

Sauvant, Karl P.; Ong, Mevelyn

**Research Report**

## The rise of self-judging essential security interest clauses in international investment agreements

Columbia FDI Perspectives, No. 188

**Provided in Cooperation with:**

Columbia Center on Sustainable Investment (CCSI) - A joint center of Columbia Law School and the Earth Institute, Columbia University

*Suggested Citation:* Sauvant, Karl P.; Ong, Mevelyn (2016) : The rise of self-judging essential security interest clauses in international investment agreements, Columbia FDI Perspectives, No. 188, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

This Version is available at:

<https://hdl.handle.net/10419/254022>

**Standard-Nutzungsbedingungen:**

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

**Terms of use:**

*Documents in EconStor may be saved and copied for your personal and scholarly purposes.*

*You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.*

*If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.*



## **Columbia FDI Perspectives**

Perspectives on topical foreign direct investment issues

No. 188 December 5, 2016

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Daniel Allman (daniel.allman@columbia.edu)

### **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”<sup>1</sup> to evade treaty obligations.

This *Perspective* presents a study of 1,861 IIAs concluded by 90 countries before early 2016.<sup>2</sup> 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].”<sup>3</sup>

- “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.”<sup>4</sup>
- “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.<sup>5</sup> This leaves the door open for arbitral review<sup>6</sup> (which can be explicitly required<sup>7</sup>), 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.”<sup>8</sup> Nonetheless, arbitral tribunals must give great deference to the judgment of governments.<sup>9</sup>

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.

---

\* Karl P. Sauvant ([karlsauvant@gmail.com](mailto:karlsauvant@gmail.com)) is Resident Senior Fellow, Columbia Center on Sustainable Investment, Columbia University; Mevelyn Ong ([mso2121@columbia.edu](mailto:mso2121@columbia.edu)) is a graduate of the Masters of Law (LL.M.) 2016 degree program at Columbia Law School; Katherine Lama ([kal2208@columbia.edu](mailto:kal2208@columbia.edu)) is a graduate of the Master in Public Administration (MPA) 2016 degree program at Columbia's School of International and Public Affairs; Thor Petersen ([tjp2141@columbia.edu](mailto:tjp2141@columbia.edu)) is a J.D. candidate at Columbia Law School. The details of the study's methodology, contained in a "Methodology Note," are available on request from Karl P. Sauvant. The authors are grateful to Louis-Alexis Bret, Pakwan Chuensuwankul, Katerina Florou, Camilla Gambarini, Jo En Low, Amanda Jiménez Pintón, Shawn Lim, and Carl Lundeohlm for their research assistance during various stages of the project, to a great number of colleagues and officials of governments and investment promotion agencies for specific help, and to Manfred Schekulin and Stephan Schill for their comments. The authors are also grateful to Mark Kantor, Michael W. Reisman and Kenneth Vandevelde for their helpful peer reviews. **The views expressed by the authors of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

<sup>1</sup> Or similar formulations establishing subjective self-judgment.

<sup>2</sup> The review drew on various databases and direct contacts with countries, but not all countries and IIAs were reviewed.

<sup>3</sup> US-Australia FTA, art. 22.2(b).

<sup>4</sup> See, e.g., US-Peru FTA, art. 22.2. Whereas the US discontinued use of such a footnote since 2007, other countries have not.

<sup>5</sup> See, e.g., Korea-Japan BIT, art. 16.

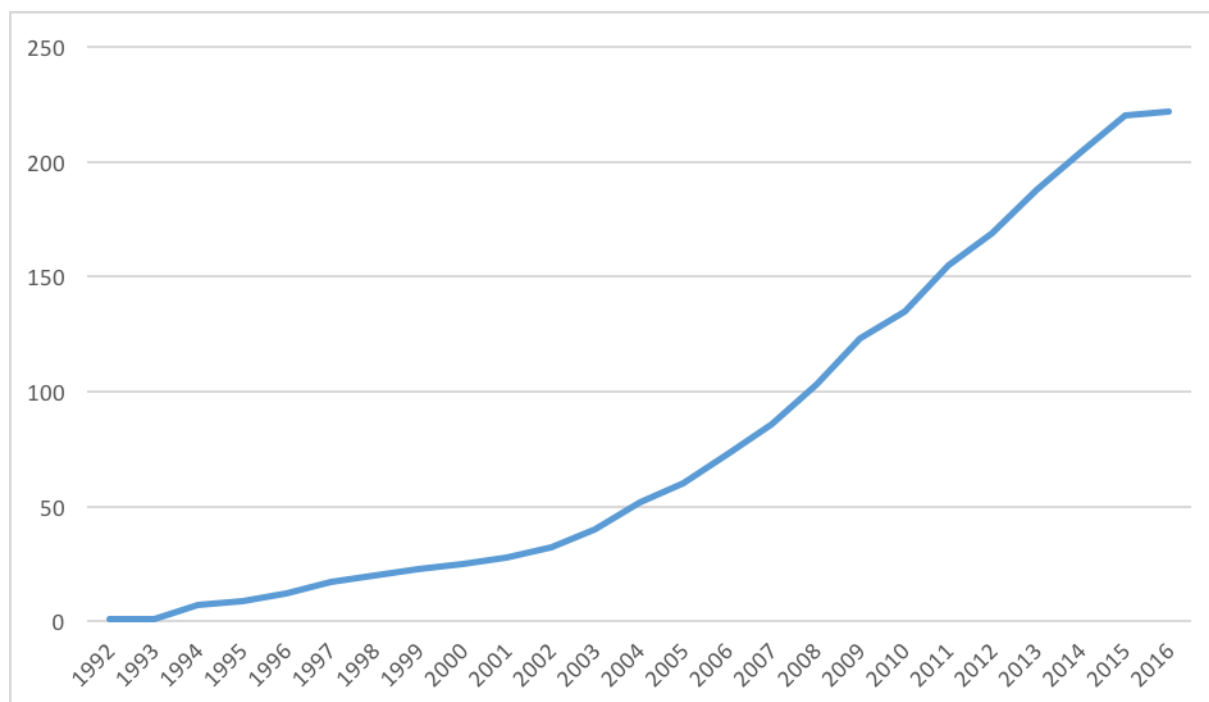
<sup>6</sup> See, e.g., Japan-Mozambique BIT, art. 18.

<sup>7</sup> See, e.g., China-Peru FTA, art. 141.

<sup>8</sup> See, e.g., Kenneth Vandevelde, "Of politics and markets: the shifting ideology of the BITs," *International Tax & Business Lawyer*, vol. 11 (1993), at p. 159; Stephan Schill and Robyn Brieze, "If the state considers': self-judging clauses in international dispute settlement," *Max Planck Yearbook of United Nations Law*, vol. 13 (2009), pp. 61-140.

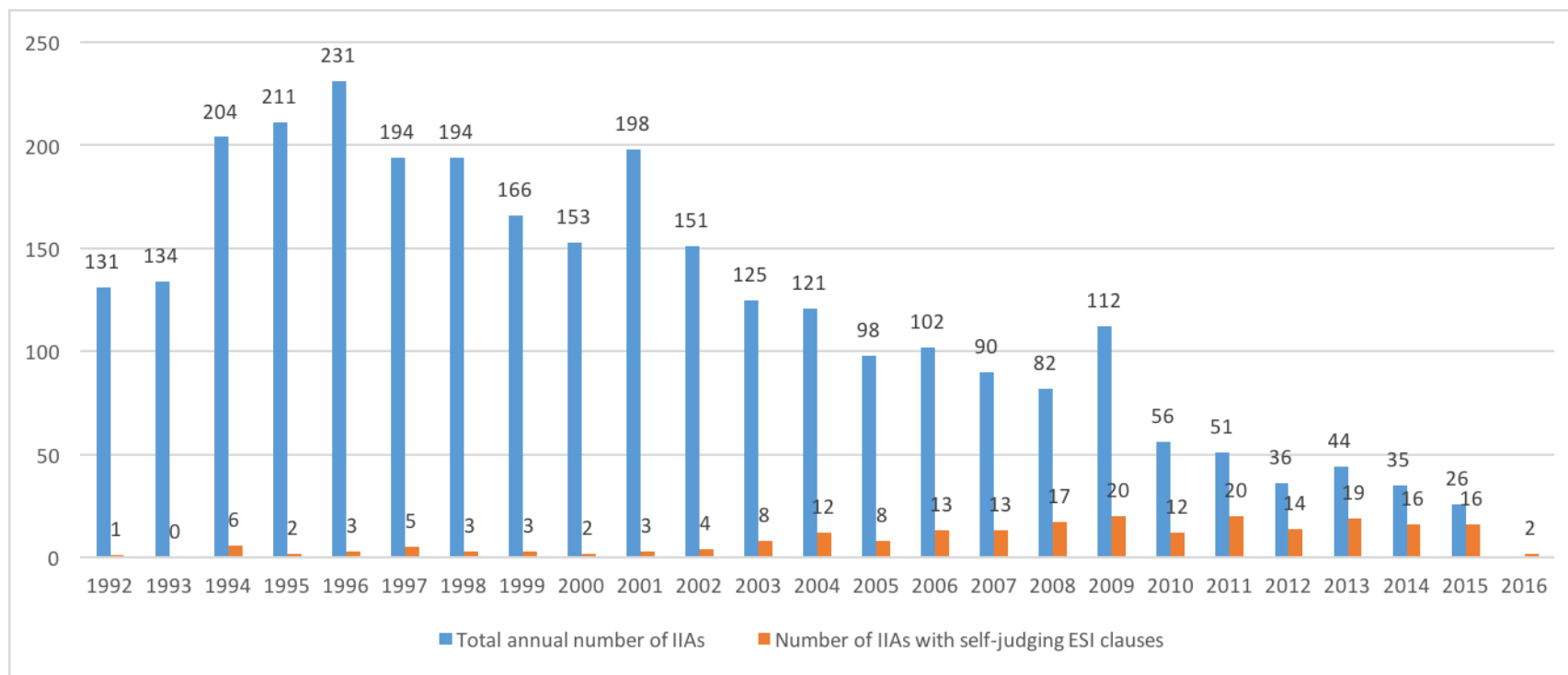
<sup>9</sup> Tribunals in investor-state arbitrations have not yet considered self-judging ESI clauses. The effect of self-judging provisions in other legal instruments (e.g., ICSID Statute, art. 36(2)) remains uncertain. See, also, *Interhandel (Switzerland v. US)* [1959] I.C.J. Rep. 6 (Judgment).

**Figure 1.** Cumulative number of IIAs signed with self-judging ESI clauses, 1992 - early 2016



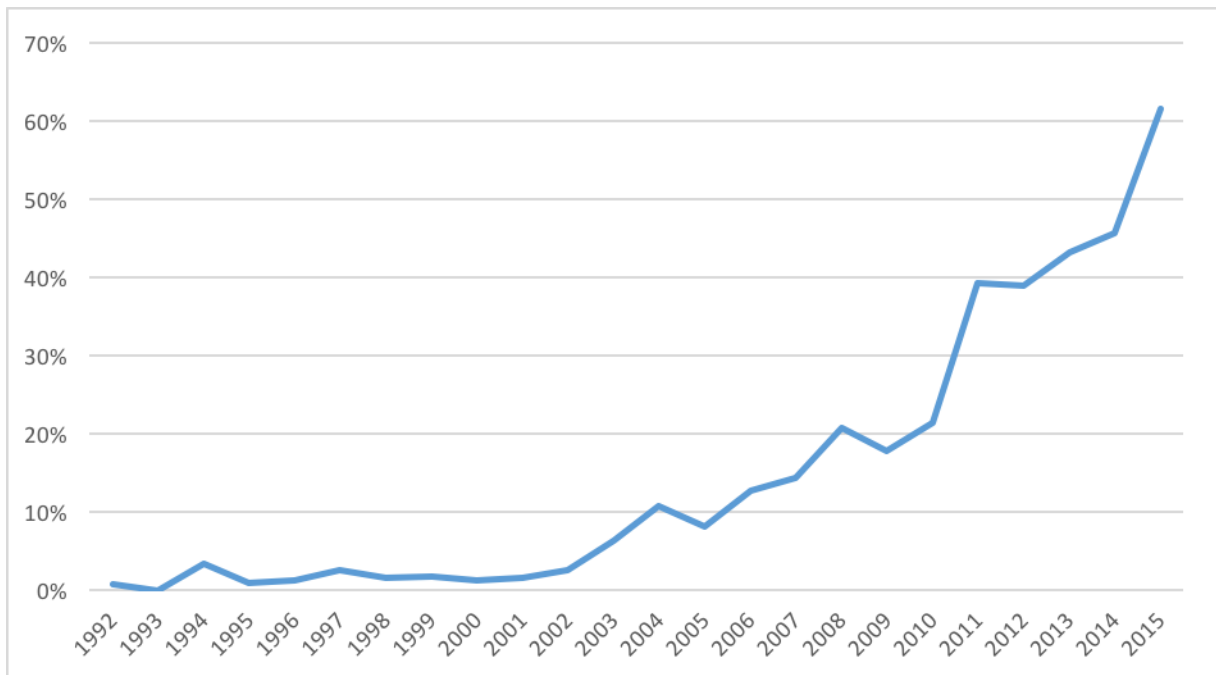
*Source:* UNCTAD IIA database for number of IIAs (<http://investmentpolicyhub.unctad.org/IIA>) and own research.

**Figure 2.** Number of IIAs signed per year and number of IIAs per year with self-judging ESI clauses, 1992 - 2016



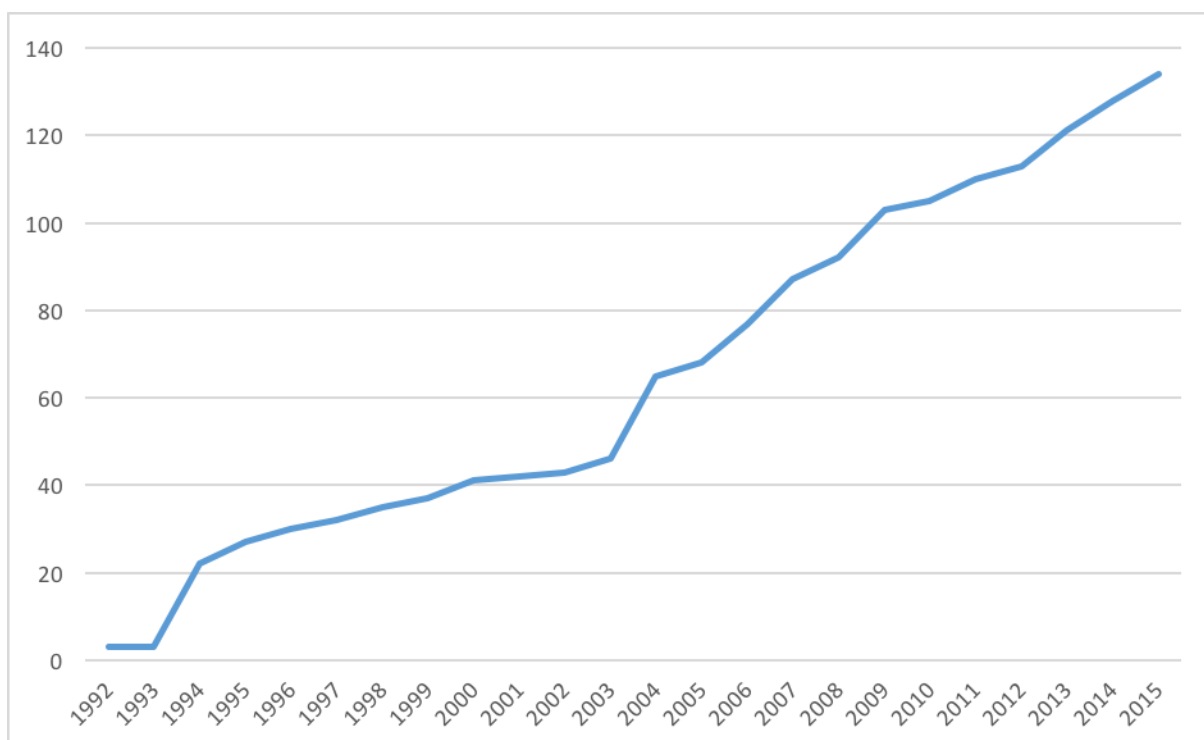
*Source:* UNCTAD IIA database for number of IIAs (<http://investmentpolicyhub.unctad.org/IIA>) and own research.

**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

	Very strong self-judging element	Strong self-judging element	Conditional self-judging element
Broad ESI scope	10	102	15
Narrow ESI scope	5	88	2

*Source: Own research.*

*The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Karl P. Sauvant and Mevelyn Ong, with Katherine Lama and Thor Petersen, ‘The rise of self-judging essential security interest clauses in international investment agreements,’ Columbia FDI Perspectives, No. 188, December 5, 2016. Reprinted with permission from the Columbia Center on Sustainable Investment ([www.ccsi.columbia.edu](http://www.ccsi.columbia.edu)).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at [ccsi@law.columbia.edu](mailto:ccsi@law.columbia.edu).*

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Daniel Allman, [daniel.allman@columbia.edu](mailto:daniel.allman@columbia.edu).

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

#### **Most recent Columbia FDI Perspectives**

- No. 187, Jan Knoerich, “Why some advanced economy firms prefer to be taken over by Chinese acquirers,” November 21, 2016.
- No. 186, Jose Guimon, “From export processing to knowledge processing: upgrading the FDI promotion toolkit,” November 7, 2016.
- No. 185, Frank J. Garcia, “Investment treaties are about justice,” October 24, 2016.
- No. 184, Lukas Linsi, “Less compelling than it seems: rethinking the relationship between aggregate FDI inflows and national competitiveness,” October 10, 2016.
- No. 183, Karl P. Sauvant and Güneş Ünüvar, “Can host countries have legitimate expectations?,” September 26, 2016.

All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.