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The rise of self-judging essential security interest clauses in international investment agreements (also in Chinese)

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The rise of self-judging essential security interest clauses in international investment agreements
by Karl P. Sauvant and Mevelyn Ong, with Katherine Lama and Thor Petersen*

A network of bilateral treaties and other international investment agreements (IIAs) has constructed a predictable and enforceable international investment regime.

Since 1992, however, the protections offered by this regime have potentially been limited by the inclusion in IIAs of self-judging essential security interest (ESI) clauses. These clauses expressly allow a government to take measures—unilaterally—that “it considers necessary”1 to evade treaty obligations.

This Perspective presents a study of 1,861 IIAs concluded by 90 countries before early 2016.2 The study sought to identify the geographic and temporal spread of self-judging ESI clauses in IIAs and trends in drafting styles. It found 222 IIAs containing self-judging ESI clauses, with the United States (US) being the first to introduce them. The US, Canada and Japan remain the leading users, followed by a growing number of Asian and Latin American countries.

While the number of self-judging ESI clauses is small compared to the total number of IIAs, the proportion of IIAs with such clauses concluded in a given year has increased from negligible in 2000 to over 60% of IIAs concluded in 2015. (See charts below.) By early 2016, at least 134 countries, accounting for 99% of world outward FDI flows and stock, were bound by such clauses.

Self-judging ESI clauses can be classified along two dimensions:

Scope

- “Broad clauses” (127 IIAs) refer to “essential security interests” without further definition or limitation, giving governments wide discretion to determine what
constitutes their ESI. For example: “Nothing in this Agreement … preclude[s] a Party from applying measures that it considers necessary for … the protection of its own [ESI].”

- “Narrow clauses” (95 IIAs) limit self-judgment to specific subjects, typically related to furnishing certain information, but also to matters such as war or other emergencies. Occasionally, narrow clauses incorporate, by reference, or replicate, GATT art. XXI and/or GATS art. XIV bis.

**Strength**

- “Very strong clauses” (15 IIAs) include a footnote prescribing that arbitral tribunals must respect a government’s determination of its ESI: “For greater certainty, if a Party invokes [ESI] … the tribunal or panel hearing the matter shall find that the exception applies.”
- “Strong clauses” (190 IIAs) state simply that they are self-judging.
- “Conditional clauses” (17 IIAs) subject self-judgment to a requirement that measures are not applied, for example, in an arbitrary or unjustifiably discriminatory manner, or so as to avoid treaty obligations. This leaves the door open for arbitral review (which can be explicitly required), especially when treaties require reasons for invoking the exception.

The most far-reaching clauses, conferring maximum discretion on governments to determine their own compliance with treaty obligations, are “broad” and “very strong.” Ten IIAs containing such clauses were identified, followed by 102 with broad/strong clauses and 88 with narrow/strong clauses.

Except perhaps when clauses are “very strong,” most self-judging clauses could arguably be challenged on the basis of “good faith.” Nonetheless, arbitral tribunals must give great deference to the judgment of governments.

Overall, the proliferation of self-judging ESI clauses makes IIA protections uncertain, subordinating treaty disciplines to governments’ self-restraint. They are likely to spread further, as governments seek to protect ESI concerns and regulatory sovereignty, and could extend beyond security to cover financial and other regulation. Broad/strong self-judging ESI clauses are quite sweeping, creating the risk of abuses by governments.

Abuses could perhaps be limited by more narrow definitions of “essential security interests” and clearer delineations of when exceptions can be invoked (for example, limiting them solely to national security concerns, and/or expressly providing that they cannot apply to broader interests and economic issues); explicitly stipulating “good-faith” requirements; incorporating a last-resort condition; requiring notification or prior reasons given to a joint committee; and/or providing for consultations with treaty counterparties before invoking an ESI clause. Ultimately, however, the clauses remain self-judging.
Although the trend described in this *Perspective* might be part of the much-needed rebalancing of the investment regime toward greater rights for governments, care must be taken not to undermine the rule of international investment law in the process.
Figure 1. Cumulative number of IIAs signed with self-judging ESI clauses, 1992 - early 2016

Source: UNCTAD IIA database for number of IIAs (http://investmentpolicyhub.unctad.org/IIA) and own research.
Figure 2. Number of IIAs signed per year and number of IIAs per year with self-judging ESI clauses, 1992 - 2016

Source: UNCTAD IIA database for number of IIAs (http://investmentpolicyhub.unctad.org/IIA) and own research.
Figure 3. Percentage of IIAs signed with self-judging ESI clauses, by year, 1992 - early 2016

Source: UNCTAD IIA database for number of IIAs (http://investmentpolicyhub.unctad.org/IIA) and own research.
Figure 4. Cumulative number of countries with self-judging ESI clauses, 1992 - 2015

Source: UNCTAD IIA database for number of IIAs (http://investmentpolicyhub.unctad.org/IIA) and own research.
Table. Self-judging ESI clauses, by scope and strength

<table>
<thead>
<tr>
<th></th>
<th>Very strong self-judging element</th>
<th>Strong self-judging element</th>
<th>Conditional self-judging element</th>
</tr>
</thead>
<tbody>
<tr>
<td>Broad ESI scope</td>
<td>10</td>
<td>102</td>
<td>15</td>
</tr>
<tr>
<td>Narrow ESI scope</td>
<td>5</td>
<td>88</td>
<td>2</td>
</tr>
</tbody>
</table>

Source: Own research.
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国际投资协定中基于安全利益单边裁决条款的兴起
Karl P. Sauvant and Mevelyn Ong,
with Katherine Lama and Thor Petersen *

双边条约与其它国际投资协定（IIAs）共同构建了一个可预测、可实施的国际投资体制。

然而，自 1992 年，根本安全利益（ESI）单边裁决条款纳入 IIAs，体制保护由此受到潜在限制。该条款明确准许政府采取措施——单方面——“其认为需要” 1 以规避条约义务。

本文介绍了一篇截至 2016 年初来自 90 个国家 1861 份 IIAs 的研究。2 该研究旨在确定 IIAs 中 ESI 单边裁决条款的时空扩展性，以及未来发展趋势。结果表明，222 份 IIAs 包括 ESI 单边裁决条款，美国（US）是首个应用国。美国、加拿大和日本仍是主要的使用者，亚洲和拉丁美洲使用国家数量在逐步上升。

尽管相较于 IIAs 总量，ESI 单边裁决条款数量较少，但包含该条款的 IIAs 比重由 2000 年可忽略不计上升至 2015 年 60%以上（见图）。截至 2016 年初，至少 134 个国家，占全球对外 FDI 流量与存量的 99%，受到该条款的约束。

ESI 单边裁决条款可从两个方面进行分类：

范围

“广义条款”（127IIAs）涉及“根本安全利益”，缺乏进一步定义或限制，给予政府自主权以决定 ESI 构成内容。例如，“本协定不应 … 阻止缔约方为保护自身利益（ESI）… 采取必要措施。” 3


“广义条款”（95IIAs）限制单边裁决的特定对象，通常与提供某些信息相关，也包括事件，例如战争，或其他紧急事件。有时，狭义条款引用包含，或复制 GATT art. XXI 和 GATS art. IXbis。”

**效果**

“强制条款”（15IIs）包括补充规定，仲裁庭必须尊重政府对其 ESI 的判断；“进一步明确，如果缔约国援引（ESI）… 仲裁庭或陪审团应该认为此例外适用。”

“一般条款”（190IIAs）仅规定单边裁决性质。

“限制条款”（17IIs）判定单边裁决不适用于，例如随意、不合理歧视措施，或仅为规避条约义务。这为审查判决预留了空间（明确要求），尤其是当条约要求为援引例外提供理由。

其中，最具深远影响力的“广义”“强制”条款，给予政府最大自主权以决定履行条约义务。10 份 IIAs 包含该类条款。随之，102 份包括广义/一般条款，以及 88 份包括狭义/一般条款。

或许除条款“强制”外，否则，大部分单边裁决条款将无疑受到“善意原则”的挑战。但是，仲裁庭必须服从政府的判断。

总体而言，ESI 单边裁决条款的激增使 IIAs 保护变得不确定，协定约束从属于政府规制。它们可能延伸更广，因为政府寻求保护 ESI 问题与监管主权，可能扩展至安全领域外，覆盖金融及其他管理。广义/一般 ESI 单边裁决条款影响范围大，导致政权滥用的风险。

滥用权力或许能受到限制，通过更狭义定义“根本安全利益”和更清晰描述例外何时能被援引（例如，限制仅针对国家安全问题，或明确规定不适用于更广义利益和经济问题）；明确规定“善意原则”要求；包括最终手段；要求向联合委员会提供通知或事先的理由；援引 ESI 条款前，与条约另一缔结方磋商。然而，最终，条款仍保持单边裁决性。

尽管本文所描述的趋势可能仅是政府将拥有更多权利的投资机制再平衡的一部分，但是，必须谨慎避免削弱此过程中国际投资法的效力。

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Amanda Jimenez Pinton, Shawn Lim, and Carl Lundholm 项目期间的研究帮助，许多同事、政府官员和投资促进机构的特殊帮助，以及 Manfred Schekulin 和 Stephan Schill 的评论表示感谢。作者也对 Mark Kantor, Michael W. Reisman 和 Kenneth Vandevelde 同级审评表示感谢。Perspective 该作者观点不代表哥伦比亚大学，以及其支持者的观点。Columbia FDI Perspectives (ISSN 2158-3579) 是一个同级审评系列。

1 或相似的自裁决表述。
2 涉及各类数据库和与国家的直接联系，但不包括所有国家和 IIAs.
3 US-Australia FTA, art. 22.2(b).
4 详见 US-Peru FTA, art. 22.2. Whereas the US discontinued use of such a footnote since 2007, other countries have not.
5 详见 Korea-Japan BIT, art. 16.
6 详见 Japan-Mozambique BIT, art. 18.
7 详见 China-Peru FTA, art. 141.
9 Tribunals in investor-state arbitrations have not yet considered self-judging ESI clauses. The effect of self-judging provisions in other legal instruments (例如 ICJ Statute, art. 36(2)) remains uncertain. 详见 Interhandel (Switzerland v. US) [1959] I.C.J. Rep. 6 (Judgment).
图 1. 含 ESI 单边裁决条款的 IIAs 累计数，1992–2016 年初

来源：UNCTAD IIAs 数据库，IIAs 数量（http://investmentpolicyhub.unctad.org/IIA）及自己整理。
图 2. 每年签订 IIAs 总量及含 ESI 单边裁决条款的 IIAs 数量，1992-2016

来源：UNCTAD IIAs 数据库，IIAs 数量（http://investmentpolicyhub.unctad.org/IIA）及自己整理。
图 3. 含 ESI 单边裁决条款的 IIAs 逐年占比，1992-2016 年初

来源：UNCTAD IIAs 数据库，IIAs 数量（http://investmentpolicyhub.unctad.org/IIA）及自己整理。

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### 表．ESI 单边裁决条款，范围与效力

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<td>广义条款</td>
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