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Spring May 20, 2018

Bashar Malkawi, Stabilization Clauses.pdf

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Introduction

Stabilization clauses are unit provisions in investment contracts that accommodate the prospect of regulatory changes for investors. Given their nature of safeguarding individual interests of investors, stabilization clauses would possibly cause tensions with intrusive states’ regulation inside the general public interest, along with to protect human rights or further typically to figure towards property development.

The debate on stabilization clauses closely relates to the extra general need coherence between investors’ rights and legit public interest in international investment law.

There is increasing public criticism concerning the one–sidedness of investment law, protective investors’ rights while not at constant time anchoring investors’ responsibilities for human rights and property development.
Some begin to question the contribution of international investment law to property development and its positive impact on the rule of law, some imply taking into consideration the whole image of property development once addressing international investment law. The purpose of investment law is, within the 1st place, the protection of economic (human) rights, like the liberty to trade or to conduct a business, equity, or property rights associated with business activities. different human rights problems touching upon social and environmental problems, extremely relevant for development and future property economy furthermore, don't seem to be subject to international investment law within the 1st place as these belong to different domains of law, like international social or environmental law.

Such bounds is, however, somehow artificial, as these domains overlap with investment protection standards and should considerably influence trade and investment (e.g. investment climate, business risks, and competition). Today, most parties to international investment agreements (IIAs) or the international organization belong to at least one of the core human rights treaties and area unit therefore at constant time guaranteed to investment and different human rights legal regimes.

The same is true for environmental regulation and connected state obligations on the concept of international environmental law. Thus, “hard cases” would possibly occur, once legal principles of assorted legal regimes hit no clear rule determinant the case. In such cases, however the case is resolved terribly much depends on the “pre-analytic vision of law”. normally, investment protection standards stay comparatively broad and can leave a margin of interpretation that enables for accommodative overlapping obligations of states within the social, environmental and investment fields. the stress underlying investment protection and different fields of human rights and environmental standards,
therefore, looks principally to arise from the scope of due legal interpretation. This changes once stabilization clauses come back to play.

They manufacture a tighter legal regime for host states, and demand specific legal answers once it involves reconciliation overlapping fields of investment protection and public interest regulation. This paper intends to allow Associate in Nursing insight within the context and discussion of stabilization clauses and mediation choices that have directly or indirectly forbidden stabilization clauses.

Against this scenery, the paper explores potential interpretive leeway to reconcile conflicts with socially or environmentally connected public interest regulation of host states.

As a conclusion, stabilization clauses, a minimum of in their most general type – i.e. providing for amendment|phase transition|state modification|physical change} or compensating any change in law (general stabilization clauses) – fail to fulfil their original purpose of investment protection and security of late as they will provoke instead of remedy legal uncertainty and business risk. Strict application of general stabilization clauses would possibly injury and not defend business interests.

**Current features of stabilization clauses in investor–state contracts**

General information regarding stabilization clauses in understanding follow is hard to go looking out, as investor–state agreements do not appear to be merely publicly accessible. In 2008, a study below the auspices of the Special Representative of the Secretary–General for business and human rights (SRSG) and so the International Finance Corporation (IFC) explored the role of stabilization clauses in follow, notably regarding their potential to negatively influence host states’ and companies’ human rights compliance record.
The study defines stabilization clauses as “contractual clauses in private contracts between investors and host states that address the problem of changes in law inside the host state throughout the time period of the project”. It identifies three main styles of trendy stabilization follow. First, “freezing clauses” that exempt associate degree investment from the appliance of recent laws, “freezing” the law of the host state, either in its totality or restricted to positive restrictive fields (e.g. business enterprise issues); second, “equilibrium clauses” that cowl the loss that relates to changes in law; and third, “hybrid clauses” that are combos of chilling and economic equilibrium clauses, providing in complementing each other “an additional layer of protection for stability of the contract”. Hybrid clauses leave it to the parties to figure out whether or not or not economic equilibrium is to be achieved through exemption from restrictive modification or different types of “alleviation of the unfavourable impact of changes” like contract adaptation or compensation. This classification projected by the study is also a rough analytical description of the characteristics of stabilization clauses; it is not basically congruent with the language in follow. inside the subsequent sections, we've got a bent to stick to this language to discussion the ultimate choices and effects of these clauses. we've got a bent to are cognizant that the quantity of quality in stabilization follow is high, and may hardly be generalized.

Freezing clauses are the “classic approach” to contract stability for investors. They “freeze” the law “as effective of” the date of the conclusion of the contract16 or verify that “laws and decrees which may at intervals the longer term impose higher rates or further progressive rates of tax or would otherwise impose a much bigger […] liabilities […] shall not apply to the Company”. Freeze clauses may additionally embrace court alternatives shortly effective. Some varieties of freeze commitments stipulate that the contract shall apply as
lex specialist over current or ulterior legislative enactments”, or providing “consistent with the investment contract”. completely different clauses might “insulate the legal document relationship from any material adverse effect” (MAE). despite the very fact that freeze clauses seem to “freeze” the right of the host state to manage with respect to the investment contract between the parties and by this flip any adverse state action embezzled, these clauses unit of measurement still “no guarantee against the state’s exercise of sovereign authority at intervals the general public interest”. They can, however, “entitle the aggrieved party to subsequent amount of compensation for its violation than at intervals the case where such a clause is absent. the stylish varied to freeze clauses is economic equilibrium clauses. they sometimes embrace negotiation provisions, typically unconditional with recourse to a third party (arbitration) to examine adaptation once negotiations fail. Some clauses in addition leave house for flexibility, like threshold financial losses, restriction to discriminatory measures, the need of the capitalist to mitigate compliance costs, or the operation of the clause at intervals the investors’ and so the host states’ favour, e.g. with host states sharing benefits in cases of unforeseen raises in profits.

From a legal purpose of view, “economic equilibrium clauses don't appear to cause important issues, as they do not stop host state regulation so long because the economic equilibrium is restored”, whereas freeze clauses limit state sovereignty and switch any adverse state action outlawed. However, from a political purpose of view, though they supply bigger flexibility and area unit initially look less intrusive with relevance the state’s sovereignty, economic equilibrium clauses could prove pricey for the state. Restoring the economic equilibrium may lead to a additional comprehensive claim for damages and a bigger coverage of claims than compensation for the breach of freeze commitments. However, apart from freeze clauses, “economic equilibrium
clauses are usually solely triggered wherever a minimum threshold is met – specifically wherever the economic equilibrium of the contract is affected”. An often cited advantage of economic equilibrium clauses is their contribution to the steadiness of the investor–state relationship. It’s argued that readjusting the economic equilibrium and negotiation tool may maintain a negotiation atmosphere once otherwise the stress between host states’ restrictive interests and investors’ expectations would have amounted to conflict and written agreement breach. This is often why some attribute to negotiation clauses the overall advantage of departure the “state’s sovereignty additional intact” and of “protecting the capitalist against changes within the law”. Others see the alleged positive influence of economic leveling provisions and renegotiation clauses additional critically, inform to the actual fact that they leave associate unsettled legal state of affairs open which renegotiation might not be as conflict–preventing because it appears. Negotiation and recourse to a 3rd party could place in agreement legal obligations in question. According to some commentators, this rather hampers than promotes the contract’s stability, the more so as the scope of stabilization clauses is often very little specified and leaves room for interpretation.

Stabilization clauses rationale and practice

The explanation of stabilization clauses is risk management for foreign investments. Stabilization clauses are mostly included in contracts that relate to capital–intensive comes in foreign countries, such as extractive trade, infrastructure or public services’ comes (e.g. mining, oil, electricity, water and waste matter, telecommunications, transport) and involve concession agreements (CA), production sharing agreements (PSA), and build–operate and transfer agreements (BOT). These comes usually require massive initial capital investments and become profitable over time. in line with the SRSG study,
credit grantors read stabilization clauses as important so as to mitigate the money risk of such investments, significantly for “nonrecourse financing” once the compensation is exclusively joined to the project’s performance. massive comes with longer periods to recover the prices and generate profits, like infrastructure investments, obtain guarantees so dynamical investment conditions don't hurt the cost–benefit equilibrium of the investment. Pre-investment cost–benefit calculations is also considerably distorted by later environmental and social legislation, e.g. associated with new technology standards or employment and health care regulation. Host states usually grant stabilization clauses to accommodate investors’ interests and attract future investment by providing a high level of warrant. Their use is fostered by their inclusion in model agreements that set a definite customary of protection for specific sectors or industries, such as, as an example, the Energy Charter Model Host Government Agreement (HGA) on Cross Border Pipelines.

As to their frequency in observe, the SRSG study has analyzed a large vary of industries, like infrastructure, extractive industries, telecommunication, and health care services, on the idea of seventy six contracts and twelve contract models from completely different regions of the planet, as well as sub–Saharan Africa, East Asia and Pacific, Mideast and North Africa, Japanese Europe, Southern Europe and Central Asia, South Asia, latin America, the Caribbean and OECD countries. in keeping with the study’s find–ings, freezing clauses still belong to trendy investment contract apply with relevance sub–Saharan Africa, Japanese and Southern Europe, Central Asia, the center East and North Africa, and particularly within the extractive business. within the Nineteen Seventies and Eighties, within the aftermath of colonialization, the employment of freezing commitments came struggling because the freezing impact significantly reduces the sovereign
power of the host state. The UN–General Assembly issued resolutions that emphasized the sovereignty of states, stressing the requirement for fairness within the share of advantages, commonality and technology transfer in international investment relations. The study shows that even if freezing clauses square measure selected “to be outdated”, they're still normally used. Some still contemplate them to be the most effective and most secure variety of written agreement stability. To–day, they sometimes come back on in rather trendy sorts of “lax specialist”, “intangibility” or “consistency” clauses. Frequent use of freezing clauses by a bunch state with relevance totally different investors over time could cause important body complexity: to every investment another law is applicable, making legal enclaves of that the administration has got to keep track. this might cause frictions, distortion in domestic competition, inequalities and tensions inside the country, and represent a challenge for developing countries where administration often suffers from deficiency of resources and equipment, issues of governance, and connected problem in scrutiny and documentation. things of goodish environmental or social impact might persist against the scene of “legal phase change shields”, the additional thus, as investment contracts sometimes keep in effect over an extended amount of your time.

Freezing clauses sometimes don't feature in contracts with OECD countries. Here, limited economic equilibrium clauses addressing specific restrictive risks prevail. In OECD–contracts, their scope is generally restricted to discriminatory regulation and that they might exclude regulation on safety, security and different public considerations, like environmental or social legislation. Conversely, full economic equilibrium clauses covering any regulatory modification in spite of its discriminatory impact or actual motivation, square measure predominant in contracts with non–OECD countries, e.g. associated
with the ability, water, transportation, infrastructure, and also the extractive trade. The distinction between the practices of developing and OECD states is explained with the assumption that in OECD countries risks associated with modification in law square measure below in developing countries, and so would like less in depth stabilization protection. The quality of social and environmental protection may additionally be considerably lower, thus raising standards, if not taken under consideration in the original economic equilibrium, can be additional expensive and cause additional risks. In developing countries, basic standards of environmental protection or human rights (e.g. health and safety, labor standards) may additionally be insufficiently regulated or enforced.

Business’ commitment to social responsibility and public–private soft law

In response to civil society pressure, investors took initiatives to publish and limit stabilization commitments, together with change in law or law application relating to national courts’ decisions, human rights and environmental protection. And often cited example is that the Baku–Tbilisi–Ceyhan (BTC) pipeline consortium’s “Human Rights Undertaking” to prevent eventual impacts of the contract’s stabilization clause on measures of public concern, reacting to strong civil society cause. Of the endeavor stipulates that the BTC pool “shall not ask for compensation below the ‘economic equilibrium’ clause or different similar provisions in such a way on preclude any action or inaction by the
relevant Host Government that's fairly needed to fulfill the obligations of that Host Government below any international written agreement on human rights (including the ECHR), labour or HSE (health, safety, environment) operative within the relevant Project State from time to time to that such Project State is then a party”. Excludes additional typically claims against host state measures that are supported human rights, health, safety and environmental aspects, providing domestic regulation is “reasonably needed by international labor or human rights treaties to that the Host Government could be a party” which “domestic law is not any additional demanding than the best of European Union standards as brought up within the Project Agreements, together with relevant EU directives (‘EU Standards’), those International Bank for Reconstruction and Development cluster standards brought up within the Project Agreements, and standards below applicable international labor and human rights treaties”. This constitutes a proper declaration to exempt from the stabilization commitment measures that mirror the host states’ public considerations associated with the surroundings, human rights, and safety though the Human Rights endeavor could be a unilateral declaration, it's formally binding because it can not be revoked while not the host states’ consent. Additional typically, an outsized range of investors and firms have committed to conduct their business during a approach that respects human rights and environmental protection, health and safety. Major international business players interact in commonplace setting activities, like the worldwide Business Initiative on Human Rights (GBI). Self-regulatory or multi-stakeholder initiatives, like the Extractive trade Transparency Initiative (EITI) and therefore the Kimberly method Certification theme (KPCS) within the extractive trade or the round-table conference on property oil (RSPO) within the agricultural field develop procedures and standards to foster accountable business conduct. Likewise, the monetary
The services sector has developed tips to foster respect of property development criteria, together with human rights and environmental standards. In parallel, firms support international frameworks fostering smart business conduct, like the worldwide Compact, a UN-framework that issued ten guiding principles permanently business practices, and provides a forum for stakeholders. Members have the proper to use an UN-label, providing they fit reportage necessities on smart business practices. Within the monetary sector, the UNEP Finance Initiative (UNEP FI) has created a platform permanently business practices, and therefore the International Finance Corporation (IFC) established a property Framework with reference to financial backing, following an extended neutral revision method that culminated in its adoption in might 2011. The framework includes the antecedently existing Performance Standards, that kind the idea of investors’ duty to assess social and environmental risks of an investment project. Another outstanding international initiative has been the mandate of the world organization Special Representative of the Secretary-General on the problem of human rights and multinational companies and alternative business enterprises (SRSG), John Ruggie, that was conducted beneath the Human Rights Council’s special procedures. The aim was to facilitate additional development of a business and human rights international framework when the world organisation Sub-Commission on the Promotion and Protection of Human Rights’ plan to “draft norms on the responsibility of multinational companies and alternative business enterprises with relation to human rights” (UN-norms) unsuccessful. The results of the mandate was the adoption by the Human Rights Council of the world organization Guiding Principles on Business and Human Rights, endorsing and guiding the implementation of the currently very fashionable 3 projection framework (i) “states’ duty to safeguard human rights, (ii) business’ responsibility to respect
human rights, and (iii) remedy to “investigate, penalize and look for redress for abuses”. This framework was the results of a comprehensive neutral method that expedited its recognition and allowed for widespread acceptance. The business’ responsibility to respect human rights includes a “human rights due-diligence method to spot, prevent, mitigate and account for the way [business enterprises] address their impacts on human rights.

Confronted with client inquiries and investment that ar progressively that specialize in compliance with and promotion of human rights and property development, corporations ar a lot of and a lot of stressed to reply to those principles. Key reportage standards like the world reportage Initiatives’ (GRI) wide unfold benchmark for companies’ property reportage (non-financial reporting) or the Dow–Jones Industrial Average property Index (DJSI) RobecoSam form, implicitly or expressly talk over with the world organization Guiding Principles. In 2011 the revised OECD tips for transnational Enterprises (OECD MNE Guidelines), a soft law framework for accountable business conduct at the start place in situ in 1976, have supported the world organization Guiding Principles, as well as the due diligence commonplace, by inserting a replacement chapter on human rights. among the OECD framework, in keeping with the OECD MNE tips, non-compliance could end in complaints before National Contact Points. though this is often a non–legal, mediation–like instrument, there's right smart so–felt pressure for reputational hurt. From a business perspective, adverse effects on human rights, public health or environmental issues represent business risks (reputational hurt, legal insecurity and political instability). Investors might have to tug out of funding a project if they can't afford in risk management terms to resist public pressure of the house state (e.g. within the context of Greek deity guarantees) or civil society. even if business commitments and initiatives ar usually broad in scope, and usually in a
roundabout way lawfully binding, their soft–binding result, primarily in terms of law interpretation, is non–negligible. Public declaration and positioning of a corporation relating to respect for human rights and environmental standards is – with relation to the principle of fine religion – hardly reconcilable with claims on the premise of general stabilization clauses busy with these standards.

**Legality of stabilization clauses**

The first category of cases dealing with stabilization clauses is to be examined in the context of nationalizations and expropriations in the 1970s and 1980s. These involve the legality and binding nature of stabilization clauses. Legal arguments revolve around the sovereignty of the host state and the extent to which stabilization clauses would “contract out” its sovereign power. The arbitral practice is divided in this re–gard. The question has never been fully settled. In the Texaco v. Libya case, the tribunal held that stabilization clauses limit the host state’s sovereignty as the host state in exercising its sovereignty committed to its waiving. The tribunal referred to the UN General Assembly Resolution 1803 on the Permanent Sovereignty of States over Natural Resources as expressing customary international law and to the principle pact servanda. In contrast to this reasoning, the tribunal in the Liamco v. Libya upheld the state’s sovereign right to nationalize as being lawful, however, provided that it is accompanied by adequate compensation. The arbitral decision in the Amino v. Kuwait case goes in a similar direction. The tribunal presumed that the limitation of a state’s sovereignty was a “particularly serious undertaking”, at least if for a long period of time, and thus could only be presumed if explicitly provided for. Similarly, arbitrators in the AGIP v. Congo case held that stabilization clauses that have been liberally signed by governments do not affect the sovereign regulatory pow–er of a state as the state could still regulate vis–à–vis investors, nationals or foreigners that are not subject to such
stabilization commitments. Both decisions pointed, however, to the limitation of the “freezing” effect of stabilization clauses, in time or in ex-tent, which could lead, hypothetically, to the argument a contrary that if there is no such limitation, stabilization clauses could be judged as affecting the sovereignty of a host state.80 In the LETCO v. Liberia case (ICSID), the arbitration panel stated that the main purpose of stabilization clauses was to protect against arbitrary actions of the contracting government and could not totally impair the sovereign power of states.81 Some commentators draw the conclusion that: “stabilization clauses are not thus a guarantee against lawful nationalization and for that matter lawful expropriation. They impose on the state an obligation to act in good faith and give rise to an obligation to compensate in case of their breach.

Regarding the result, there's not abundant distinction among the divergent court approaches to the matter. altogether cases, the requirement to pay compensation is that the results of states breaching stabilization clauses. albeit the Texaco case declared a wrongful act that needs restitution in integrum this failed to prove enforceable in apply. The distinction of the 2 approaches will, however, play a task concerning the number of compensation that varies for lawful or unlawful acts. Another branch of jurisprudence has been coping with the lawfulness of stabilization clauses underneath domestic law. National constitutional principles might interchange the means of stabilization clauses, betting on that law is applicable to the investor–state contract. the selection of domestic law will secure sovereign power of the state to vary the law, a minimum of “in to date as a due diligence effort by the capitalist would have indicated serious doubts over the government’s ability to grant such a guarantee effectively underneath national law”. However, given the international character of arbitration and therefore the international rules applicable to aliens, tribunals
might all the same believe international law when adjudicating the case. Moreover, the judicature argued that the international character of the contract arose from the actual fact that the contract was “part of a recent international method of economic development, significantly within the less developed countries”, that needed “contractual guarantees” for the protection of personal parties, which “governments of developing countries successively area unit willing to produce such guarantees so as to push abundant required economic development.” This was, within the eyes of the judicature, confirmed by the actual fact that the house government of the personal parties “are abundantly curious about such agreements and in promoting their conclusion”, and during this case, even “provided its own guarantees for the investment”. On this basis, the judicature upheld the lawfulness and binding nature of the clause and emphasised that “under jurisprudence the commitments created in favour of foreign national share area unit binding however the ability of parliament and alternative governmental organs beneath the domestic constitution to override or nullify such commitments.

II. Indirect reference to stabilization clauses

In up to date investment arbitration the chance of getting claims of arrogation supported stabilization clauses is more and more remote as arrogation standards square measure currently well established at the international level, particularly considering the ever–spreading network of IIAs. all the same, as some commentators have determined, the appliance by host states of recent legislation to associate degree investment lined by a stabilization clause may well be seen as associate degree arrogation of the written agreement right to not be subject to such new legislation while not compensation. because it has been argued, it's well established in investment practice that rights arising from
contracts could quantity to investments, and therefore be subject to the protection against arrogation envisaged by IIAs. The potential legal worth of stabilization clauses with respect to investment pact arbitration involving arrogation is mirrored within the case Methanex v. u. s.. during this case, a commitment like a stabilization clause was coupled to the notion of a live equivalent to arrogation. The assembly therein case control that a “non-discriminatory regulation for a public purpose, that is enacted in accordance with group action and, that affects a distant capitalist or investment isn't deemed expropriator and remunerative unless specific commitments had been given by the regulation government (...) that the got would refrain from such regulation.” The latter half, though not exploitation the expression “stabilization clause”, just about summarizes its underlying style. The assembly relied on the shortage of any such commitment joined of the grounds on that to dismiss the arrogation claim. different indirect mentioning has been created with reference to the honest and just treatment normal, additional exactly to delimit the extent of the “legitimate expectations” of the capitalist. In AES v. Hungary, associate degree Energy Charter pact case, the ICSID assembly saw the shortage of a stabilization clause as a component to assist it verify that there may well be no legitimate expectations that the applicable regulation wouldn't be modified by the govt. The claim that the capitalist’s legitimate expectations were pissed off was inserted into a broader claim of failure by Magyarorszag to accord honest and just treatment to the investor. therein case, considering the facts, the assembly found that there may well be no legitimate expectations that body rating wouldn't be reintroduced. The assembly went on to mention that the duty to supply a stable surroundings for investment isn't to be confused with a stabilization clause, noting that: “It is additionally footing that the 2001 Settlement Agreement doesn't contain a questionable
“stabilization clause” – i.e. a covenant to not modification the relevant law. In these circumstances, the assembly concludes that

Claimants cannot lawfully are diode by Magyarorszag to expect that a regime of body rating wouldn't be reintroduced. A legal framework is by definition subject to vary because it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which embrace legislative acts.

Direct application of stabilization clauses

The third class of cases refers to those during which stabilization clauses were at the core of the dispute. The case CMS Gas Transmissions v. Argentina, Associate in Nursing example involving the conjunction between stabilization and umbrella clauses suggests that violations of investor–state written agreement stabilization obligations represent a breach of the inter–state investment agreement. The applicant relied on a particular enterprise that the tariff structure wouldn't be frozen or subject to additional regulation or control, still as on the commitment that the essential rules governing the license wouldn't be modified while not the licensee’s consent. The judicature found that such undertakings were valid and enforceable supported the umbrella clause within the relevant “[…] there are specially 2 stabilization clauses contained within the License that have important result once it involves the protection extended to them below the umbrella clause. the primary is that the obligation undertaken to not freeze the tariff regime or subject it to cost controls. The second is that the obligation to not alter the essential rules governing the License while not [the licensee]’s written consent. It ought to be noted, however, that the a part of the CMS award addressing the tribunal’s finding regarding the umbrella clause was later annulled by the impromptu
Committee, on the grounds that the judicature didn't create it clear however it need to the conclusion that CMS, as a minority investor of the retail merchant, may claim supported obligations undertaken toward the retail merchant (and not CMS itself), yet, the validity of a stabilization clause in and of itself was ne'er place into question or perhaps challenged by Argentina within the annulment continuing. The impromptu Committee dominated that: “[i]n the top it's quite unclear however the judicature found out its conclusion that CMS may enforce the obligations of Argentina to TGN [the licensee]. (…) In these circumstances there's a big lacuna within the Award, that makes it not possible for the reader to follow the reasoning on this time. it's not the case that answers to the question raised ‘can be moderately inferred from the terms employed in the decision’; they can't. consequently, should be annulled for failure to state reasons.” In another case, the judicature in LG&E v. Argentina, once noting that there was no written agreement stabilization clause in this case, found that failure by Argentina to look at statutory stabilization provisions would produce to liability below the umbrella clause:

“As such, Argentina’s cancellation of the guarantees below the statutory framework – calculation of the tariffs in greenbacks before conversion to pesos semi–annual tariff changes by the PPI and no value controls while not indemnification – profaned its obligations to Claimants’ investments. Argentina created these specific obligations to foreign investors, like LG&E, by enacting the Gas Law and alternative laws, then advertising these guarantees within the giving memo to induce the entry of

foreign capital to fund the privatization program in its public service sector. “In short, one should additionally recall that between Argentina and LG&E there's no binding written agreement agreement. The existence of such relationship
would have allowed the parties to agree on stabilization clauses within the event of changes in bound circumstances. But, within the absence of such agreement, one is certain to resort to a system regulation those events”. The cases show that social control of written agreement stabilization clauses could also be supported umbrella clauses in international investment treaties. The aim of such clauses is to place written agreement commitments entered into by the state with foreign investors below the protecting “umbrella” of the international investment agreement. Commentators have ascertained the nice diversity each within the interpretation given by arbitral tribunals to such clauses also as within the expression they gift themselves in. There looks to be no single idea of umbrella clauses however rather multiple umbrella clauses and with this additional or less in depth reading of their scope. It thus pretty much depends on the expression and context of an umbrella clause to that degree its reach are often typically understood to elevate written agreement commitments to the amount of the international accord protection. An example of the role that stabilization clauses might play during this context is that the urban center v. Argentina case. The ICSID judicature, once round-faced with the task of drawing the boundaries of umbrella clause coverage, found it helpful to form respect to stabilization clauses as an illustration “[i]internally interpreted during this means, the umbrella clause (...) won't extend the accord protection to breaches of a normal industrial contract entered into by the State or a State–owned entity, however can cowl extra investment protections contractually in agreement by the State as a sovereign – like a stabilization clause – inserted in AN investment agreement.

Conclusion
As a conclusion, all reviewed decisions that directly or indirectly involved stabilization clauses, have implicitly or explicitly recognized the validity of such clauses, giving rise to, at least, the right to compensation, including the case of legitimate public purpose and bona fide regulation. However, it is worth noting that so far the decisions that dealt directly with stabilization clauses (third category) revolved around taxation issues and tariff readjustment. Arbitrators were not faced with the more troublesome cases touching upon stabilization clauses in the context of human rights or environmental regulation. Nonetheless, as we have seen, arbitration decisions suggest that stabilization clauses may well fix the investors’ position to no flexibility and zero risk in those cases. This goes beyond the extent and nature of investment law protection as it is anchored in average IIAs today.

In general IIA practice, the sovereign role of the state is usually the starting point of reasoning. In recent arbitration, this has led to a limited principle and balancing approach when conflicting public interests were involved. Arbitral tribunals have referred to the jurisprudence of the European Court of Human Rights (ECHR), e.g. in Tecmed, Azurix and LG&E to interpret the expropriation standard. If “there is a reasonable relationship of proportionality between the charge or weight imposed on the foreign investor and the aim sought to be realized by any expropriating measure”, the state’s measure is not to be considered expropriatory and thus would not prompt compensation. Even if arbitrators depending on their interpretive approaches may apply a very narrow concept of “legitimate expectations”, at large, the standards as they are applied within the framework of IIA today leave room for balanced interpretation. When discussing “frustration of the investor’s legitimate expectations”, the tribunal in Saluka v. Czech Republic held, for example, that if “taken too literally”, a narrow reading “would impose upon host States’
obligations which would be inap-propriate and unrealistic”. The tribunal deployed a proportionality test, weighing “the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other”. Other tribunals introduced a counter-balance by conditioning legitimate expectations guarantees upon “due diligence” on the side of the investor. The arbitrators in Parkerings v. Lithuania state: “The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.” Similarly, the tribunal in MTD v. Chile held that the host state’s liability for frustrating the investor’s legitimate expectations should be partially offset by the investor’s own lack of diligence. The tribunal found that, although the host state was responsible for breaches of the fair and equitable treatment standard, MTD had contributed to the damages suffered as a result of its negligent conduct. After making these assertions, the tribunal went on to say that “BITs are not an insurance against business risk”. Therefore, the more expansive notion of the protection of legitimate expectations “may be circumscribed by the notion of the ‘investor conduct’, reflected in various investor duties such as (i) the duty to refrain from unconscionable conduct, (ii) the duty to invest with adequate knowledge of risk and (iii) the duty to conduct business in a reasonable manner.”

References: