Law, the only relevant pattern with respect to economic activity is manufacturing and tourism (31.6 percent of analyzed LSCs).[155] Only 9 percent of investments were for the primary sector.[156]

2. *Efficacy to Fulfill its Purposes*

As explained earlier, the particular context in which LSCs and most incentives for FDI in Colombia were implemented was due to the need for fresh financial resources and significant employment generation.[157] Since those constitute the ulterior purposes of the Law, I chose to analyze the Law's efficacy to meet its own expectations in those matters.

a. *Attraction of Investments*

There are two sets of findings with respect to attracting investments. The first concerns the direct role of the Law in increasing investments and the second looks at its contribution to an investment environment (investors' reliance).

There is evidence that the Law has had a successful impact on investments. As represented in Figure 2 (stability terms), most analyzed LSCs (79 percent) establish long terms of stability of 15 years or more.[158] This shows that Colombia has an advantage in competing for FDI since similar legislation in Latin America only allows stabilization for up to 10 years.[159] This is bolstered by the fact that these projects are planned for an extensive period and are thus more likely to reinvest. It is reasonable to infer that some investors have chosen Colombia instead of similar destinations considering these comparative advantages of the Law.

Additionally, more than half of the analyzed LSCs are for investments above COP $50.000 million, which is around 10 times the minimum required by law.[160] Statistics on the number of LSCs with

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153 *See infra* Figure 2.
154 *See infra* Figure 3.
155 *See infra* Figure 4.
156 *See id*.
157 *See supra* pp. 255-60.
158 *See infra* Figure 2.
159 *Id*.
160 *See infra* Figure 3.

foreign and domestic investments are not included given that there is no conclusive data on the participation of foreign capital in the projects entitled to stabilization. There is no available official record of the number of LSCs in which foreign investors participated and the contracts do not provide decisive information on the owners of the assets of the companies. An inference based on the information included in the contracts would not be precise enough considering that most foreign investors either merge or acquire Colombian companies in private contracts. In any case, it is consistent with the purpose of this text not to distinguish the two situations since, as expressed above, local investments that benefit from LSCs have FDI characteristics and comply with the purposes of incentivizing FDI in that they attract investments with high positive social impact.

b. Contribution to an Investment Environment

I identified two deficiencies in the application of the Law that could harm the incentives' attractiveness and eventually the country's investment environment: inexplicable delays in the approval and evidence that the Committee lacks both cautiousness and general criteria to guarantee equality.

With respect to the former, the most alarming finding is that 59 percent of the analyzed LSCs spent more than six months in the approval process.[161] Considering the Law stipulates that submissions must be answered within four months of presentation, this clearly damages the country's image as an investment destination.[162]

Nonetheless, it is also true that most of the submissions that took more than a year to be approved are long-term LSCs and therefore are presumably more complex projects.[163] Generally, the longer the stability, the longer the time to approve the submission.[164] Investors may have some responsibility in this. Submissions have increasingly addressed all types of legislation and investors have sent extensive folders with complex information that have increased the amount of work for the Committee during the time the law has been in force.[165] The Committee thus sometimes has to consult experts in different areas, which demands more time than the four months stipulated by law.

With respect to the destination, only projects related to culture and health evidence a significantly shorter time for approval, though

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161 *See infra* Figure 5.
162 *See id.*
163 *See infra* Figure 6.
164 *Id.*
165 Interview with an expert consultant for the Committee (Feb. 2012).

this is not a conclusive finding in the sense that projects in the mentioned areas are also fewer.[166]

Finally, even though there is no connection between the amount of capital invested and the time the Committee took to approve the application, it is at least curious that higher amounts are equivalent to shorter terms for approval.[167]

Regarding the Committee's lack of caution, it is unclear why it signed LSCs with investments that were already executed at the moment of the signature. It is true that the Law is applicable to investments made after its entry into force, but the object of each LSC is to execute new investments, whether in new projects or in existing ones, but new executions nonetheless. Guaranteeing stability to already executed investments is like an empty glass of water: the investment was going to be executed with or without the LSC. The State is still providing benefits that imply a detriment in collection.

Now, although only 6 percent of the analyzed contracts concern executed investments,[168] it suggests that the Committee either did not notice or did not apply the law in accordance with its purposes. The lack of general criteria for an objective analysis of submissions is apparent in the results of the study: there is absolutely no clear connection between the amount invested and the years of stability granted.[169]

c. Employment Generation and Social Commitments

Although the main purpose of the Law is to attract investment, employment generation requirements were thought to increase the positive social impact of investments, both local and foreign.[170] It was included in the Committee's own criteria to approve submissions,[171] in the law,[172] and in the technical[173] and legal[174] instruments that developed it.

Yet, immediate changes left the cited texts without any binding character. Following technical recommendations for allowing the Committee to decide whether the social commitments had a binding char-

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[166] *See infra* Figure 7.

[167] *See infra* Figure 8.

[168] *See infra* Figure 9.

[169] *See infra* Figure 10.

[170] *See* CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 1.

[171] *See* Ministerio de Comercio, Industria y Turismo, Res. 01, ¶ 7 (2010).

[172] *See* L. 963, julio 8, 2005, DIARIO OFICIAL [D.O.] art. 4(a) (Colom.).

[173] *See* CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, *supra* note 8, at 1.

[174] *See* Decreto 2950, Agosto 29, 2005, arts. 3(h), 8(h) (Colom.).

acter in each case,[175] the president issued a decree eliminating the exigency of including social obligations, such as generating employment.[176] The result: obligations only for investment commitments.

This dramatic change not only reduced the Committee's negotiation capacity, but also eliminated an important mode of increasing investments' social impact. Therefore, 31 percent of studied LSCs do not have commitments in employment generation[177] and the existing ones are not considered binding obligations. Therefore, not complying with the LSCs does not entail contractual responsibility.

One could contend that, since none of the direct competitors (namely, Latin American countries) included such obligations in their legislation, it was reasonable to eliminate them to retain attractiveness for FDI. However, it is also true that none of the direct competitors allowed stabilization for 20 years, which is evidently more beneficial for investors. Additionally, the content and extent of social commitments was part of the negotiation power attributed to the Committee for it to use on a case-by-case basis to maximize the positive impact of investments in Colombia's development. The elimination of this requirement and the inclusion of new non-negotiable and capital-related pre-requisites prevented the execution of projects with proven incidence in the wealth of communities and development, in general.[178]

3. *The Law's Main Problems and Its Causes*

It is important to stress that the results of my analysis provide evidence of deficiencies in Law 963 of 2005. Even though most are attributable to the Committee's misapplication of the Law, earlier reforms left no option for the establishment of social commitments as binding obligations. The latter clearly reduces eventual benefits for the State and increases its aptitude to attract FDI.

It is thus fair to conclude that Law 963 experienced earlier reforms, before it was applied, that oriented it to the attraction of capital in detriment of other interests. The following table summarizes key issues.

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[175] CONSEJO NACIONAL DE POL. ECON. Y SOCIAL, MODIFICACIÓN ACLARATORIA DEL DOCUMENTO CONPES 3366 "CONSIDERACIONES TÉCNICAS PARA LA EVALUACIÓN DE SOLICITUDES DE CELEBRACIÓN DE CONTRATOS DE ESTABILIDAD JURÍDICA" 2 (Documento Conpes, No. 3406, 2005).

[176] *See* L. 133, enero 23, 2006, DIARIO OFICIAL [D.O.] art. 1 (Colom.) (repealing article 8 of Decreto 2950 de 2005).

[177] *See infra* Figure 10.

[178] *See* Interview with César Cermeño, *supra* note 142.

TABLE 4. LAW 963 OF 2005'S MAIN PROBLEMS AND THEIR CAUSES

	Cause	**Problem**	**Result**
		Employment and social concerns	
1	Deficient application of the Law.	Committee's lack of clarity on the applied criteria.	Long-term stabilization for low investments.
2	Elimination of binding character for social commitments.[179]	No employment generation obligations.	LSCs for investments with less positive social impact.
3	New non-negotiable and capital-related requirements.[180]	Impossible to sign LSCs for projects with high positive impact in development.	Fewer LSCs with high positive social impact.
		Approval	
4	Committee's inefficiency.	Average time for approval exceeds what the Law contemplates.	59 percent of analyzed LSCs spent more than six months in the approval process. More than 160 repressed submissions.
		Projects	
5	Applying the Law without considering its purposes.	Committee's self-limitation of its negotiation capacity.	LSCs for investments that were already executed at the moment of the signature.

VII. CONCLUSION

Colombia began the 21st century with major challenges in both economic and social aspects. The competition for the attraction of Foreign Direct Investment, as uneven as it is, required legal instruments specifically created to stimulate it. At the same time, the consequences of a complex and prolonged internal armed conflict in society, and of unstable tax legislation in business, urged for an increase in investments with a positive social impact.

In this context, LSCs appeared as a competitive tool to attract FDI and to increase the benefits of national investments. The results of my analysis suggest that the law that established them successfully met the expectations of increasing investments. I also found evidence that some LSCs concern investments that might have been executed without the incentive. Nevertheless, from the investment commitments established in the studied contracts it is reasonable to conclude that the law was appropriate.

Still, as promising as it might seem, it is the only remarkable result of my research. According to the findings exposed in the previous section, there are two preoccupant conclusions. The first is that

[179] *See* L. 133, art. 1.
[180] *See* Comité de Estabilidad Jurídica, Acta 11 (2009); Interview with César Cermeño *supra* note 142.

the Committee has been inefficient in the application of the law, which could explain the ascending number of applications repressed and of the related administrative and judicial actions. The other depressing result is that early reforms have denaturalized the incentive, limiting the possibilities to increase its impact in development.

Initiatives with a positive social impact are essential for Colombia today. According to UNCLAC, 45.5 percent of the Colombian population was poor and 16.5 percent of the population was extremely poor in 2009.[181] These rates contrast with the country's consistent growth and with its renewed image as an investment destination. In the period between 2007-2010 the country ascended 40 positions in the world business environment ranking, reaching position 39, which means that it is the third most business-friendly country in Latin America, the first in reforms for FDI, and the first in the region (fifth in the world) that offers guarantees to foreign investors.[182]

Along this train of thought, it is fairly reasonable to question the suitability of the reforms, since they have inclined the balance toward financial resources to the detriment of development objectives. The government has had the opportunity to reactivate employment generation obligations and, instead, has imposed new capital-related rules and requirements, some of which even limit the normative spectrum to stabilize. The findings presented above suggest that this is not a step forward in the attraction of the desired investments.

If the government is pretending to make further modifications, it should be for increasing the social impact: economic growth is stable and investment confidence is at its highest level. Then, if Colombia is finally an investment destination with *investors' reliance*, it should stop focusing on the capital and start focusing on society.

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[181] *Colombia Avanza en ODM, Pero Persisten Grandes Brechas Regionales*, NOTAS DE LA CEPAL, http://www.eclac.cl/notas/65/Subsedes_Colombia.html (last visited Mar. 4, 2013).

[182] *See* WORLD BANK, DOING BUSINESS 156 (2011).

FIGURES

FIGURE 1: *Contracts Per Year*

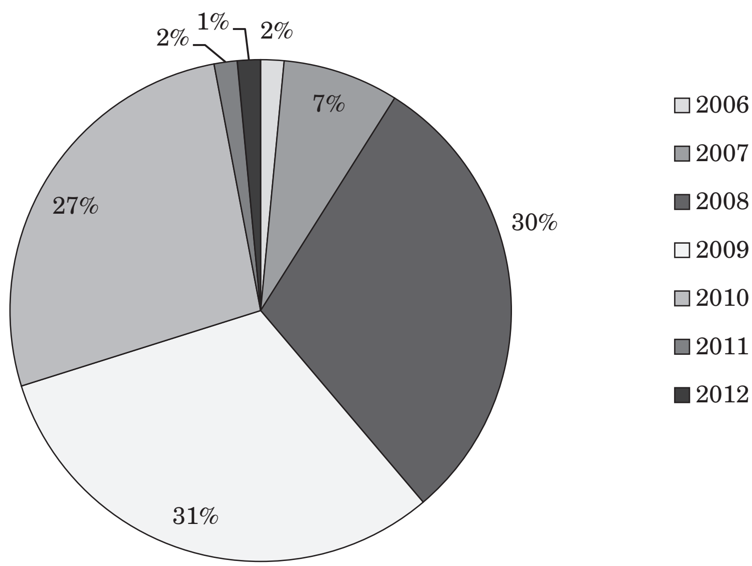

FIGURE 2: *Stability Terms*

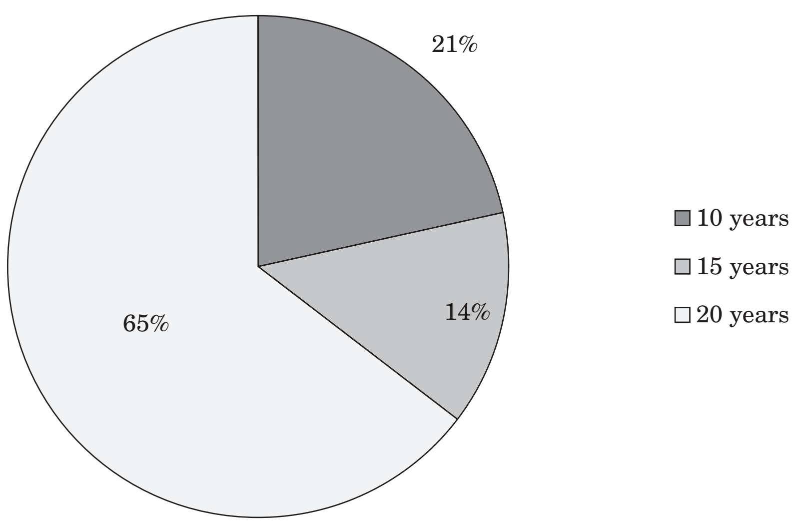

FIGURE 3: *Investments per LSC*

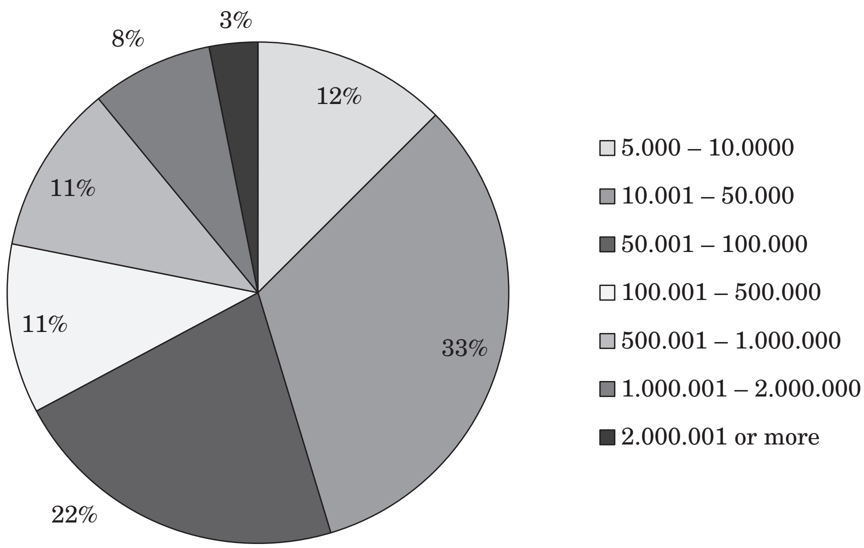

FIGURE 4: *LSCs per Ministry*

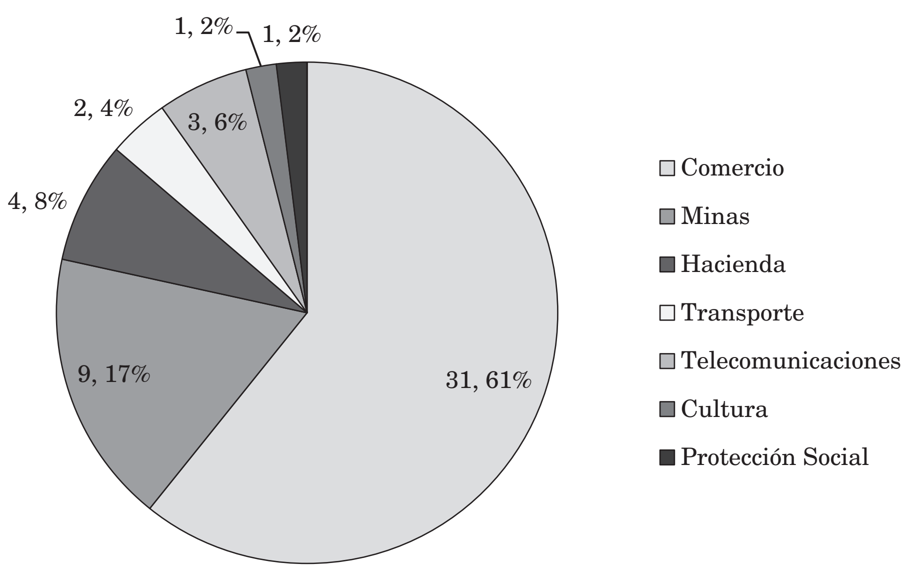

Figure 5: *Time for Approval*

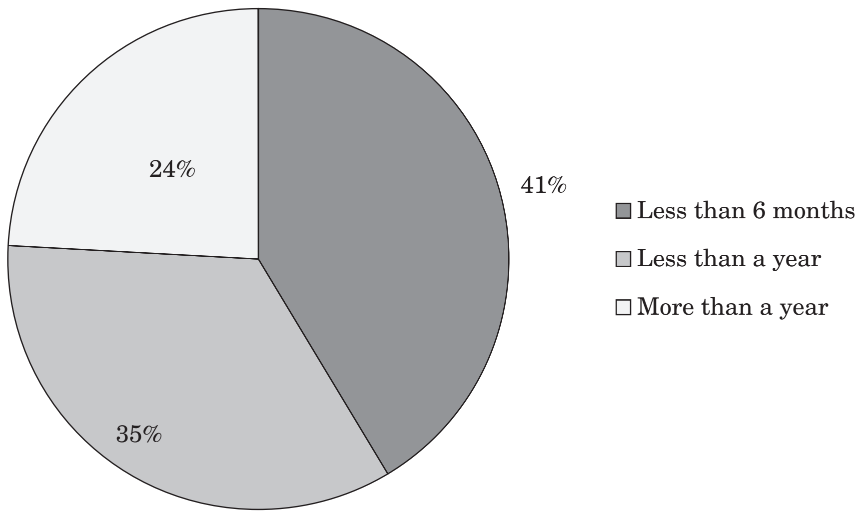

Figure 6: *Approval vs. Stability*

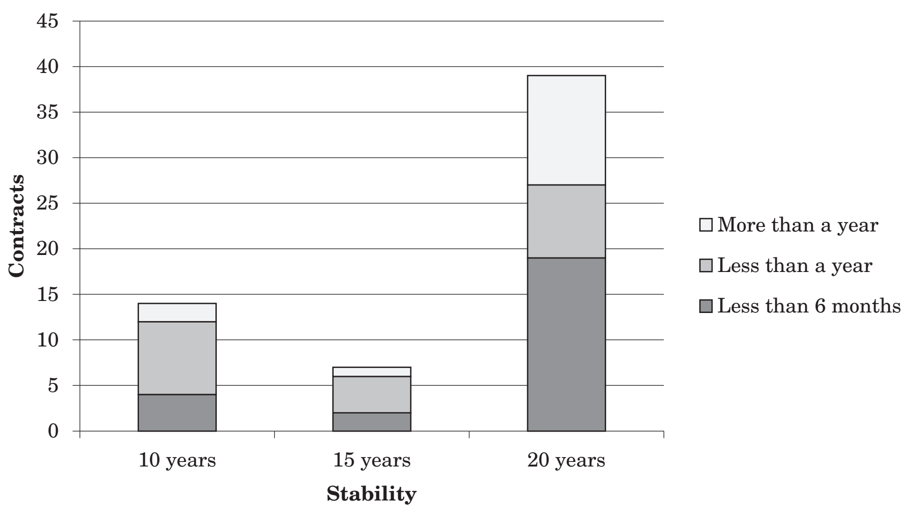

FIGURE 7: *Approval vs. Ministry*

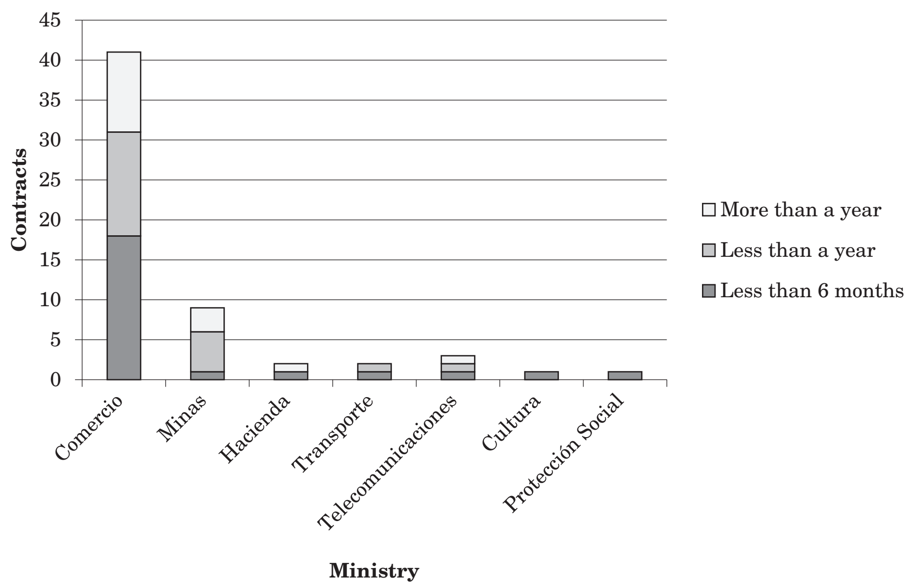

FIGURE 8: *Approval vs. Investment*

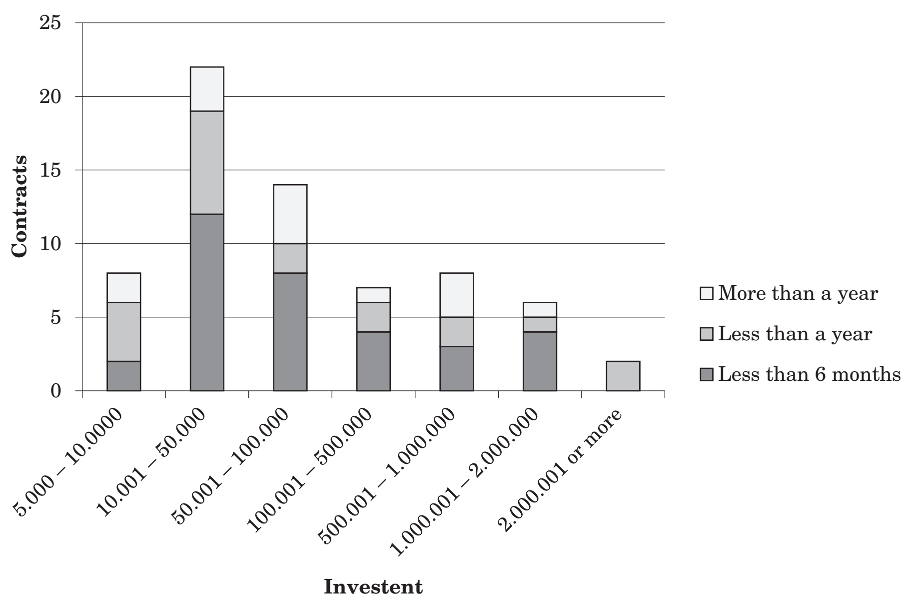

FIGURE 9: *Term to Execute Investments*

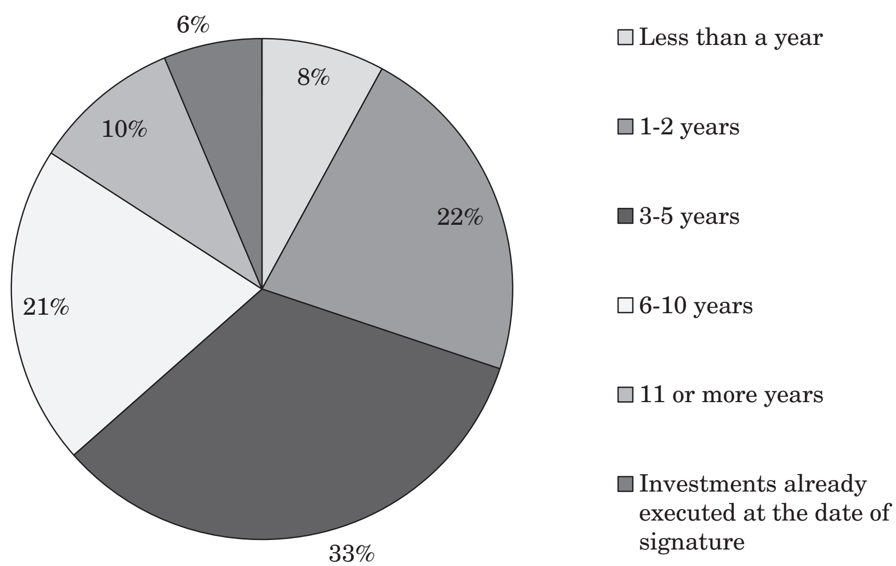

FIGURE 10: *Stability vs. Investment*

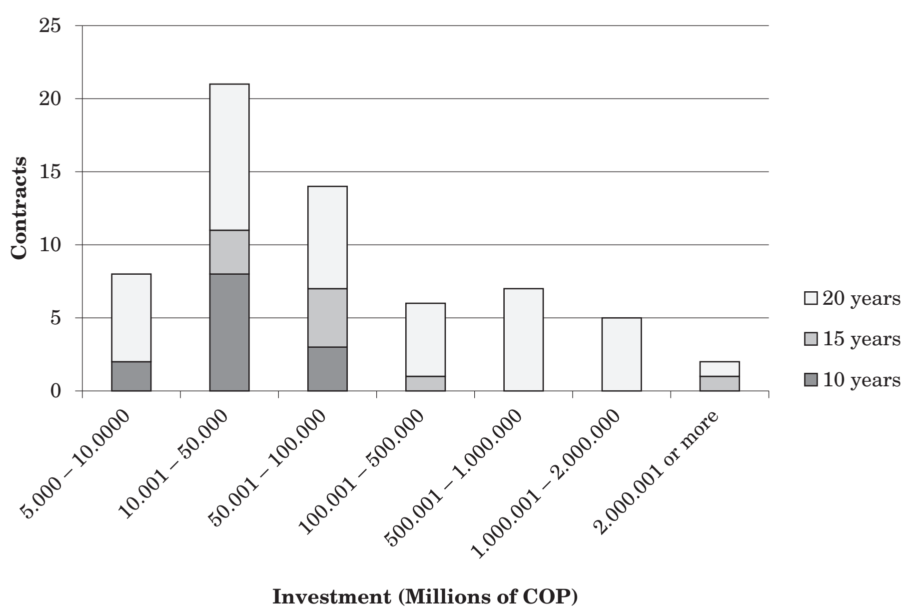

FIGURE 11*: Stability vs. Direct Employment*