



RIETI Discussion Paper Series 26-E-073

# **Self-Judging Security Exceptions in International Investment Agreements: Functions and Limits of Anti-Abuse Clauses**

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## Self-Judging Security Exceptions in International Investment Agreements: Functions and Limits of Anti-Abuse Clauses<sup>1</sup>

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### Abstract

Recent international investment agreements (IIAs) often include self-judging security exceptions, but the legal impact of associated provisions designed to prevent their abuse remains unexplored. Using qualitative and quantitative methods, this paper examines the functions and limitations of such anti-abuse clauses. After clarifying similarities and differences between self-judging security exceptions in contemporary IIAs and GATT Article XXI, it analyzes the first arbitral applications of self-judging clauses in *Seda v Colombia* and *Riverside Coffee v Nicaragua* to understand how self-judging exceptions without anti-abuse clauses are interpreted and applied. It then presents a large-scale survey of anti-abuse provisions in IIAs based on an original article-level dataset, identifying their principal forms and distribution. The paper argues that these devices do not interact with the exception's self-judging nature in a uniform manner, with some types of provisions potentially affecting self-judgment more directly than others. Treaty negotiators should not underestimate the practical impact of anti-abuse provisions and should adopt a treaty design that best reconciles State discretion and legal control.

**Keywords:** international investment agreements; self-judging security exceptions; essential security interests; anti-abuse provisions; investment arbitration; good faith; treaty design

**JEL classification:** F21; F52; F53; K33

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<sup>1</sup>This study was conducted as part of the project “Comprehensive Research on the Current International Trade/Investment System (pt. VII)” undertaken at the Research Institute of Economy, Trade and Industry (RIETI). Earlier versions of this paper were presented at a research meeting of the RIETI project on 29 June 2026 and at the RIETI DP Seminar for the paper on 8 September 2026. I thank the participants in both meetings for their helpful comments.

## I. Introduction

As the ‘securitization’ of foreign direct investment (FDI) becomes an important policy priority, States have increasingly recognized the need to provide an essential security interest (ESI) exception in international investment agreements (IIAs).<sup>2</sup> In particular, so-called self-judging clauses have been seen as a useful tool to ensure broader policy space for national security measures. The use of such clauses has increased especially since the 2000s,<sup>3</sup> and UNCTAD reported in 2026 that 92% of security exceptions in IIAs concluded since 2021 were self-judging.<sup>4</sup> [Figure 1](#), based on our dataset, presents the corresponding agreement-level pattern.<sup>5</sup>

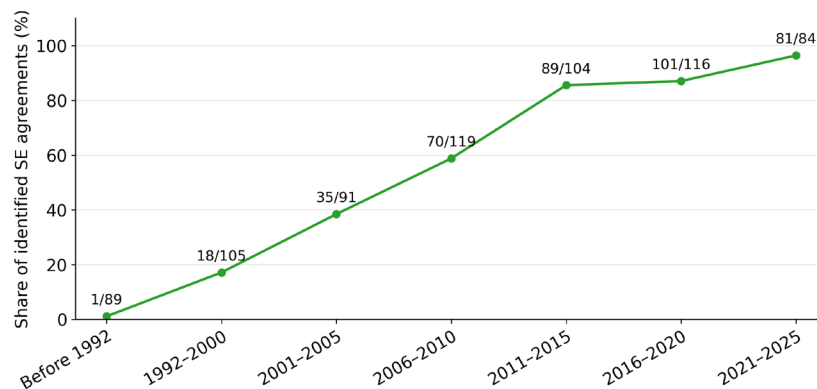


**Figure 1: Self-Judging Security Exceptions in the Treaty Corpus**

Article 9.14 of the investment chapter of the Japan-Bangladesh Economic Partnership Agreement (EPA), signed on 6 February 2026, provides a clear example of a modern self-judging security exception, which deserves full quotation for the sake of discussion throughout this paper:

<sup>2</sup> For a description of the background of the issue by the present author, see 二杉健斗「安全保障化する外国直接投資—対内・対外投資規制の投資条約による統御」法律時報 96 巻 1 号 (2024 年) 30 頁 [Kento Nisugi, ‘Securitization of Foreign Direct Investment – Regulation of Inbound and Outbound Investment under International Investment Agreements’ (2024) 96 The Hōritsu Jihō 30 (in Japanese)]. See also Ji Ma, ‘International Investment and National Security Review’ (2021) 52 Vand J Transnat’l L 899; UNCTAD, ‘National Security-Related Screening Mechanisms for Foreign Investment’ (2019) December 2019 Investment Policy Monitor 1 <[https://unctad.org/system/files/official-document/diaepcbinf2019d7\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2019d7_en.pdf)> accessed 8 October 2026.

<sup>3</sup> Some authors attribute the increase to the Argentine saga from 2001. J Benton Heath, ‘The New National Security Challenge to the Economic Order’ (2020) 129 Yale LJ 1020, 1059.

<sup>4</sup> UNCTAD, *World Investment Report 2026* (United Nations 2026) 147.

<sup>5</sup> A security exception is coded as self-judging where the treaty text expressly delegates the assessment of the fulfillment of some requirements to the invoking State (eg ‘which it considers necessary’). [Figure 1](#) counts agreements containing at least one self-judging action clause, using agreements with an identified investment-applicable security exception as the denominator. Self-judgment concerning information non-disclosure alone is not counted in the numerator. See [Section III.A](#) for corpus construction.

1. Notwithstanding paragraph 3 of Article 1.5, subject to paragraph 3 of Article 9.11, nothing in this Chapter shall be construed to prevent a Party from adopting or enforcing measures:
  - (a) which it considers necessary for the protection of its essential security interests, including measures:
    - (i) taken in time of war, armed conflict or other emergency in that Party or in international relations; or
    - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; or
  - (b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
2. Nothing in this Chapter shall be construed to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.
3. In cases where a Party takes any measure, pursuant to paragraph 1, that does not conform with the obligations of the provisions of this Chapter, that Party shall not use such measure as a means of avoiding its obligations.

While this provision apparently draws upon Article XXI of the General Agreement on Tariffs and Trade (GATT) of 1994 as a model, it differs from GATT in two respects. First, GATT Article XXI(b) contains a contextual requirement regarding the circumstances in which a trade-restrictive measure may be taken. In addition to the requirement that the State consider the measure to be necessary to protect its ESI, the measure must also fall within one of the three contextual settings specified in Article XXI(b). The Japan-Bangladesh EPA instead makes its list of circumstances illustrative by using ‘including,’ thereby broadening the State’s discretion.<sup>6</sup> Second, the EPA includes an anti-abuse clause in paragraph 3, stipulating that the exception must not be used as a means of ‘avoiding its obligations.’

The situation in international investment law raises two legal and policy problems. On the one hand, review under IIAs’ security exceptions may be too thin if good faith is the only constraint without an objective assessment of contextual requirements. On the other hand, review may be too thick when an IIA’s anti-abuse clause neutralizes self-judging discretion by importing an objective inquiry into the measure’s design, alternatives, or under- or over-inclusiveness. The latter inquiry may reproduce a necessity or proportionality analysis that the self-judging language was drafted to avoid.

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<sup>6</sup> See Emmanuel Kolawole Oke, ‘Armed Conflicts, Pandemics, Intellectual Property Rights, and International Investment Law’ (2025) 74 GRUR Intl 1140, 1144; Nisugi (n 2) 34.

While the existing investment law literature has extensively examined whether self-judging security exceptions are justiciable and subject to good faith review,<sup>7</sup> other studies have also paid attention to the limitations and safeguards attached to security exceptions.<sup>8</sup> Most of these studies, however, do not focus on how these diverse constraints interact with a self-judging security exception. Sakai, for example, conducted a meticulous survey of security exceptions and associated anti-abuse clauses in Japanese treaty practice, but his review is confined to practice before 2022 and does not examine how including anti-abuse controls affects the State's self-judgment.<sup>9</sup> In light of the emergence of investment cases in which respondent States have invoked broadly drafted self-judging exceptions – *Angel Samuel Seda and others v Colombia* (2024) and *Riverside Coffee, LLC v Nicaragua* (2025) – how IIAs can constrain the exercise of State discretion under such exceptions is a question that calls for systematic analysis.

Against this backdrop, this paper examines the functions and limits of anti-abuse clauses attached to self-judging security exceptions in IIAs from both qualitative and quantitative perspectives. It begins by examining adjudicative practice under self-judging exceptions *without* such anti-abuse tools ([Section II](#)). While WTO panels have developed a line of jurisprudence under GATT Article XXI ([Section II.A](#)), IIAs sometimes depart from the GATT model by granting States broader discretion ([Section II.B](#)). This makes applying such exceptions particularly sensitive, as illustrated by the two recent cases, *Seda v Colombia* and *Riverside Coffee v Nicaragua* ([Section II.C](#)). The paper then conducts an empirical survey of IIA practice on anti-abuse clauses ([Section III](#)). Based on a comprehensive analysis of a large dataset compiled from online sources ([Section III.A](#)), it shows that anti-abuse devices are neither exceptional nor uniform ([Section III.B–C](#)). Focusing on two substantive variants of these controls, the paper then examines the potential functions and limits of their inclusion in IIAs ([Section IV](#)), with particular attention to GATT chapeau-like restrictions ([Section IV.A](#)) and

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<sup>7</sup> See, eg, Michael D Nolan and Frédéric G Sourgens, 'The Limits of Discretion? Self-Judging Emergency Clauses in International Investment Agreements' in Karl P Sauvant (ed), *Yearbook on International Investment Law and Policy 2010–2011* (OUP 2012) 363; William J Moon, 'Essential Security Interests in International Investment Agreements' (2012) 15 J Intl Econ L 481; Caroline Henckels, 'Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict' in Katia Fach Gómez and others (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) 319.

<sup>8</sup> UNCTAD, *The Protection of National Security in IIAs* (United Nations 2009) 81–91; Dilini Pathirana and Mark McLaughlin, 'Non-Precluded Measures Clauses: Regime, Trends, and Practice' in Julien Chaisse and others (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 496–500; Mohamed Shalbaya, 'Security Exceptions' (2024) 39 ICSID Rev 263, 272–73.

<sup>9</sup> 酒井啓恒「日本が締結した経済関係協定における安全保障例外条項について」日本エネルギー法研究所『エネルギーに関する国際取決めの法的問題の諸相：2017～2018 年度エネルギーに関する国際取決めの法的問題検討班報告書』（日本エネルギー法研究所、2023 年）[Hironobu Sakai, 'Security Exception Clauses in Economic Agreements Concluded by Japan' in *Various Aspects of Legal Issues Concerning International Arrangements Relating to Energy: Report of the 2017–2018 Study Group on Legal Issues Concerning International Arrangements Relating to Energy* (Japan Energy Law Institute 2023) (in Japanese)].

prohibitions on avoiding treaty obligations ([Section IV.B](#)). It concludes by summarizing the overall findings and their policy implications ([Section V](#)).

## II. From GATT Article XXI to Self-Judging IIA Exceptions

### A. GATT Article XXI and WTO Jurisprudence

Article XXI(b) of the 1947/1994 GATT is an archetypal self-judging clause. It provides that nothing in the Agreement shall prevent a Member from taking ‘any action which it considers necessary for the protection of its essential security interests’ but only in three specified contextual settings: namely, those (i) relating to fissionable materials, (ii) relating to the traffic in arms, and (iii) ‘taken in time of war or other emergency in international relations.’<sup>10</sup> Similar provisions are found in GATS Article XIV bis:1(b) and TRIPS Article 73(b). At the time of writing, WTO panels in four sets of disputes have explicitly addressed the interpretation and application of these exceptions: *Russia – Traffic in Transit* (DS512), *Saudi Arabia – Intellectual Property Rights* (DS567), *United States – Steel and Aluminum Products* (DS544/552/556/564), and *United States – Origin Marking Requirement* (DS597).<sup>11</sup> Although all the reports except for the one in DS512 were appealed ‘into the void’ and not adopted, their findings nevertheless provide ‘useful guidance.’<sup>12</sup>

The familiar controversy concerns the reach of the self-judging language of ‘which it considers necessary.’<sup>13</sup> If the relative clause governed every element of paragraph (b), the

<sup>10</sup> For the historical background of GATT Article XXI, particularly the origins of the requirement (iii), see 北村朋史「対ロシア貿易制裁と WTO—WTO は国際の平和と安全の敵か」有斐閣 Online (記事 ID: L2306011) (2023 年) [Tomofumi Kitamura, ‘Trade Sanctions against Russia and the WTO: Is the WTO an Enemy of International Peace and Security?’ (2023) L2306011 Yuhikaku Online (DOI: 10.69450/yuhilaw-l2306011) (in Japanese)] <<https://yuhikaku.com/articles/-/12928>> accessed 31 August 2026.

<sup>11</sup> *Russia - Measures Concerning Traffic in Transit* (Panel Report) WTO Doc No WT/DS512/R (circulated 5 April 2019, adopted 26 April 2019); *Saudi Arabia - Measures Concerning the Protection of Intellectual Property Rights* (Panel Report) WTO Doc No WT/DS567/R (circulated 16 June 2020); *United States - Certain Measures on Steel and Aluminium Products* (Panel Reports) WTO Doc Nos WT/DS544/R, WT/DS552/R, WT/DS556/R, and WT/DS564/R (circulated 9 December 2022); *United States - Origin Marking Requirement* (Panel Report) WTO Doc No WT/DS597/R (circulated 21 December 2022). For a comparative overview, see Fujio Kawashima, ‘Trade Sanctions against Russia and their WTO Consistency: Focusing on Justification under National Security Exceptions’ (2024) 26 Int C L Rev 121.

<sup>12</sup> See *Japan - Taxes on Alcoholic Beverages* (Appellate Body Report) WTO Doc Nos WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R (circulated 4 October 1996, adopted 1 November 1996) 14–15; *Guatemala - Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* (Panel Report) WTO Doc No WT/DS156/R (circulated 24 October 2000, adopted 17 November 2000) [8.15]. However, see also Sherzod Shadikhodjaev, ‘United States—Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products’ (2022) 116 AJIL 842, 848–49 (discussing the potential shift to relying only on adopted WTO rulings).

<sup>13</sup> See generally Dapo Akande and Sope Williams, ‘International Adjudication on National Security Issues: What Role for the WTO?’ (2003) 43 Va J Int’l L 365, 389–96; Chao Wang, ‘Invocation of National Security Exceptions under GATT Article XXI: Jurisdiction to Review and Standard of Review’ (2019) 18 Chinese JIL 695, 698–700.

invoking Member would determine both the protected interest and the factual circumstances in question, leaving no element of paragraph (b) to be determined by a panel. If, on the other hand, it governed the requirement of necessity alone, the listed circumstances in subparagraphs would remain objectively reviewable.

The panel in *Russia – Traffic in Transit* established a basic framework following the latter restrictive construction. It treated the existence of ‘war or other emergency in international relations’ under subparagraph (iii) as an objective requirement, the presence of which was a prerequisite for the invoking Member to exercise the self-judging discretion to identify its ESI and the necessary measure.<sup>14</sup> Moreover, the panel found that the self-judging discretion was subject to the principle of good faith.<sup>15</sup> This imposed two minimal requirements. First, the State had to articulate the protected interest with sufficient clarity, the required level of specificity depending on the gravity of the emergency.<sup>16</sup> Second, the measure had to bear a relationship to that interest that was not ‘implausible.’<sup>17</sup>

The objective assessment of the contextual requirement under subparagraph (iii) thus plays an important disciplinary role in the application of Article XXI but to a varying degree depending on the interpretation of the key phrase ‘war or other emergency in international relations.’ The first two panels – in *Russia – Traffic in Transit* and *Saudi Arabia – IPRs* – understood it to generally mean ‘a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state.’<sup>18</sup> On the other hand, the latter two panels – in *U.S. – Steel and Aluminum Products* and *U.S. – Origin Marking* – adopted a heightened standard that the situation must be ‘if not equally grave or severe, [but] at least comparable in its gravity or severity to a “war” in terms of its impact on international relations’<sup>19</sup> or ‘of a truly grave character for the relevant international relations that the situation implicates, in effect, a situation representing a breakdown or near-breakdown in those relations.’<sup>20</sup> The latter panels rejected the US claims that global overproduction of steel and aluminum products and human rights concerns surrounding Hong Kong constituted emergencies within the meaning of subparagraph (iii), finding that the exception did not apply.<sup>21</sup>

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<sup>14</sup> *Russia - Traffic in Transit* (n 11) [7.53]–[7.103], especially [7.100]–[7.103].

<sup>15</sup> *Russia - Traffic in Transit* (n 11) [7.132]–[7.139]; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Judgment) [2008] ICJ Rep 177 [145].

<sup>16</sup> *Russia - Traffic in Transit* (n 11) [7.132]–[7.135].

<sup>17</sup> *Russia - Traffic in Transit* (n 11) [7.138]–[7.145].

<sup>18</sup> *Russia - Traffic in Transit* (n 11) [7.76]; *Saudi Arabia - IPR* (n 11) [7.254]–[7.257].

<sup>19</sup> *US - Steel and Aluminium Products* (n 11) [7.139].

<sup>20</sup> *US - Origin Marking Requirement* (n 11) [7.289].

<sup>21</sup> *US - Steel and Aluminium Products* (n 11) [7.143]–[7.145]; *US - Origin Marking Requirement* (n 11) [7.289]–[7.306].

Another divergence among the panels relates to the legal characterization of the exception. There has been a debate on whether an exception operates as a substantive exemption from the underlying primary rule ('scope limitation') or justifies a measure after a *prima facie* inconsistency with the underlying obligation has been established ('affirmative defense').<sup>22</sup> Among the four panels, the *Russia – Traffic in Transit* panel found it unnecessary to determine whether the measures were WTO-inconsistent before applying Article XXI and accordingly proceeded directly to examine the exception.<sup>23</sup> On the other hand, other panels invariably identified violations before applying Article XXI, with the *U.S. – Origin Marking* panel explicitly holding that 'where there is no breach, there is nothing to justify.'<sup>24</sup> Since the Appellate Body has never decided this issue, the WTO practice remains inconsistent.

## B. Security Exceptions in IIAs

GATT Article XXI has supplied a drafting model for security exceptions in IIAs.<sup>25</sup> Some IIAs reproduce its wording substantially or even verbatim, while others incorporate it by reference *mutatis mutandis* or adapt individual elements of the provision.<sup>26</sup> Yet Article XXI has not produced textual uniformity. Indeed, many IIAs dating back to the 1990s or before fall short of granting States self-judging discretion, retaining a necessity requirement that remains objectively reviewable.<sup>27</sup>

In contrast, some other IIAs confer on States even greater discretion than under the GATT. The first adaptation concerns the exception's substantive scope. While GATT Article

<sup>22</sup> Caroline Henckels, 'Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 363–74; Caroline Henckels, 'Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law' (2020) 69 ICLQ 557. However, it is debatable whether this distinction necessarily determines procedural matters such as the order of analysis or the allocation of the burden of proof. Eg Joost Pauwelyn, 'Defences and the Burden of Proof in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 88–107; 若狭彰室「『安全保障例外』の法的性質—規律範囲画定と措置正当化—」現代法学 42 号 (2022) 116–17 頁・121 頁 [Amuro Wakasa, 'On the Legal Nature of "Security Exceptions": Delimitation and Justification' (2022) Tokyo Keizai Law Review 107, 116–17, 121 (in Japanese)].

<sup>23</sup> *Russia - Traffic in Transit* (n 11) [7.108]–[7.110]; Momchil Milanov, 'A Lauterpachtian Affair: Security Exceptions as "Self-Judging Obligations" in the Case Law of the International Court of Justice and Beyond' (2021) 22 J World Investment & Trade 509, 555.

<sup>24</sup> *US - Origin Marking Requirement* (n 11) [7.189]; see also *Saudi Arabia - IPR* (n 11) [7.6]; *US - Steel and Aluminium Products* (n 11) [7.7]–[7.10].

<sup>25</sup> William J Moon, 'Essential Security Interests in International Investment Agreements' (2012) 15 J Intl Econ L 481, 495–500.

<sup>26</sup> UNCTAD and APEC, *International Investment Agreements Negotiators Handbook* (2012) 125–130; Krista Nadakavukaren and Rodrigo Polanco Lazo, *Legal Opinion on General Exceptions and Security Exceptions in Investment Agreements* (E-Avis ISDC 2023) 27–29.

<sup>27</sup> See, eg, *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic* (Decision on Liability) ICSID Case No ARB/02/1 (3 October 2006) [204]–[214] (applying Argentina-US BIT (1991) art XI); *Deutsche Telekom AG v Republic of India* (Interim Award) PCA Case No 2014-10 (13 December 2017) [225], [230]–[231], [238]–[239] (applying Germany-India BIT (1995) art 12).

XXI(b) confines self-judgment to a closed set of contextual limitations, a number of IIAs relax that restriction. Some IIAs expand the list of circumstances covered by the exceptions to include *domestic* emergency<sup>28</sup> or the protection of critical infrastructure.<sup>29</sup> Other IIAs make the list merely illustrative by adding ‘including’ or ‘such as’ before the GATT-like contextual items.<sup>30</sup> Still others, particularly those of the US, dispense with objective circumstantial requirements altogether, simply permitting the State to take ‘measures that it considers necessary [...] for the protection of its own essential security interests.’<sup>31</sup> As [Figure 2](#), based on our survey, shows, the share of the illustrative list approach has significantly increased in the last decade.

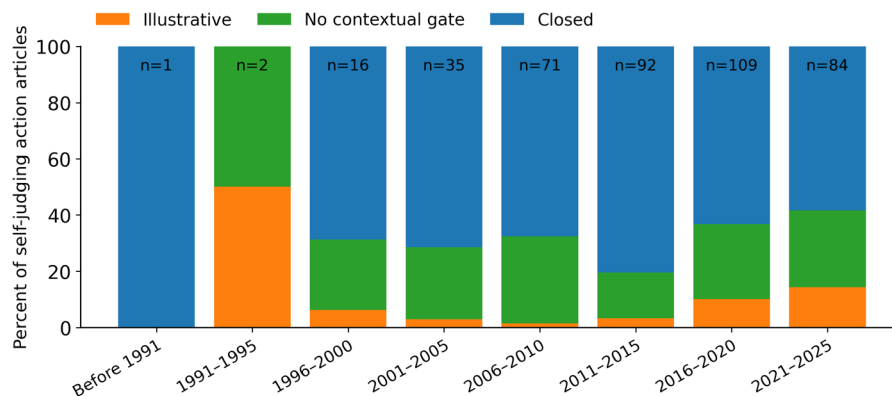


**Figure 2: Contextual Breadth of Self-Judging Discretion**

<sup>28</sup> Eg Japan-Korea BIT (2002) art 16(1)(a)(i); ASEAN-Japan FTA (2008) art 8(b)(iv); ASEAN-China Investment Agreement (2009) art 17(b)(iv); ASEAN-Korea Investment Agreement (2009) art 21(1)(b)(ii); India Model BIT (2015) art 33.1(ii)(b); Australia-Malaysia FTA (2012) art 18.2(1)(b)(iv); Korea-Viet Nam FTA (2015) art 16.2(1)(b)(iv); Belarus-India BIT (2018) art 33.1(ii)(b); Australia-Indonesia CEPA (2019) art 17.3(b)(iv); Australia-Hong Kong BIT (2019) art 19(1)(b) n 10(iv); RCEP (2020) art 17.13(b)(iv); Brazil-India BIT (2020) art 24.1(b)(ii); India-UAE CEPA (2022) art 16.2(1)(b)(v).

<sup>29</sup> Eg Trans-Pacific Strategic Economic Partnership Agreement (2005) art 19.2(1)(b) n 2; ASEAN-Japan FTA (2008) art 8(b)(iii); ASEAN-China Investment Agreement (2009) art 17(b)(iii); ASEAN-Korea Investment Agreement (2009) art 21(1)(b)(iv); India-Malaysia CECA (2011) art 12.2(1)(b)(iv); Australia-Malaysia FTA (2012) art 18.2(1)(b)(iii); Colombia-Singapore BIT (2013) art 28(2); India Model BIT (2015) art 33.1(ii)(d); EU-Singapore IPA (2018) art 4.5(b)(iv); Australia-Hong Kong BIT (2019) art 19(1)(b) n 10(iii); RCEP (2020) art 17.13(b)(iii); India-UAE CEPA (2022) art 16.2(1)(b)(iv).

<sup>30</sup> Eg ASEAN-China Investment Agreement (2009) art 17(b); Brazil-Chile CFIA (2015) art 14(b); India Model BIT (2015) art 33.1(ii); Argentina-Qatar BIT (2016) art 13(1)(b); Ghana-Türkiye BIT (2016) art 7(2)(b); Belarus-India BIT (2018) art 33.1(ii); India-Taiwan BIT (2018) art 32.1(b); Brazil-India BIT (2020) art 24.1(b); Bahrain-Japan BIT (2022) art 18(2)(a); Angola-Japan BIT (2023) art 16(2)(a); India-UAE BIT (2024) art 34.1(ii).

<sup>31</sup> Eg Mozambique-US BIT (1998) art 14(1); Chile-US FTA (2003) art 23.2(b); Singapore-US FTA (2003) art 21.2(b); US Model BIT (2004) art 18(2); Australia-US FTA (2004) art 22.2(b); US-Uruguay BIT (2005) art 18(2); Peru-US TPA (2006) art 22.2(b); KORUS FTA (2007) art 23.2(b); Costa Rica-Peru FTA (2011) art 18.2(b); US Model BIT (2012) art 18(2); Colombia-Costa Rica FTA (2013) art 21.1(b); Kazakhstan-Singapore BIT (2018) art 20(b); Australia-Peru FTA (2018) art 28.2(b); CPTPP (2018) art 29.2(b).

The second modification concerns tribunals' authority to review the invocation of the exception. The US has included a so-called 'reinforcement' <sup>32</sup> footnote in four FTAs, providing '[f]or greater certainty' that a tribunal or panel 'shall find that the exception applies' when the latter is invoked.<sup>33</sup> Other States, such as India, go even further, explicitly providing for the non-justiciability of self-judgment in the context of investment disputes.<sup>34</sup>

Neither reform, however, is necessarily peculiar to investment. Some FTAs include broad security exceptions that apply across the entire agreement, encompassing trade chapters.<sup>35</sup> The relaxation of the contextual conditions derived from GATT may therefore be better understood as a broader development in international economic treaty practice than as a distinct feature of IIAs. Similarly, the limitation of judicial review is also not investment-specific. The US, for example, maintains that GATT Article XXI is non-justiciable,<sup>36</sup> and its FTAs' reinforcement footnotes address both investment tribunals and inter-State trade panels.<sup>37</sup>

Nevertheless, some States' practice reflects the trade-investment divergence. The security exceptions in Indian FTAs, for example, have an agreement-wide scope but are non-justiciable in investment disputes, whether investor-State or State-State.<sup>38</sup> Despite such differences, the partial overlap between the two regimes gives our analysis significance beyond investment law, particularly given the absence of publicly available inter-State trade decisions interpreting such broadened security exceptions.

### C. The First Two Arbitral Applications

While investment tribunals have dealt with security exceptions for two decades, early tribunals expressly considered, but rejected, arguments that the applicable exceptions were

<sup>32</sup> Fabian Eichberger, 'Self-judgment in International Law: Between Judicialization and Pushback' (2024) 37 LJIL 915, 917.

<sup>33</sup> US-Peru FTA (2006) art 22.2; US-Colombia FTA (2006) art 22.2; US-ROK FTA (2007) art 23.2; US-Panama FTA (2007) art 21.2. A similar footnote has spilled over to other States (Eichberger (n 32) 935). Eg Australia-ROK FTA (2014) art 22.2; Colombia-ROK FTA (2013) art 21.2.

<sup>34</sup> Eg India-Singapore CECA (2005) art 6.12(4) and Exchange of Letters, Annex 5(1)(a); India-Korea CEPA (2009) art 10.18(3) and Annex 10-C(a); India-Malaysia CECA (2011) art 12.2(5) and Annex 12-2; ASEAN-India Investment Agreement (2014) art 22(5) and Annex 2; Bangladesh-India BIT (2009), Joint Interpretative Notes (2017), Note on "essential security interests"—art 12; Colombia-India BIT (2009), Joint Interpretative Declaration (2018), Note 9(1); Belarus-India BIT (2018) art 33.4 and Annex (ii); India-Taiwan Investment Agreement (2018) art 32 and Annex (b); India-Kyrgyzstan BIT (2019) art 33 and Annex 1(ii); India-UAE BIT (2024) art 34.4; India-Uzbekistan BIT (2024) art 35.4 and Annex 1(ii); India-Israel BIT (2025) art 33 and Annex ("Essential Security Exceptions"). See also India Model BIT (2015) art 33.4 and Annex 1(ii); Brazil-India Investment Cooperation and Facilitation Treaty (2020) art 24.4 and Annex I(1)(b). Cf India-Japan CEPA (2011) art 96(18), Note.

<sup>35</sup> Eg CPTPP (2018) art 29.2; RCEP (2020) art 17.13; India-Malaysia CECA (2011) art 12.2. Cf India-Singapore CECA (2005) arts 2.13 and 6.12; India-Korea CEPA (2009) arts 2.9 and 10.18.

<sup>36</sup> See below [Section II.C.3.a](#).

<sup>37</sup> See n 33.

<sup>38</sup> See n 34.

self-judging.<sup>39</sup> It was only with *Angel Samuel Seda v Colombia*, followed by *Riverside Coffee v Nicaragua*, that publicly available investment awards recognized the security exception as expressly self-judging.

## 1. *Seda v Colombia*<sup>40</sup>

### a. The Dispute

*Seda* concerned a real estate development project in Colombia and its interaction with the country's long-standing fight against drug cartels. The claimants invested in a luxury residential development near Medellín. However, after allegations arose that drug cartel members had been involved in the property's ownership history, it became subject to Colombia's asset forfeiture regime (*extinción de dominio*).<sup>41</sup> The proceedings effectively

<sup>39</sup> For a series of Argentine cases, see *CMS Gas Transmission Company v Argentine Republic* (Award) ICSID Case No ARB/01/8 (12 May 2005) [359]–[374]; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic* (Decision on Liability) ICSID Case No ARB/02/1 (3 October 2006) [205]–[214], [226]–[266]; *Enron Corporation and Ponderosa Assets LP v Argentine Republic* (Award) ICSID Case No ARB/01/3 (22 May 2007) [324]–[340]; *Sempra Energy International v Argentine Republic* (Award) ICSID Case No ARB/02/16 (28 September 2007) [366]–[388]; *Continental Casualty Company v Argentine Republic* (Award) ICSID Case No ARB/03/9 (5 September 2008) [166]–[195]; *El Paso Energy International Company v Argentine Republic* (Award) ICSID Case No ARB/03/15 (31 October 2011) [564]–[610], [611] ff; *Mobil Exploration and Development Inc Suc Argentina and Mobil Argentina SA v Argentine Republic* (Decision on Jurisdiction and Liability) ICSID Case No ARB/04/16 (10 April 2013) [1023]–[1057]; *AES Corporation v Argentine Republic* (Award) ICSID Case No ARB/02/17 (30 May 2025) [197]–[209] ff. For Indian satellite cases: *CC/Devas (Mauritius) Ltd, Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v Republic of India* (Award on Jurisdiction and Merits) PCA Case No 2013-09 (25 July 2016) [211], [218]–[245], [353]–[371], [392]–[416]; *Deutsche Telekom AG v Republic of India* (Interim Award) PCA Case No 2014-10 (13 December 2017) [225]–[239], [265]–[281], [362]–[375]. For environmental cases: *Michael Anthony Lee-Chin v Dominican Republic* (Final Award) ICSID Case No UNCT/18/3 (6 October 2023) [217]–[265]; *Discovery Global LLC v Slovak Republic* (Award) ICSID Case No ARB/21/51 (17 January 2025) [272(iv)], [357]–[363]. See also *Mr Patrick Mitchell v Democratic Republic of the Congo* (Decision on the Application for Annulment of the Award) ICSID Case No ARB/99/7 (1 November 2006) [50]–[60]. For an overview, see Caroline Henckels, 'Whither Security? The Concept of "Essential Security Interests" in Investment Treaties' Security Exceptions' (2024) 27 J Intl Econ L 114. It is also reported that the tribunal in *Tenoch/Naumchenko v India* (2019) under the India-Russia BIT (1994) discussed the ESI (art 3(3)) and dismissed the claims in their entirety, but the award is undisclosed. Ministry of Finance, 'BIT claims against India dismissed' (20 January 2020) <<https://www.pib.gov.in/PressReleasePage.aspx?PRID=1599905>> accessed 31 August 2026. See also Luke Eric Peterson, 'Investigation: In Still-Confidential Tenoch v. India Award, Brower and Stern Fall Out Over Availability of National Security Defence to Justify Measures Taken Against Russian Investors' *Investment Arbitration Reporter* (28 October 2020) <<https://www.iareporter.com/articles/investigation-in-still-confidential-tenoch-v-india-award-brower-and-stern-fall-out-over-availability-of-national-security-defence-to-justify-measures-taken-against-russian-investors/>> accessed 31 August 2026.

<sup>40</sup> *Angel Samuel Seda and others v Republic of Colombia* (Award) ICSID Case No ARB/19/6 (27 June 2024). For commentaries, see Fabian Eichberger, 'Angel Samuel Seda and Others v. The Republic of Colombia, Award' (2026) 120 AJIL 365; Habib Sabzevari and Maher Abdelaziz, 'Seda v Colombia Award: Judging the Self-Judgment of Security Exception' in *European Yearbook of International Economic Law* (Springer 2026) 1 <[https://doi.org/10.1007/8165\\_2026\\_149](https://doi.org/10.1007/8165_2026_149)> accessed 2 September 2026.

<sup>41</sup> *Seda* (n 40) [222]–[230]. For a general description of the asset forfeiture system in Colombia, see Wilson Alejandro Martínez Sánchez (ed), *La Extinción del Derecho de Dominio en Colombia: Especial Referencia al Nuevo Código* (UNODC and ICITAP 2015).

prevented further development of the project, resulting in arbitration under the US-Colombia TPA.<sup>42</sup>

In its rejoinder,<sup>43</sup> the respondent invoked the security exception in the treaty, which provided that:

Nothing in this Agreement shall be construed:

- (a) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
- (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.<sup>2</sup>

<sup>2</sup>. For greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.

In particular, the respondent initially argued that the provision deprived the tribunal of jurisdiction and subsequently advanced a broader claim of non-justiciability, relying in part on footnote 2.<sup>44</sup> The US, participating in the proceedings as a non-disputing treaty party, also supported Colombia's interpretation of the footnote.<sup>45</sup>

#### **b. The Award**

Despite the respondent's argument, the tribunal recognized the exception as self-judging but stopped short of declaring it non-justiciable.<sup>46</sup> The tribunal placed particular emphasis on the treaty language. For the tribunal, non-justiciability requires that the States provide it 'explicitly and unambiguously.'<sup>47</sup> However, the present exception did not make the intention clear, even though the respondent was aware of India's drafting practice of providing for non-justiciability explicitly.<sup>48</sup> Indeed, the footnote itself indicated that the exception was to

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<sup>42</sup> *Seda* (n 40) [222]–[230].

<sup>43</sup> *Seda* (n 40) [62], [69], [772]–[773].

<sup>44</sup> *Seda* (n 40) [421]–[428], [622].

<sup>45</sup> *Seda* (n 40) [598]–[603].

<sup>46</sup> *Seda* (n 40) [662], [725].

<sup>47</sup> *Seda* (n 40) [722].

<sup>48</sup> *Seda* (n 40) [713]–[717].

apply only upon a ‘finding’ by the tribunal, rather than automatically upon invocation.<sup>49</sup> The tribunal also referred to ‘legal certainty and predictability for the investors.’<sup>50</sup>

The support for the respondent’s view by the US did not alter the interpretation. The tribunal recognized that the two States’ positions were ‘congruent’ but not necessarily ‘identical’ and found no subsequent agreement or practice within the meaning of Article 31(3)(a) and (b) of the Vienna Convention on the Law of Treaties (VCLT).<sup>51</sup> In any event, such a subsequent agreement could only be ‘taken into account’ and could not override the ordinary meaning of the treaty.<sup>52</sup> Investors’ due process rights also militated against considering an agreement that postdated the commencement of the arbitration.<sup>53</sup> Nor did the tribunal regard *travaux préparatoires* as endorsing the respondent’s view, finding that the latter’s contemporaneous understanding of the provision in question was not clear.<sup>54</sup>

On the other hand, the tribunal similarly denied the claimants’ assertion that the exception, even when applicable, should not exempt the respondent from the obligation to compensate.<sup>55</sup> For the tribunal, the security exception was ‘hierarchically above’ and took ‘precedence’ over other treaty provisions.<sup>56</sup> It aligned with the view expressed by the *ad hoc* Committee in *CMS v Argentina* that the security exception was a ‘threshold requirement’,<sup>57</sup> characterizing the exception as a ‘derogation’ from, and an ‘exception to the scope of,’ the treaty obligations.<sup>58</sup>

As to the substantive requirements of the exception, the tribunal accorded the respondent a significant margin of discretion. Regarding the ‘essential security interest,’ the tribunal referred to the ‘open-ended approach’ of the FTA, which differed from GATT’s closed

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<sup>49</sup> *Seda* (n 40) [719].

<sup>50</sup> *Seda* (n 40) [720].

<sup>51</sup> *Seda* (n 40) [695]–[696].

<sup>52</sup> *Seda* (n 40) [694].

<sup>53</sup> *Seda* (n 40) [697].

<sup>54</sup> *Seda* (n 40) [706]–[708].

<sup>55</sup> *Seda* (n 40) [663]–[672]. This contrasts with environmental cases under general exceptions. Cf *Bear Creek Mining Corporation v Republic of Peru* (Award) ICSID Case No ARB/14/21 (30 November 2017) [471]–[478], especially [477]–[478]; *Eco Oro Minerals Corp v Republic of Colombia* (Decision on Jurisdiction, Liability and Directions on Quantum) ICSID Case No ARB/16/41 (9 September 2021) [829]–[836]; *Montauk Metals Inc (formerly known as Galway Gold Inc) v Republic of Colombia* (Award) ICSID Case No ARB/18/13 (7 June 2024) [978]–[984], especially [981]–[984]; *Red Eagle Exploration Limited v Republic of Colombia* (Dissenting Opinion of José A Martínez de Hoz) ICSID Case No ARB/18/12 (28 February 2024) [145]–[152]. For an article critical of these decisions, see Caroline Henckels, ‘General and Security Exceptions and the Question of Compensation in International Investment Law’ (2025) 28 J Intl Econ L 63.

<sup>56</sup> *Seda* (n 40) [671]–[672].

<sup>57</sup> *CMS Gas Transmission Company v Argentine Republic* (Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic) ICSID Case No ARB/01/8 (2007) [129].

<sup>58</sup> *Seda* (n 40) [678], [681].

list approach.<sup>59</sup> It thus held that ‘it [was] for the State to determine the scope of its “own essential security interests”,’ subject to the good faith principle.<sup>60</sup> On the requirement of a ‘nexus’ between the measure and the ESI, the tribunal relied on *Russia – Traffic in Transit* and adopted the plausibility test.<sup>61</sup> It emphasized the deferential nature of the test by characterizing it as a ‘light-touch’ review, serving as a ‘basic “sanity check”’.<sup>62</sup>

Applying the standard, the tribunal affirmed that both conditions were satisfied. The characterization of Colombia’s fight against drug-related crime as an ESI was not disputed.<sup>63</sup> The claimants contested the connection between the interest and the measures taken against them, arguing that the respondent merely ‘relabelled’ the crime issue as a security matter only at a later stage of the proceedings.<sup>64</sup> However, the tribunal recognized that the somewhat belated invocation of the ESI was understandable, given that criminal proceedings were by nature ‘evolutionary,’ and the nexus with the ESI was supported by the historical chain of ownership of the claimants’ property.<sup>65</sup> As a result, the tribunal dismissed the claimants’ claims.

## **2. *Riverside Coffee v Nicaragua***<sup>66</sup>

### **a. The Dispute**

The second case also involved Latin America. The claimant, a US company, owned Hacienda Santa Fé, a large plantation used for avocado cultivation and forestry, through Empresa Inagrosa S.A., a company incorporated in Nicaragua. The dispute arose in mid-June 2018, when armed individuals entered and occupied the plantation amid Nicaragua’s worst political unrest in three decades. The occupation effectively lasted until the summer of 2021, causing damage to the investments.<sup>67</sup> The claimant, relying on DR-CAFTA, alleged that the police did not properly respond to the violence, failing, among other things, to accord full protection and security. The respondent, by contrast, argued that the police’s reaction was justified under Article 21.2(b), a self-judging ESI exception, which, unlike the exception in *Seda*, was not accompanied by a reinforcement footnote.

Nicaragua’s ESI defense was based on a so-called ‘shelter order’ that was allegedly issued during the political turmoil. According to the State, the government had directed the police to remain in their barracks to reduce bloodshed and proceed with peace talks ‘without

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<sup>59</sup> *Seda* (n 40) [645]–[646].

<sup>60</sup> *Seda* (n 40) [650].

<sup>61</sup> *Seda* (n 40) [652]–[653].

<sup>62</sup> *Seda* (n 40) [655], [751].

<sup>63</sup> *Seda* (n 40) [766].

<sup>64</sup> *Seda* (n 40) [767].

<sup>65</sup> *Seda* (n 40) [772]–[804].

<sup>66</sup> *Riverside Coffee, LLC v Republic of Nicaragua* (Award) ICSID Case No ARB/21/16 (17 October 2025).

<sup>67</sup> *Riverside Coffee* (n 66) [84]–[106].

the police being accused of any escalation,’<sup>68</sup> and deploying police officers to the claimant’s plantation would have been ‘inconsistent with the Government’s efforts.’<sup>69</sup> Although the claimant contested the factual circumstances, including the very existence of such an order and the degree to which police in fact complied with it, the respondent submitted President Ortega’s televised remarks and police communiqués ostensibly referring to the order.<sup>70</sup>

## **b. The Award**

Unlike *Seda*, the starting point in *Riverside* was the good faith reviewability of self-judgment under the security exception. Indeed, even the respondent did not contest the application of good faith,<sup>71</sup> although it disputed the scope of the review.<sup>72</sup>

The tribunal took a noteworthy approach to separate the good faith review into procedural and substantive aspects.<sup>73</sup> After reviewing investment and WTO cases, including *CC/Devas v India*, *Seda*, and *Russia – Traffic in Transit*,<sup>74</sup> the tribunal established the following ‘standards of review’:<sup>75</sup>

- (i) whether the CAFTA Party in question has invoked the provision in due time, in order to put the other CAFTA Parties and their investors on notice of the non-applicability of DR-CAFTA to such measures; and
- (ii) whether the measures in question are reasonably or plausibly related to the alleged essential security interests.

The tribunal examined each aspect. On requirement (ii), the tribunal affirmed that the shelter order was taken to protect ‘Nicaragua’s [ESI] during a nationwide civil strife’ and that the occupation of the claimant’s farm had occurred in connection with the social disorder rather than as a separate local incident.<sup>76</sup> The tribunal also accepted that the requirement (i) was met, because the order had been in place for a short period and broadcast on national television, which had put the claimant on ‘sufficient notice of invocation of Nicaragua’s [ESI]’ even without explicit mention of Article 21.2(b).<sup>77</sup>

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<sup>68</sup> *Riverside Coffee* (n 66) [100].

<sup>69</sup> *Riverside Coffee* (n 66) [213].

<sup>70</sup> Consejo de Comunicación y Ciudadanía, “Daniel y Rosario en Diálogo Nacional” (16 May 2018); *Riverside Coffee v Nicaragua*, Hearing on Jurisdiction and Merits, Day 5 (5 July 2024) 1195–97 (referring to Exhibit C-0339-SPA).

<sup>71</sup> *Riverside Coffee* (n 66) [255].

<sup>72</sup> *Riverside Coffee* (n 66) [260]–[261].

<sup>73</sup> *Riverside Coffee* (n 66) [265].

<sup>74</sup> *Riverside Coffee* (n 66) [266]–[270].

<sup>75</sup> *Riverside Coffee* (n 66) [271].

<sup>76</sup> *Riverside Coffee* (n 66) [277].

<sup>77</sup> *Riverside Coffee* (n 66) [278].

The exception's applicability was short-lived, however. Once the shelter order was retracted at the close of July, the ESI no longer justified police inaction.<sup>78</sup> The tribunal therefore evaluated the later conduct under substantive standards and ultimately dismissed all claims.<sup>79</sup>

### 3. Assessment of the First Two Cases

Being the first cases in which self-judging clauses were applied, *Seda* and *Riverside* have set important precedents. A critical question is how the tribunals drew on and developed the prior jurisprudence governing the invocation of these otherwise slippery self-judging exceptions.

#### a. Good Faith Review and Non-Justiciability

A threshold issue is how the concept of ESI is interpreted. Despite the qualification by 'essential,' the concept has often been interpreted flexibly. The panel in *Russia – Traffic in Transit*, for instance, construed it to refer to 'those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally,' and recognized each State's discretion to define what it considered to be its ESI.<sup>80</sup> The broad approach has also been present in investment cases. In *CMS v Argentina*, the tribunal admitted that a nationwide economic crisis could fall within the concept.<sup>81</sup> *Seda* and *Riverside*, which applied the ESI exceptions to purely domestic public-order measures, reinforced the high threshold investors must meet to challenge the existence of an underlying ESI.

Accordingly, good faith review plays an essential role, and *Seda* and *Riverside* provided separate contributions. On the one hand, *Seda* dismissed the non-justiciability argument despite the reinforcement footnote. The footnote's history indicates that such an interpretation was not self-evident. The footnote, which the US introduced in several FTAs after the 2006 *Dubai Ports World* incident,<sup>82</sup> has been understood by different organs of the FTA partners

<sup>78</sup> *Riverside Coffee* (n 66) [278]–[280].

<sup>79</sup> *Riverside Coffee* (n 66) [305]–[574], especially [569] and [574(b)].

<sup>80</sup> *Russia - Traffic in Transit* (n 11) [7.130]–[7.131].

<sup>81</sup> *CMS Gas Transmission Company v Argentine Republic* (Award) ICSID Case No ARB/01/8 (12 May 2005) [359]–[360]. See also *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic* (Decision on Liability) ICSID Case No ARB/02/1 (3 October 2006) [231], [238]–[239]; *Enron Creditors Recovery Corp and Ponderosa Assets LP v Argentine Republic* (Award) ICSID Case No ARB/01/3 (22 May 2007) [332]; *Sempra Energy International v Argentine Republic* (Award) ICSID Case No ARB/02/16 (28 September 2007) [374]; *Continental Casualty Co v Argentine Republic* (Award) ICSID Case No ARB/03/9 (5 September 2008) [173]–[175], [180]–[181]; *The AES Corporation v Argentine Republic* (Award) ICSID Case No ARB/02/17 (30 May 2005) [212]–[214].

<sup>82</sup> Charles B Rangel, 'Moving Forward: A New, Bipartisan Trade Policy That Reflects American Values' (2008) 45 Harv J on Legis 377, 405–406. For a reference in Japanese, see 渡井理佳子『経済安全保障と対内直接投資——アメリカにおける規制の変遷と日本の動向——』（信山社、2023 年）43–45 頁

essentially as a non-justiciability clause. Colombia's Constitutional Court, for example, in reviewing the US-Colombia TPA in 2008, held as follows:<sup>83</sup>

[I]f either party invokes the essential security exception, the arbitral tribunal or panel shall find that the exception 'applies,' without entering into an evaluation of whether or not it concerns an essential security interest, or whether the measures adopted were oriented toward protecting that interest, or whether they actually served a commercial purpose.

Similarly, the Korean government commented on a similar footnote in the KORUS FTA in several policy documents, explaining that the tribunal or panel 'must determine that the exception applies,' 'must accept its application,' or 'applies it as such.'<sup>84</sup> It was also the view of the European Union in *U.S. – Origin Marking Requirement* that the security exception in the KORUS FTA was 'very close' (but not necessarily equivalent) 'to the idea of "non-justiciability",'<sup>85</sup> with which the US was also aligned.<sup>86</sup>

International judicial practice has required clear language when recognizing self-judging discretion,<sup>87</sup> suggesting that an even clearer indication should be required, *a fortiori*, to conclude that a clause is non-justiciable.<sup>88</sup> While the *Seda* tribunal's interpretation of the

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[Rikako Watai, *Economic Security and Inward Direct Investment: Changes in US Regulation and Developments in Japan* (Shinzansha 2023) 43-45 (in Japanese)].

<sup>83</sup> Corte Constitucional de Colombia, Sentencia C-751/08 (24 July 2008) 135 (author's translation).

<sup>84</sup> 관계부처 합동 『한·미 FTA 주요내용』 (2012 年 6 月) 194 頁 [Relevant Ministries (Republic of Korea), *Key Provisions of the Korea-US FTA* (June 2012) 194 (in Korean)] <[https://fta.motir.go.kr/webmodule/PSD\\_FTA/us/data/13/k\\_us\\_12.pdf](https://fta.motir.go.kr/webmodule/PSD_FTA/us/data/13/k_us_12.pdf)> accessed 31 August 2026; 외교통상부 「한·미 FTA 최종 협정문 공개」 (보도자료 제 07-428 호, 2007 年 7 月 2 日) [Ministry of Foreign Affairs and Trade (Republic of Korea), 'Publication of the Final Text of the Korea-US FTA' (Press Release No 07-428, 2 July 2007) (in Korean)] <[https://www.mofa.go.kr/www/brd/m\\_4080/view.do?page=1&pitem=102026&seq=293092](https://www.mofa.go.kr/www/brd/m_4080/view.do?page=1&pitem=102026&seq=293092)> accessed 31 August 2026; 외교통상부 『투자자-국가간 분쟁해결절차 (ISD), 공정한 글로벌 스탠다드』 (2011 年 11 月) 31 頁 [Ministry of Foreign Affairs and Trade (Republic of Korea), *Investor-State Dispute Settlement (ISD): A Fair Global Standard* (November 2011) 31 (in Korean)] <[https://fta.motir.go.kr/webmodule/htsboard/template/read/fta\\_infoBoard\\_07\\_view.jsp?boardid=162&c=all&cattype=08&dc=&du=&iu=&lu=&pagenum=12&pc=undefined&seqno=94800&t=&tableName=fta\\_new\\_board01&typeID=8&vu=&wc=>](https://fta.motir.go.kr/webmodule/htsboard/template/read/fta_infoBoard_07_view.jsp?boardid=162&c=all&cattype=08&dc=&du=&iu=&lu=&pagenum=12&pc=undefined&seqno=94800&t=&tableName=fta_new_board01&typeID=8&vu=&wc=>)> accessed 31 August 2026.

<sup>85</sup> European Union, Third-Party Submission, *United States - Origin Marking Requirement*, WT/DS597/R/Add.1 (21 December 2022) 75 [32].

<sup>86</sup> The United States, 'Responses of the United States of America to the Panel's First Set of Questions' *United States - Origin Marking Requirement* (WTO DS597, 14 October 2021) <[https://ustr.gov/sites/default/files/enforcement/DS/DS597/US.RPQ1.\(14Oct21\).fin.pdf](https://ustr.gov/sites/default/files/enforcement/DS/DS597/US.RPQ1.(14Oct21).fin.pdf)> accessed 31 August 2026, [278]-[279].

<sup>87</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14 [282]; *Oil Platforms (Islamic Republic of Iran v United States of America)* (Merits) (Judgment) [2003] ICJ Rep 161 [43]; *CMS Gas Transmission Company v Argentine Republic* (n 39) [370]; *CC/Devas (Mauritius) Ltd and others v Republic of India* (n 39) [219]; *Deutsche Telekom AG v Republic of India* (n 27) [231].

<sup>88</sup> Stephan W Schill and Robyn Briebe, "If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) 13 Max Planck Yrbk UN L 61, 69-73, 119-20 (arguing that self-judging clauses 'unless clearly framed otherwise, do not oust a Tribunal's jurisdiction but merely lower the

footnote has been criticized as inconsistent with ‘the clear textual command to apply the exception upon invocation’ and as depriving the footnote of *effet utile*,<sup>89</sup> the ordinary meaning of the phrase ‘find that the exception applies’ is not manifestly clear,<sup>90</sup> either in the English text or in the other authentic texts.<sup>91</sup> In fact, legal usage does not invariably employ ‘applies’ to denote a final determination that all substantive requirements of a rule have been satisfied. In *US – Origin Marking Requirement*, for example, the US itself used virtually identical language when addressing whether GATT Article XXI(b) was applicable to claims under other Annex 1A agreements.<sup>92</sup> The point is not that the contrary reading is implausible but that the phrase does not necessarily collapse the issues of a rule’s applicability and the satisfaction of its requirements into a single determination.

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standard of review to good faith’). But cf Schill and Briese (n 88) 90, treating the materially identical US-Peru footnote as depriving a tribunal of jurisdiction.

<sup>89</sup> Sabzevari and Abdelaziz (n 40) 20 (criticizing *Seda* for giving ‘no normative value to the footnote’); Fabian Eichberger, ‘Angel Samuel Seda and Others v The Republic of Colombia, Award’ (2026) 120 AJIL 365, 369–70. See also Fabian Eichberger, ‘When Reinforced Self-Judgment Meets Judicial Review: Insights from *Seda v Colombia*’ (*EJIL: Talk!*, 10 September 2024) <<https://www.ejiltalk.org/when-reinforced-self-judgment-meets-judicial-review-insights-from-seda-v-colombia/>> accessed 4 September 2026. For other authors treating the reinforcement footnote as sufficient to exclude substantive review, see Schill and Briese (n 88) 90; Christian Riffel, ‘Good Faith in Exception Clauses: An Abus de Bonne Foi?’ (2026) NILR, s 3.3 (concluding that the US-style footnote satisfies the requisite degree of explicitness).

<sup>90</sup> Cf Emmanuel Kolawole Oke, ‘Armed Conflicts, Pandemics, Intellectual Property Rights, and International Investment Law’ (2025) 74 GRUR Intl 1140, s IV (endorsing *Seda*’s distinction between the US-style footnote and provisions explicitly excluding review).

<sup>91</sup> See Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (‘VCLT’) art 33(3). The equally authentic Spanish text provides: ‘el tribunal o panel que atienda el caso determinará que la excepción se aplica’. Protocol Modifying the Trade Promotion Agreement between the Republic of Colombia and the United States of America (signed 28 June 2007) para 9 (also confirming the equal authenticity of the English and Spanish texts). Materially identical formulations appear in the US-Peru and US-Panama agreements: Protocol of Amendment to the Trade Promotion Agreement between the United States and Peru (signed 24 June 2007) para 11; US-Panama TPA art 21.2 n 2. The equally authentic Korean text of the KORUS FTA similarly provides that ‘그 사건을 심리하는 중재판정부 또는 패널은 그 예외가 적용됨을 판정한다’ [the tribunal or panel hearing the matter shall determine that the exception applies]: KORUS FTA art 23.2 n 2; see also art 24.6. None of these formulations expressly excludes review of the exception’s substantive requirements, notwithstanding the more categorical language used in the Korean government’s domestic explanations (see n 84).

<sup>92</sup> *United States - Origin Marking Requirement*, Integrated Executive Summary of the Arguments of the United States, WT/DS597/R/Add.1, annex B-2, [65] (‘Based on the overlaps between the claims at issue under each of the agreements, with respect to the *applicability* of Article XXI(b), the Panel should find that the exception *applies* to the specific claims at issue’) (emphasis added). The issue was whether Article XXI(b) could cover claims under the Agreement on Rules of Origin and the TBT Agreement, neither of which expressly incorporates Article XXI through a bridge provision. See further the United States’ Response to DS597 Panel (n 86) [97]–[102], [137]–[141], especially [138], 37. Cf *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, Replies of the European Communities to Questions from the Panel, WT/DS246/R, annex B-2, [78] (expressly contemplating a situation in which the Enabling Clause ‘applies’ because the measure falls within para 2(a), while the obligation in para 3(c) is not satisfied). For a similar usage by the US Supreme Court, see *South Carolina v Catawba Indian Tribe, Inc*, 476 US 498, 500 (1986) (‘We hold that the State’s statute applies, but we do not reach the question whether it bars the Tribe’s claim.’).

Nor does such an alternative reading necessarily deprive the footnote of *effet utile*. Its introductory words '[f]or greater certainty' indicate a clarificatory function, which may serve a useful purpose even where it is not strictly necessary.<sup>93</sup> The footnote can accordingly be read as confirming, for example, that, once Article 22.2 is invoked, the tribunal must treat the exception as applicable to the dispute and examine whether its requirements are satisfied without itself predetermining the outcome of that inquiry.

The footnote's clarificatory nature also invites us to recall Colombia's prior practices on comparable self-judging exceptions. In *Seda*, the US itself argued that the footnote merely makes explicit the non-justiciability already inherent in such provisions, even without a similar footnote.<sup>94</sup> In GATT/WTO disputes, however, Colombia did not consistently proceed on the premise that invoking Article XXI foreclosed panel consideration when supporting the 1982 Argentine proposal on joint interpretation<sup>95</sup> or the establishment of panels to address such invocations,<sup>96</sup> despite a contrary statement made during the US-Colombia TPA negotiations.<sup>97</sup> Colombia's 2018 agreement with India also differed from the TPA's footnote by explicitly excluding substantive review.<sup>98</sup> India's support for the reviewability of GATT Article XXI further cautions against treating its agreement to exclude review under particular IIAs as evidence that self-judgment generally entails non-justiciability.<sup>99</sup> In light of the textual ambiguity and these mixed indications of State practice, the tribunal's reading remains contestable but cannot readily be dismissed as contrary to an unambiguous textual command.

<sup>93</sup> See *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v Colombia)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 3, 23 [43]; *Question of the Delimitation of the Continental Shelf beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Preliminary Objections) (Judgment) [2016] ICJ Rep 100, 120 [41].

<sup>94</sup> *Angel Samuel Seda and others v Republic of Colombia* (Respondent's Submission on US Treaty Practice on Essential Security Interests Exceptions, ICSID Case No ARB/19/6, 21 December 2022) [27], 12 (quoting the US' oral submission of 3 May 2022); *Seda* (n 40) [657].

<sup>95</sup> GATT Council, 'Minutes of Meeting Held on 29-30 June 1982' C/M/159, 13-21.

<sup>96</sup> GATT Council, 'Minutes of Meeting Held on 17-19 July 1985' C/M/191, 41-43 (regarding Nicaragua's request for a panel concerning the US trade embargo); DSB, 'Minutes of Meeting Held on 7 April 2000' WT/DSB/M/78, paras 54-60, especially paras 58-59; DSB, 'Minutes of Meeting Held on 18 May 2000' WT/DSB/M/80, paras 26, 29-30, 40 (regarding *Nicaragua - Measures Affecting Imports from Honduras and Colombia*); Trade Policy Review Body, 'Trade Policy Review: Nicaragua - Minutes of Meeting Held on 24 and 26 July 2006' WT/TPR/M/167, paras 35, 131 (regarding allegedly discriminatory tax imposed by Nicaragua).

<sup>97</sup> *Seda* (n 40) [706]-[708].

<sup>98</sup> India-Colombia Joint Interpretative Declaration (signed 4 October 2018), note 9; cf India-Colombia BIT art 13(4), which contains the phrase 'which it considers necessary'. The tribunal appears to have confused the date of the BIT with that of the declaration: *Seda* (n 40) [716] (referring to a declaration signed 'in 2009'). The Indian Government presented the declaration as a means of clarifying the existing treaty against the background of increasing investment disputes: Press Information Bureau, 'Cabinet approves Joint Interpretative Declaration between India and Colombia' (10 November 2017).

<sup>99</sup> *United States - Certain Measures on Steel and Aluminium Products*, Integrated Executive Summary of the Arguments of India, WT/DS564/R/Add.1, annex C-4, [5]-[9], [59]-[60].

## b. Good Faith Review and Prior Notice

On the other hand, *Riverside*'s contribution is the articulation of the standard of review. The introduction of a procedural requirement of prior notice of the exception's invocation is innovative. It went further than the 'procedural guidelines' under the 1982 Decision on Article XXI of the GATT, which deliberately used hortatory language<sup>100</sup> that merely encouraged that the Members '*should be informed to the fullest extent possible* of trade measures taken under Article XXI.'<sup>101</sup> In fact, WTO panels have declined to treat prior notification as a substantive condition under Article XXI(b)(iii).<sup>102</sup>

Nevertheless, the application of the procedural limb of good faith in the *Riverside* decision is not without problems. First, it is debatable whether good faith alone can generate such an 'especially stringent'<sup>103</sup> requirement of prior notice. While notification is prevalent across treaties, those treaties differ on its addressee, timing, content, and the legal consequences of non-compliance.<sup>104</sup> These variable practices indicate that a procedural notification system requires policy choices by treaty parties, which the *Riverside* tribunal appears to have made in their place.

Second, and in any event, the application of the procedural requirement by the tribunal is irreconcilable with its own formulation. As a matter of law, the tribunal required notice of a legal consequence, ie the invocation of the security exception and the resulting 'non-applicability' of the treaty.<sup>105</sup> However, as a matter of fact, it merely found that the 'shelter order'<sup>106</sup> stated that the police had suspended some of its activities. President Ortega never

<sup>100</sup> Cf GATT Council, 'Trade Measures Affecting Argentina Applied for Non-Economic Reasons: Draft Decision', GATT Doc C/W/402 (2 November 1982) 1 ('must be notified').

<sup>101</sup> Decision concerning Article XXI of the General Agreement, GATT Doc L/5426 (30 November 1982) (emphasis added).

<sup>102</sup> *Russia - Traffic in Transit* (n 11) [7.129] fn 210 and [7.123]–[7.145]; *Saudi Arabia - IPR* (n 11), Addendum, [6.3]–[6.11]. On practice under the 1947 GATT, see *Russia - Traffic in Transit* (n 11), Appendix, [1.20] ff.

<sup>103</sup> Fabian Eichberger, 'Essential Security Interests Exceptions and the Limits of Self-Judgment: Implications of *Riverside Coffee v Nicaragua*' (*EJIL: Talk!*, 19 March 2026) <<https://www.ejiltalk.org/essential-security-interests-exceptions-and-the-limits-of-self-judgment-implications-of-riverside-coffee-v-nicaragua/>> accessed 31 August 2026.

<sup>104</sup> Under some treaties, notice is not treated as a substantive condition for the exercise of the right. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14 [195], [200]; International Covenant on Civil and Political Rights art 4(3); *Landinelli Silva and others v Uruguay* Communication No 34/1978, UN Doc CCPR/C/OP/1 (1984) [8.3]; Human Rights Committee, 'General Comment No 29: States of Emergency (Article 4)' (31 August 2001) UN Doc CCPR/C/21/Rev.1/Add.11, para 17. Other treaties take a different approach, however. *Greece v United Kingdom* App No 176/56, Commission Report, vol I (26 September 1958) [158]; American Convention on Human Rights art 27(3); *Baena Ricardo and others v Panama* (Merits, Reparations and Costs) IACtHR Series C No 72 (2 February 2001) [92]–[94].

<sup>105</sup> *Riverside Coffee* (n 66) [271].

<sup>106</sup> It should be noted that the expression 'shelter order' did not refer to a single written order so called contemporaneously. Rather, the public record indicates that it is a composite of a series of statements and subsequent accounts. On 16 May 2018, President Ortega stated on television that the police had

mentioned DR-CAFTA, much less its security exception. In fact, his remark did not describe a blanket suspension of policing activities; he only affirmed that the police would respond to ‘normal problems,’ while refraining from intervention in ‘more complicated situations’ associated with the unrest.<sup>107</sup> An investor could therefore hardly understand that treaty protection would not apply to their situation or that the ‘order’ would continue only for a ‘relatively short period of time,’ on which the tribunal relied in support of its finding.<sup>108</sup> This is particularly so because the obligation to accord full protection and security is itself an obligation of due diligence, whose specific standard depends on the particular circumstances. A statement of temporary restraint on police activities could reasonably be understood as reflecting the level of protection reasonably expected in the circumstances.<sup>109</sup>

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already been ordered to remain in barracks, responding only to ‘normal problems’: *Video of Opening of the National Dialogue - President Daniel Ortega Speech* (C-0339-SPA); Daniel Ortega, ‘Comandante Daniel y Compañera Rosario en Diálogo Nacional (16 de mayo de 2018)’ (*Canal 4*, 16 May 2018) <<https://www.canal4.com.ni/comandante-daniel-companera-rosario-dialogo-nacional-16-mayo-2018>> accessed 31 August 2026. On 18 May, the Government also undertook to withdraw the police to barracks for the duration of a weekend truce: ‘Ésto fue lo que se acordó luego de la primera jornada de trabajo en el Diálogo Nacional’ (*El 19 Digital*, 18 May 2018) <<https://www.el19digital.com/articulos/ver/77156-esto-fue-lo-que-se-acordo-luego-de-la-primera-jornada-de-trabajo-en-el-dialogo-nacional>> accessed 31 August 2026. On 27 and 28 May, the National Police issued two press releases subsequently relied upon by Nicaragua as evidence of the arrangement. The 27 May release expressly stated that the Police had refrained from acting against certain groups because agreements in the National Dialogue required police forces to remain barracked; an article published on the Police website the following day repeated that explanation: Policía Nacional, ‘Nota de Prensa No 25-2018’ (27 May 2018) (R-0180); Policía Nacional, ‘Nota de Prensa No 26-2018’ (28 May 2018) (R-0181); Policía Nacional, ‘Seguridad Ciudadana, una preocupación de todos’ (28 May 2018) (R-0192). Nicaragua subsequently characterized these materials together with witness statements as establishing a ‘shelter order.’ Resp Rej, [123]–[124] fns 140–45. The tribunal accepted this factual characterization, referring to ‘President Ortega’s “shelter order” in late May 2018.’ *Riverside Coffee* (n 66) [277] (emphasis original).

<sup>107</sup> *Canal 4* (n 106), also submitted in the arbitration as C-0339-SPA; see *Riverside Coffee* (n 66) [100] fn 25; Resp Rej, [124] fn 142 (‘Entonces, aquí lo importante es que nosotros tenemos pruebas convincentes de que la Policía está en sus Cuarteles y simplemente acude cuando la población la llama frente a los problemas normales que existen. Cuando tenemos situaciones más complicadas como estas, de los que se andan desplazando por la noche, grupos paramilitares, eso sí, que se desplazan haciendo destrozos, les hemos dicho a la Policía: No, ahí déjenlos, ahí que sigan destruyendo. ¿Que quemaron un Supermercado, que quemaron una Institución del Estado, un Local? Bueno, ¡ahí déjenlos, ahí déjenlos, ahí déjenlos!’).

<sup>108</sup> *Riverside Coffee* (n 66) [278].

<sup>109</sup> *Riverside Coffee* (n 66) [339] (holding that the FPS standard is one of due diligence and requires ‘the level of police protection that is reasonable in the circumstances’). Cf *Pantechniki SA Contractors & Engineers v Republic of Albania* (Award) ICSID Case No ARB/07/21 (30 July 2009) [76]–[82], [18]–[20]. In *Pantechniki*, following the widespread civil disturbances, Albania had formally declared a nationwide state of public emergency on 2 March 1997 and even notified a derogation under ECHR art 15(3): Council of Europe, ‘Derogation contained in a Note Verbale from the Ministry for Foreign Affairs of Albania, dated 4 March 1997, registered at the Secretariat General on 10 March 1997’ (ETS No 005). The tribunal nevertheless analyzed the State’s obligation as one of due diligence, taking account of the scale of the disorder and the resources available to the State: *Pantechniki* [76]–[82].

### III. Survey of Anti-Abuse Clauses in IIAs

*Seda* and *Riverside* demonstrate the continuing applicability of good faith under a broadly worded self-judging exception, but also expose the limits of relying on the general principle alone. Without an objective contextual requirement like the one under GATT, good faith may provide only a thin restraint or invite arbitrators to construct additional requirements beyond textual prescriptions. A third possibility exists in treaty practice, where treaty parties themselves impose additional controls on self-judging discretion.

Existing studies have already mapped the spread of self-judging exceptions in IIAs,<sup>110</sup> but they have not systematically examined anti-abuse clauses attached to such self-judging clauses. A 2016 survey by Sauvants and Ong is a good starting point.<sup>111</sup> They reviewed 1,861 IIAs concluded by 90 countries before early 2016 and identified 222 agreements containing self-judging ESI exceptions, classifying these clauses into three categories of ‘very strong’ (15 IIAs with a reinforcement footnote discussed above ([Section II.B](#))), ‘strong’ (190 IIAs with simple self-judging clauses), and ‘conditional’ (17 IIAs with prohibitions on arbitrary or unjustifiable discrimination or obligation avoidance).<sup>112</sup> The study remains important and useful, but it was not an exhaustive survey, and its categories were necessarily coarse and did not isolate the legal devices through which abuse was to be controlled. Similarly, Shelbaya catalogs ten forms of substantive limitations citing 16 IIAs, but his analysis concerns security exceptions generally and does not isolate self-judging clauses; indeed, the treaty examples cited for these limitations are overwhelmingly *non*-self-judging.<sup>113</sup> Pathirana and McLaughlin provide a useful qualitative typology of conditions limiting recourse to non-precluded measures clauses and separately discuss their self-judging character. Their analysis, however, relies on a few selected treaty examples.<sup>114</sup>

The present study therefore fills this gap by systematically examining the variety and distribution of anti-abuse provisions in self-judging ESI exceptions and assessing their significance and challenges.

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<sup>110</sup> William W Burke-White and Andreas von Staden, ‘Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties’ (2008) 48 *Va J Int'l L* 307; UNCTAD, *The Protection of National Security in IIAs* (United Nations 2009); Caroline Henckels, ‘Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict’ in Katia Fach Gómez and others (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) 319.

<sup>111</sup> Karl P Sauvants and Mevelyn Ong, ‘The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements’ (2016) 188 *Columbia FDI Perspectives* 1.

<sup>112</sup> Sauvants and Ong (n 111) 2.

<sup>113</sup> Mohamed Shelbaya, ‘Security Exceptions’ (2024) 39 *ICSID Rev* 263, 272-73. Of the sixteen treaties cited by Shelbaya, only the Colombia-India BIT (2009) art 13(4) contains an express self-judging formulation in the treaty text.

<sup>114</sup> Dilini Pathirana and Mark McLaughlin, ‘Non-Precluded Measures Clauses: Regime, Trends, and Practice’ in Julien Chaisse and others (eds), *Handbook of International Investment Law and Policy* (Springer 2021) 496-98.

## A. Survey Strategy

To quantify and visualize anti-abuse clauses, we constructed a corpus from the Electronic Database of Investment Treaties (EDIT), an online database developed and maintained by the World Trade Institute of the University of Bern.<sup>115</sup> Figure 3 illustrates the corpus construction process.

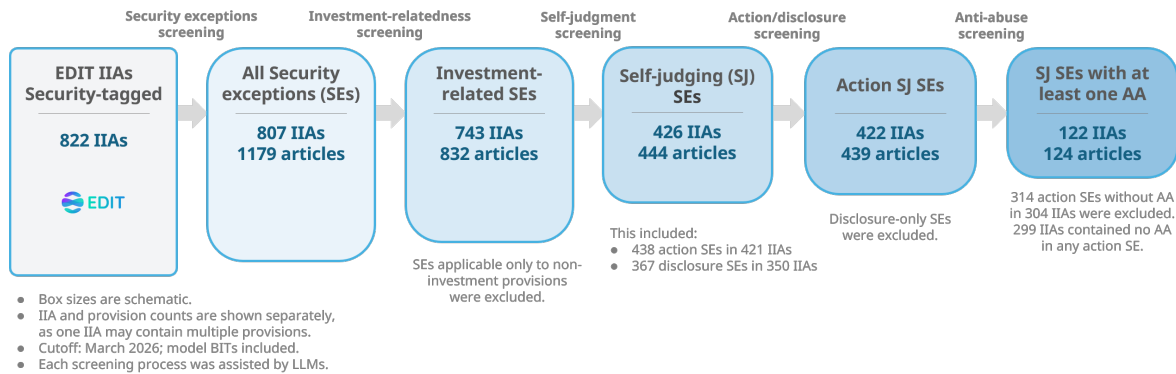


**Figure 3: Corpus Construction Process Visualized**

We first selected 822 IIAs tagged as containing a national security exception<sup>116</sup> and downloaded the English text – the authentic English version where one exists, and otherwise a machine translation. We then disaggregated the treaty texts at the article level and extracted articles containing the term ‘security’ as candidate provisions that may contain a security exception. These candidate articles were further screened to exclude provisions that used ‘security’ in another sense, such as full protection and security, security for costs, social security, and sector-specific provisions that did not function as an ESI exception. After adding one provision identified from outside the population, we obtained 1,179 articles contained in 807 IIAs.

We then cleaned and coded these candidate articles in four stages. First, we determined whether each article functions as a security exception. This included security exceptions that apply only to non-investment measures such as trade restrictions. Second, we examined whether each article applies to investment obligations. Third, we coded these articles based on whether they are explicitly self-judging. At this stage, we distinguished whether self-judgment applied to substantive State actions, non-disclosure of sensitive information, or both. Fourth, we coded whether the remaining action-justifying self-judging provisions contained at least one of the anti-abuse elements defined below. In this last step, we distinguished clauses applying to

<sup>115</sup> Electronic Database of Investment Treaties, World Trade Institute <<https://edit.wti.org>> accessed 7 October 2026. See Wolfgang Alschner and others, ‘Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use’ (2021) 20 WTR 73.

<sup>116</sup> The initial screening frame was obtained through ‘Filter by categories’ > ‘Exceptions’ > ‘National security.’ The treaty inclusion cut-off is March 2026, with verified corrections incorporated through 8 October 2026. For the supplementary provision, see Australia–UK FTA (2021) art 31.2.

security exceptions from anti-abuse chapeaux or clauses applying only to general or prudential exceptions.

We treated a security exception as ‘investment-related’ only where, by its own terms or through incorporation or cross-reference, it applied to substantive investment obligations. This included provisions in BITs, both actual and model, agreement-wide exceptions in FTAs with investment obligations, and investment chapter-specific exceptions. We excluded security exceptions confined to other domains, such as services-only provisions. We used the article as the unit of observation and counted distinct security exceptions in a single treaty separately.<sup>117</sup>

In this study, we defined an ‘anti-abuse provision’ as any provision that imposes additional requirements or obligations governing the invocation or exercise of the exception, beyond those found in GATT Article XXI, which we treated as a convenient benchmark. Through a preliminary survey and a review of existing studies, we identified the following six principal devices:

1. a heightened crisis or threat threshold;
2. a notification or consultation requirement;
3. a prohibition on arbitrary, unjustifiable, or discriminatory application;
4. a prohibition on disguised restrictions on investment;
5. a prohibition on using the measure as a means of avoiding treaty obligations; and
6. express reference to good faith.

A single article may contain different types of clauses. Accordingly, a treaty may require notification (No. 2) and prohibit obligation avoidance (No. 5). Similarly, if an article contains both a prohibition on arbitrary or unjustifiable discrimination and a prohibition on disguised restrictions, it is coded under both categories 3 and 4. As a result, categories Nos. 3 and 4 overlap in many treaties.

To conduct as comprehensive and accurate a survey as possible, we employed large language models (LLMs) to facilitate each screening stage.<sup>118</sup> We provided LLMs with codebooks and prompted them to produce initial coding results in JSON format. We then validated the output through rule-based checks and manual review to minimize false positives and negatives. False positives identified in the validation stage included, for example,

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<sup>117</sup> The final dataset contains 439 article-level self-judging action provisions: 199 in BITs, 24 in model BITs, and 216 in broader IIAs such as FTAs with an investment chapter. Because some broader agreements contain more than one qualifying provision, these observations correspond to 422 distinct instruments (199 BITs, 24 model treaties, and 199 broader IIAs), or 398 concluded agreements if model treaties are excluded.

<sup>118</sup> We employed several versions of Google’s Gemini available through the API between March and September 2026, including gemini-2.5-pro/flash/flash-lite, gemini-3.1-pro and flash, and gemini-3.8-lite.

obligation-avoidance language attached to denial-of-benefits provisions, prudential provisions, as well as chapeau language applicable only to a general exception.

## B. Overall Results

The first overall result confirms the trend already identified by previous studies: self-judging clauses are increasing ([Figure 4](#)).<sup>119</sup> Within the corpus, 88.4% (84 of 95) of investment-applicable security-exception articles in IIAs signed in 2021–2025 contained self-judging action clauses. At the agreement level, 96.4% (81 of 84) of IIAs containing an investment-applicable security exception included at least one such clause. UNCTAD’s reported 92% is based on a different mapped treaty population and is not directly comparable to the article-level figure.<sup>120</sup> Among the 439 self-judging action clauses, 363 also contain self-judging information non-disclosure provisions, while 76 do not. This difference is discussed in relation to the notification requirements ([Section III.C.2](#)).

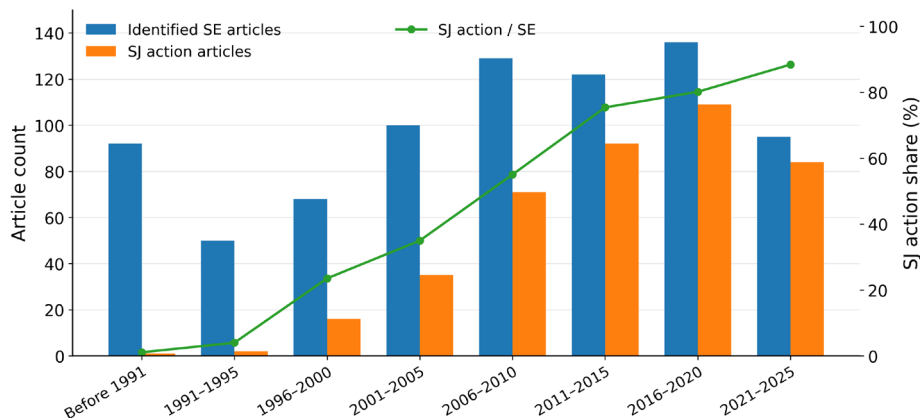


**Figure 4: Expanding Self-judgment in IIAs**

The second overall result is the relative stability of the prevalence of anti-abuse devices within self-judging exceptions. [Figure 5](#) shows that, among IIAs in the corpus with an investment-applicable security exception, the share containing at least one coded device increased from 19.3% in 2006–2010 to 26.2% in 2021–2025 (orange line). However, among IIAs containing a self-judging action clause, the share has remained around 27–28% since 2011 (green line), reaching 27.2% in 2021–2025. Thus, within this corpus, the growing use of self-judging security exceptions has not been accompanied by a sustained increase in the proportion of such treaties incorporating anti-abuse devices.

<sup>119</sup> Sauvants and Ong (n 111) 4; Shelbaya (n 8) 263; Mohammad-Ali Bahmaei and Habib Sabzevari, ‘Self-Judging Security Exception Clause as a Kind of Carte Blanche in Investment Treaties: Nature, Effect and Proper Standard of Review’ (2023) 13 AsianJIL 97.

<sup>120</sup> See n 4.

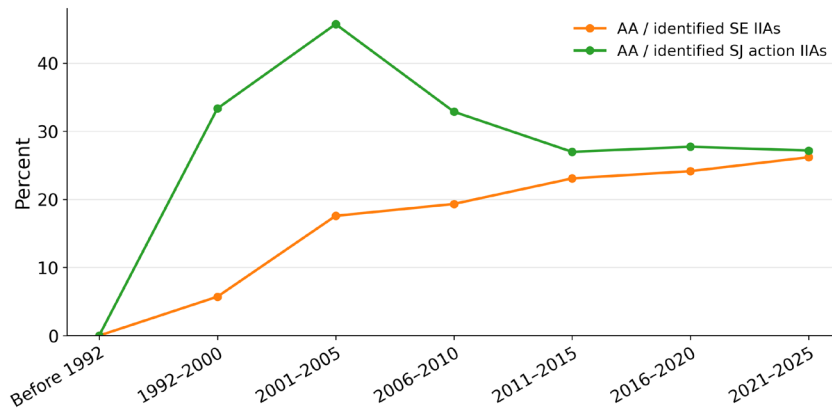


**Figure 5: Anti-Abuse Devices in the Treaty Corpus, by Denominator**

This aggregate stability, however, conceals divergent drafting patterns. First, BITs and other IIAs, including FTAs, have followed contrasting trajectories ([Figure 6, panel A](#)). Among BITs with a self-judging exception, the share containing at least one anti-abuse device rose from 24.1% in 2006–2010 to 42.1% in 2021–2025, while the corresponding share among other IIAs fell from 39.0% to 14.0%.<sup>121</sup> Second, the prevalence of anti-abuse devices also varies considerably across different clause designs ([Figure 6, panel B](#)). Among self-judging clauses in IIAs signed in 2016–2025 that provide an illustrative list of circumstances in which security measures may be taken, 69.6% (16 of 23) contain an anti-abuse device.<sup>122</sup> This is markedly higher than the corresponding shares for GATT-like clauses retaining a closed list (23.7%, 28 of 118) and US-style clauses without contextual requirements (15.4%, 8 of 52). This pattern may reflect a drafting compromise: States adopting illustrative-list clauses seek to preserve broad security discretion while providing express safeguards against its abuse, whereas those opting for clauses without contextual requirements appear to emphasize maximizing discretion. Interestingly, this discrepancy appears only in BITs, and the prevalence of anti-abuse clauses in other IIAs, principally FTAs, remains low regardless of the design of contextual requirements.

<sup>121</sup> At the agreement level, the decline among other IIAs is concentrated in heightened-severity and notification or consultation devices. At least one of these appears in 32.9% (26 of 79) of self-judging other IIAs signed in 2006–2015, compared with 11.8% (9 of 76) signed in 2016–2025. Agreements containing another coded device but neither of these two numbered three in each period.

<sup>122</sup> At the clause level, 93.8% (15 of 16) illustrative-list BIT clauses signed in 2016–2025 contain a coded anti-abuse device, compared with only 14.3% (one of seven) of such clauses in other IIAs. At the agreement level, all nine illustrative-list BITs signed in 2021–2025 contain a device, compared with seven of the remaining 29 BITs.

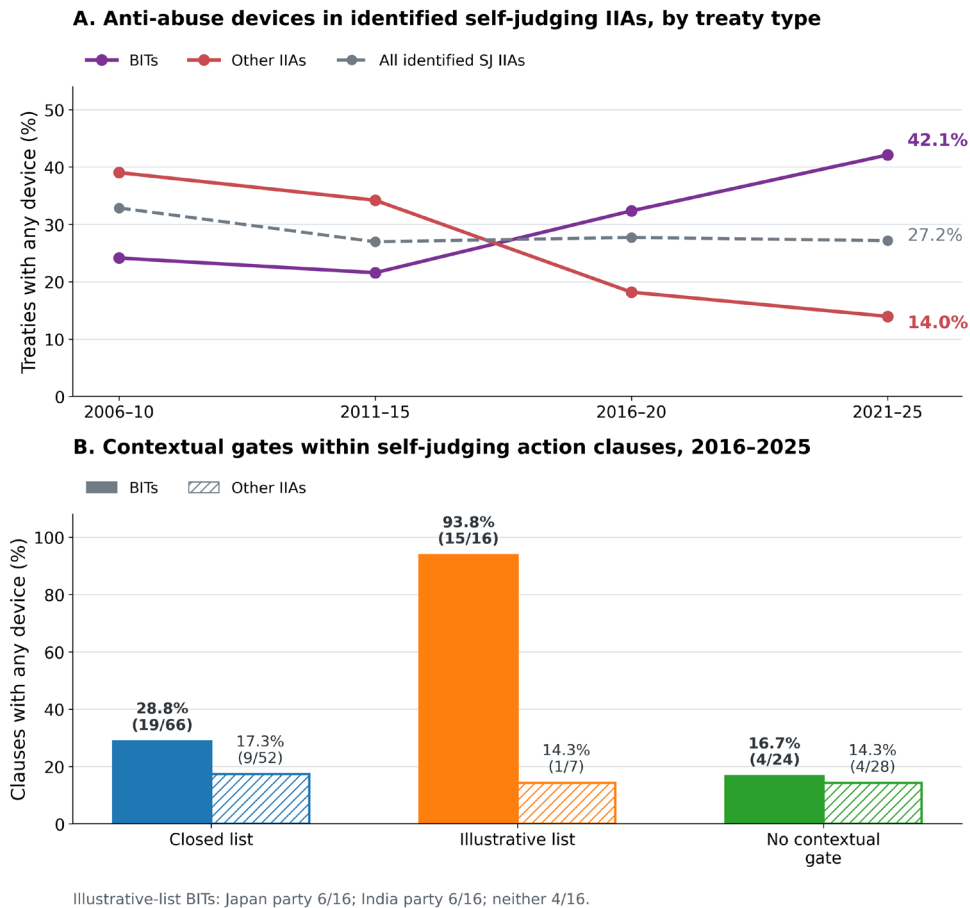


**Figure 6: Divergent Patterns within Self-Judging Exceptions**

The third observable result is the substantial variation in the types and design of the controls employed (Figure 7). The most common element is a notification or consultation requirement, and the express requirement of good faith is the least frequent.

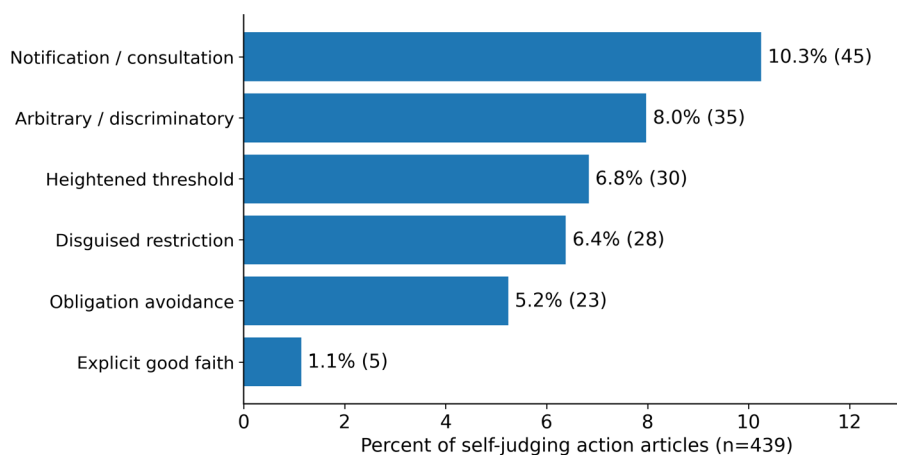


**Figure 7: Six Categories of Anti-Abuse Clauses**

While a single IIA or clause may contain multiple anti-abuse mechanisms, treaties also vary in how they mix these tools across agreements involving different States and regional

groupings (Figure 8). These differences suggest that treaty parties have developed not a single model of constrained self-judgment, but a variety of legal techniques whose functions and implications require closer examination.

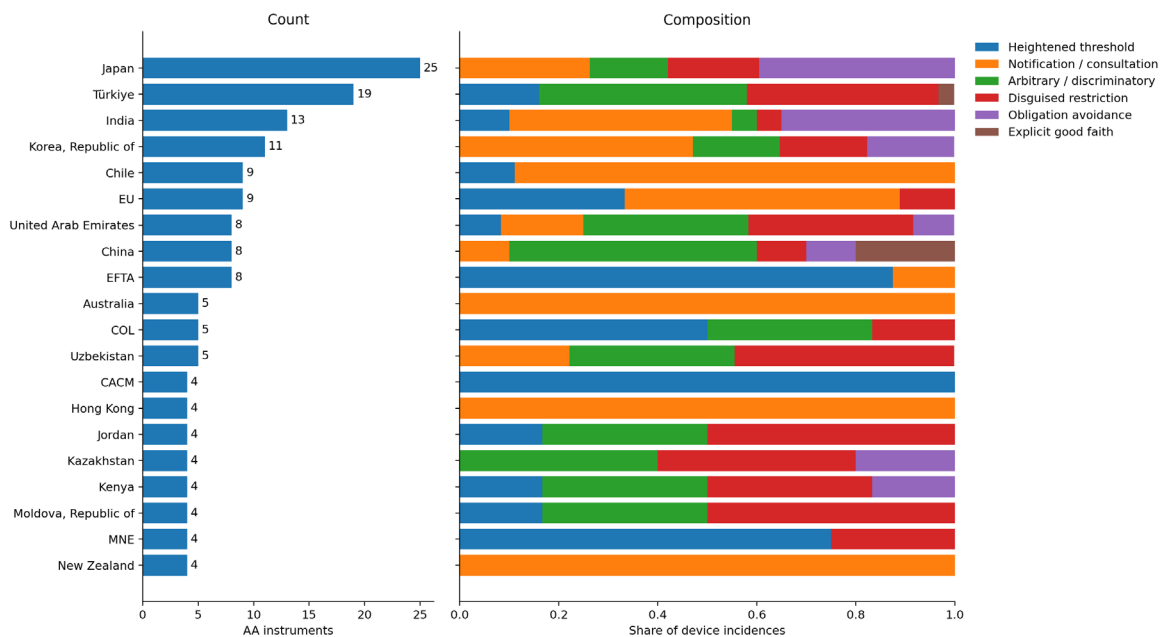


Figure 8: Per-Country Composition of Anti-Abuse Clauses

### C. Functional Typology

The six devices differ in both wording and legal function. They also exhibit national patterns and changes over time. The following discussion considers each category in turn, analyzing the prohibitions on arbitrary or unjustifiable discrimination (No. 3) and disguised restrictions (No. 4) together because they frequently form part of the same chapeau-like clause.

#### 1. Heightened Severity Requirement

The first group qualifies the contextual requirement in the GATT Article XXI(b)(iii) formula by requiring the situation to meet a higher threshold of severity. The EFTA family and a broad set of Central and South American agreements, for example, require ‘serious’ or ‘grave international tension’.<sup>123</sup> A Turkish variant requires that the tension constitute a threat of

<sup>123</sup> EFTA–Morocco FTA (1997) art 26(b)(iii); EFTA–Palestine Interim Agreement (1998) art 24(b)(iii); Central America–Chile FTA (1999) art 20.03(b)(ii); EFTA–North Macedonia FTA (2000) art 25(b)(iii); EFTA–Jordan FTA (2001) art 26(b)(iii); Central America–Panama FTA (2002) art 21.03(b)(ii); CACM Agreement on Investment and Trade in Services (2002) art 803(b)(ii) and Protocol thereto (2007) art 8.03(b)(ii); EFTA–Lebanon FTA (2004) art 22(b)(iii); EFTA–Tunisia FTA (2004) art 22(b)(iii); Guatemala–Taiwan FTA (2005) art 19.03(b)(ii); EFTA–Egypt FTA (2007) art 22; Mexico–Peru FTA (2011) art 18.2(b)(iii); Colombia–Panama FTA (2013) art 24.2(b)(iii); Colombia–Northern Triangle FTA (2013) art 19.2(b)(ii); Costa Rica–UAE BIT (2017) art 16(b)(iv).

war.<sup>124</sup> EU agreements broaden the range of covered circumstances to include ‘internal disturbance’ while requiring such disturbances to be ‘serious.’<sup>125</sup>

It is a matter of definition whether we call this first group of provisions ‘anti-abuse.’ In fact, they provide a higher threshold that strengthens a tribunal’s review of a contextual requirement analogous to that in subparagraph (iii) of GATT Article XXI(b). In contrast, if the self-judging clause contains no contextual requirement at all, as in *Seda* and *Riverside*, then this type of controlling factor has no role.

## 2. Notification or Consultation Requirement

Notification of the invocation of the security exception is a common anti-abuse device, presumably influenced by the practice under the GATT as described above ([Section II.C.3.b](#)). In line with that practice, a majority of the procedural provisions are hortatory, generally calling for notification only ‘to the fullest extent possible’ either to a joint committee<sup>126</sup> or the other State party.<sup>127</sup>

In contrast, Japanese treaty practice in the 2000s adopted a stricter approach. It required notice before entry into force of the measure, or as soon as possible thereafter, providing specific information on the following five items:<sup>128</sup>

<sup>124</sup> Palestine–Türkiye Interim FTA (2004) art 44(c); Syria–Türkiye FTA (2004) art 42(2)(c); Albania–Türkiye FTA (2006) art 30(b)(iii); Montenegro–Türkiye FTA (2008) art 30(b)(iii). Without Turkish participation: Albania–Montenegro–Serbia FTA (2003) art 35(b); CEFTA (2006) art 18(2)(c).

<sup>125</sup> EC–Georgia Cooperation Agreement (1996) art 90; EU–Georgia Association Agreement (2014) art 415; EU–Moldova Association Agreement (2014) art 446; Ukraine–UK Free Trade and Strategic Partnership Agreement (2020) art 407.

<sup>126</sup> Chile–EC Association Agreement (2002) art 194(2); Chile–ROK FTA (2003) art 20.2(2) (‘The Commission shall be informed to the fullest extent possible of measures taken under subparagraphs 1(b) and (c) and of their termination.’); China–New Zealand FTA (2008) art 201(2); Australia–Chile FTA (2008) art 22.2(2); ASEAN–ROK Investment Agreement (2009) art 21(2); Malaysia–New Zealand FTA (2009) art 17.2(2); India–Malaysia CECA (2011) art 12.2(2); Australia–Malaysia FTA (2012) art 18.2(2); Australia–ROK FTA (2014) art 22.2(2); ROK–New Zealand FTA (2015) art 20.2(2); ROK–Viet Nam FTA (2015) art 16.2(2); PACER Plus (2017) art 2(2); ASEAN–Hong Kong Investment Agreement (2017) art 8(2); Chile–EU Interim Agreement (2023) art 32.2(2); Chile–EU Advanced Framework Agreement (2023) art 41.4(2); Sri Lanka–Thailand FTA (2024) art 14.5(2); Chile–UAE CEPA (2024) art 19.2(2); Chile–EFTA Updated FTA (2024) art 175(2). Some treaties dispense with the reference to ‘to the fullest extent possible’: EU–SADC Economic Partnership Agreement (2016) art 98(2). One treaty requires notification at an amendment meeting: ROK–Singapore FTA (2005) art 21.3(1).

<sup>127</sup> India Model BIT (2015) art 33.2; India–Taiwan Province of China BIT (2018) art 32.2; India–Kyrgyzstan BIT (2019) art 33.2; Australia–Hong Kong BIT (2019) art 19(2) (without ‘to the fullest extent possible’); Brazil–India BIT (2020) art 24.2; India–UAE BIT (2024) art 34.2; Sri Lanka–Thailand FTA (2024) art 9.20(2); India–Uzbekistan BIT (2024) art 35.2. Some treaties require ‘prompt’ notification: India–ROK CEPA (2009) art 10.18(4); Chile–Hong Kong FTA (2012) art 18.2(2). A treaty requires notification only when the invocation affects the BIT’s implementation: Belarus–India BIT (2018) art 33.2.

<sup>128</sup> Japan–ROK BIT (2002) art 16(3); Japan–Viet Nam BIT (2003) art 15(3); Japan–Philippines EPA (2006) art 99(2); Japan–Laos BIT (2008) art 18(3).

(a) sector and sub-sector or matter; (b) obligation or article in respect of which the measure is taken; (c) legal source or authority of the measure; (d) succinct description of the measure; and (e) motivation or purpose of the measure.

Probably for this reason, these treaties do not contain self-judging exceptions permitting the non-disclosure of information, which would hardly be reconciled with the stringent transparency duty. Japan moved away from this practice, however; after testing the best-effort formula in several IIAs,<sup>129</sup> its subsequent IIAs dispensed with the notification procedure altogether.<sup>130</sup>

### **3. Non-Discrimination, Arbitrary or Unjustifiable Application, and Disguised Restrictions**

Some IIAs extend a GATT Article XX-like chapeau to security exceptions, but with different modifications. On the one hand, certain IIAs of States including Japan, the UAE, and Kenya prohibit ‘arbitrary or unjustifiable discrimination’ and ‘disguised restrictions’ on investment in the application of self-judging security exceptions.<sup>131</sup> Unlike the chapeau of GATT Article XX, however, these provisions generally omit the qualification ‘between countries where the same conditions prevail,’ instead referring, for example, to discrimination ‘against the other Party.’ The India-Korea CEPA presents a narrower example, applying a similar restriction only to measures taken to protect critical public infrastructure.<sup>132</sup>

By contrast, Türkiye has developed a distinctive chapeau formulation. In the past, Turkish BITs contained anti-abuse provisions applicable only to general exceptions, some of which incorporated language analogous to GATT Article XX almost verbatim.<sup>133</sup> From 2016 onward, however, Türkiye began providing, in a sizable group of BITs, a chapeau paragraph applicable to both general and security exceptions, typically requiring that measures under those exceptions not be applied in an ‘arbitrary or unjustifiable manner’ or constitute a ‘disguised restriction’.<sup>134</sup> Most of these common chapeaux make no explicit reference to non-discrimination. The next section ([Section IV.A](#)) explores the implications of this adaptation.

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<sup>129</sup> Japan-Brunei EPA (2007) art 8(4).

<sup>130</sup> Eg Japan-UAE BIT (2018) art 18; Japan-Morocco BIT (2020) art 21; Japan-Bangladesh EPA (2026) art 9.14(1).

<sup>131</sup> Japan-Philippines EPA (2006) art 99(1) (‘Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party, or a disguised restriction on investments of investors of the other Party in the Area of a Party [...]’); Kenya-Slovakia BIT (2011) art 14(1); Kenya-ROK BIT (2014) art 15; Japan-UAE BIT (2018) art 18; Ecuador-UAE BIT (2025) art 27.

<sup>132</sup> India-ROK CEPA (2009) art 10.18.

<sup>133</sup> Colombia-Türkiye BIT (2014) art 6; Lithuania-Türkiye BIT (2018) art 7.

<sup>134</sup> Moldova-Türkiye BIT (2016) art 5(3); Burundi-Türkiye BIT (2017) art 5(3); Chad-Türkiye BIT (2017) art 5(3); Türkiye-Uzbekistan BIT (2017) art 5(3); Belarus-Türkiye BIT (2018) art 5(3); Mauritania-Türkiye BIT (2018) art 5(3); Burkina Faso-Türkiye BIT (2019) art 5(3); Türkiye-Venezuela

Other States tend to regulate only one of the two forms of abuse. China, for example, imposes non-discrimination requirements, in particular on security measures applied to State-owned enterprises, but without clauses prohibiting disguised restrictions.<sup>135</sup>

#### 4. Prohibitions on Avoiding Obligations

Japan has a unique practice of including a provision addressing obligation-avoidance. For example, paragraph 2 of Article 16 (General and Security Exception) of the Japan-Korea BIT of 2002 provides that:<sup>136</sup>

In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that Contracting Party shall not use such measure as a means of avoiding its obligations.

While such a provision appeared in Japanese IIAs only sporadically during the 2000s and 2010s,<sup>137</sup> it has been a regular feature since 2022.<sup>138</sup>

Interestingly, this practice has spilled over to other States. Some countries that concluded an IIA with Japan containing such a provision have incorporated similar clauses in their IIAs with other States.<sup>139</sup>

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BIT (2023) art 6(4) (applying the same paragraph to the general, security, and prudential exceptions); Türkiye–United Arab Emirates BIT (2024) art 6(3). A notable variant is Jordan–Türkiye BIT (2016) art 5(3), which subjects the same general and security exceptions to the requirement that measures not be applied in a ‘discriminatory, arbitrary or unfair manner’ and not constitute ‘(veiled) restrictions.’ Jordan–Uzbekistan BIT (2025) art 5(3) follows the post-2016 Turkish model. There are also post-2016 BITs that continue to lack an anti-abuse clause applicable to security exceptions: Ukraine–Türkiye BIT (2017) art 5; Türkiye–Zambia BIT (2018) art 6; Serbia–Türkiye BIT (2018) art 5.

<sup>135</sup> China–Mauritius FTA (2019) art 8.18(1); Angola–China BIT (2023) art 19(2); Belarus–China Agreement on Service Trade and Investment (2024) art 3.20(2). For a general non-discrimination requirement, see China–Türkiye BIT (2015) art 4(2)(b).

<sup>136</sup> Japan–ROK BIT (2002) art 16(2).

<sup>137</sup> Among Japan’s investment-applicable self-judging IIAs signed in 2000–2021, 8 of 36 (22.2%) contain an obligation-avoidance clause: Japan–ROK BIT (2002) art 16(2); Japan–Viet Nam BIT (2003) art 15(2); Japan–Laos BIT (2008) art 18(2); India–Japan CEPA (2011) art 11(2); Japan–Kazakhstan BIT (2014) art 18(2); Japan–Oman BIT (2015) art 16(2); Japan–Ukraine BIT (2015) art 19(2); Japan–Kenya BIT (2016) art 16(2).

<sup>138</sup> Among Japan’s investment-applicable self-judging IIAs signed from 2022 through March 2026, 7 of 7 (100%) contain an obligation-avoidance clause: Bahrain–Japan BIT (2022) art 18(4); Angola–Japan BIT (2023) art 16(4); Japan–Paraguay BIT (2025) art 15(4); Japan–Serbia BIT (2025) art 16(4); Japan–Tajikistan BIT (2025) art 16(4); Japan–Zambia BIT (2025) art 16(4); Japan–Bangladesh EPA (2026) art 9.14(3). Cf Sakai (n 9) 17.

<sup>139</sup> China–ROK FTA (2015) art 12.14(2); Bahrain–UAE BIT (2024) art 12(4).

## 5. Explicit Good Faith

Perhaps contrary to our expectations, only a small group of IIAs make good faith an explicit requirement, such as the Ghana-Türkiye BIT, the Ethiopia-Qatar BIT, and certain Chinese FTAs. The language varies, with some merely stating good faith and others combining it with equity, non-discrimination, and regard for the agreement's objectives.<sup>140</sup> The rarity of an explicit good faith requirement may indicate States' implicit assumption that the principle applies even without such an explicit basis.

## IV. Function and Limits of Substantive Anti-Abuse Clauses

The six anti-abuse devices identified above do not affect self-judging discretion in the same way. On one hand, heightened emergency requirements operate primarily as objective gateways to the exception's availability, rather than as controls on self-judgment. Notification and consultation requirements are often recommendatory, although their legal consequences may vary by treaty. Express references to good faith may help remind arbitrators of the general principle's applicability, but their independent substantive contribution is uncertain. On the other hand, the two forms of substantive anti-abuse provisions, ie, prohibitions on arbitrary, unjustifiable, or discriminatory application and disguised restrictions (A) and avoiding treaty obligations (B), may have a more direct influence on self-judgment.

### A. Arbitrary or Discriminatory Application and Disguised Restrictions

#### 1. GATT/WTO *Acquis* and Interactions with Self-judgment

As the review in [Section III.C.3](#) has shown, the self-judging security exceptions of some States draw on the chapeau of GATT Article XX, which requires that measures falling within its exceptions 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.' The extent of textual correspondence, however, varies across treaties. Some IIAs reproduce the GATT chapeau almost verbatim, whereas others – most notably a group of Turkish BITs – omit express reference to discrimination.

WTO jurisprudence on GATT Article XX has established the 'two-tiered' review structure: first, 'provisional justification' under paragraphs (a) to (j), and second, 'further appraisal' of the same measure under the chapeau.<sup>141</sup> Thus, the chapeau imposes an 'additional

<sup>140</sup> Iraq-Saudi Arabia BIT (2019) art 22(2); Ghana-Türkiye BIT (2016) art 7(2)(b); Ethiopia-Qatar BIT (2017) art 13(2); China-Maldives FTA (2017) art 160(b); China-Mauritius FTA (2019) art 16.2(b).

<sup>141</sup> *United States - Standards for Reformulated and Conventional Gasoline* (Appellate Body Report) WTO Doc No WT/DS2/AB/R (circulated 29 April 1996, adopted 20 May 1996) 22.

discipline’<sup>142</sup> to be satisfied.<sup>143</sup> The purpose of the second stage is to prevent ‘abuse or illegitimate use of the exceptions.’<sup>144</sup> The Appellate Body’s approach is to impose on the State invoking the exception the burden of proving that the chapeau requirements are met, which, in *US – Gasoline*, was described as ‘of necessity’ a heavier task than establishing provisional justification under Article XX(g).<sup>145</sup>

The chapeau establishes three standards concerning the manner in which the measure is applied: (i) arbitrary discrimination, (ii) unjustifiable discrimination, provided that such discrimination occurs ‘between countries where the same conditions prevail’, and (iii) a disguised restriction on international trade.<sup>146</sup> Assessment under (i) and (ii) is thus premised on the presence of discrimination, which is ‘arbitrary or unjustifiable’ if the reasons or ‘rationale’ bear ‘no rational connection to’, or ‘would go against’, the objective under a paragraph of Article XX.<sup>147</sup> The ‘manner’ of a measure’s application may be assessed through its objective aspects, such as the ‘design, architecture, and revealing structure’.<sup>148</sup>

While the Appellate Body has interpreted Article XX’s chapeau as ‘necessarily broad in scope and reach’,<sup>149</sup> it has also underscored the importance of maintaining the balance between the rights of respective States. As Article XX reflects good faith, it requires the reasonable exercise of the right with due regard for the rights of others.<sup>150</sup> As was held in *US – Shrimp*:<sup>151</sup>

The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out *a line of equilibrium* between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement. The location of the line of

<sup>142</sup> *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (Appellate Body Reports) WTO Doc Nos WT/DS400/AB/R and WT/DS401/AB/R (circulated 22 May 2014, adopted 18 June 2014) [5.296].

<sup>143</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) WTO Doc No WT/DS58/AB/R (circulated 12 October 1998, adopted 6 November 1998) [157] (noting that justification under the respective paragraph of art XX is ‘limited and conditional’ and that ‘the ultimate availability of the exception is subject to the compliance by the invoking Member with the requirements of the chapeau’).

<sup>144</sup> *US - Gasoline* (n 141) 25; see also *US - Shrimp* (n 143) [120].

<sup>145</sup> *US - Gasoline* (n 141) 23.

<sup>146</sup> *US - Gasoline* (n 141) 23; *US - Shrimp* (n 143) [150].

<sup>147</sup> *Brazil - Measures Affecting Imports of Retreaded Tyres* (Appellate Body Report) WTO Doc No WT/DS332/AB/R (circulated 3 December 2007, adopted 17 December 2007) [227].

<sup>148</sup> *EC - Seal Products* (n 142) [5.302].

<sup>149</sup> *US - Shrimp* (n 143) [120].

<sup>150</sup> *US - Gasoline* (n 141) 22; *US - Shrimp* (n 143) [158]–[159]; *Brazil - Retreaded Tyres* (n 147) [224].

<sup>151</sup> *US - Shrimp* (n 143) [159] (emphasis added).

equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measures at stake vary and as the facts making up specific cases differ.

Thus, under WTO jurisprudence, the chapeau of GATT Article XX constitutes an additional requirement assessed objectively and independently of the provisional justification under the respective paragraphs. These interpretations were, of course, developed in the context of Article XX, and their transposition to self-judging security exceptions with a distinct context cannot simply be assumed. Nevertheless, insofar as the self-judging language does not extend to the chapeau-like elements themselves, an investment tribunal applying a self-judging exception incorporating the Article XX chapeau would be expected to assess objectively whether the measure is applied in a manner constituting arbitrary or unjustifiable discrimination or a disguised restriction on investment. The scope of such review may be broader under the Turkish variant ([Section III.C.3](#)), which prohibits application in an ‘arbitrary or unjustifiable manner’ in general, without making discrimination an express element.

The more difficult question concerns the appropriate standard of review for such anti-abuse requirements. In this context, the ‘equilibrium’ identified in *US – Shrimp* must accommodate an additional treaty choice: the self-judging clause explicitly entrusts the assessment of a measure’s necessity to the invoking State. Given this particular nature, tribunals may opt for deferential review so that the State’s discretion is not canceled out. However, excessive deference would risk depriving the anti-abuse provision of meaningful effect. WTO jurisprudence under Article XX offers limited guidance on where this revised equilibrium should lie.

## 2. An Example: *Mexico – GE Corn*<sup>152</sup>

No investment tribunals have ever interpreted or applied the substantive anti-abuse clauses in connection with a self-judging security exception. Nonetheless, a recent United

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<sup>152</sup> *Mexico - Measures Concerning Genetically Engineered Corn* (Final Report) USMCA Chapter 31 Panel Case No MEX-USA-2023-31-01 (20 December 2024). See generally Tomohiko Kobayashi, ‘Role of the Indigenous Exceptions in International Economic Law for Effective Protection of Indigenous Peoples’ Rights and Interests: A Case Study of *Mexico - GE Corn* Dispute under the USMCA’ (2025) 44 *Polar Science* 101163. For case notes in Japanese on the case, see 小林友彦「メキシコー遺伝子改変トウモロコシに関する措置」WTO パネル・上級委員会報告書等研究会に関する調査研究報告書（2025 年）1 頁 [Tomohiko Kobayashi, ‘Mexico - Measures Concerning Genetically Engineered Corn’ (METI WTO Panel Appellate Body Reports Study Group, FY 2025 Research Report, 2025) 1 (in Japanese)] <[https://www.meti.go.jp/policy/trade\\_policy/wto/3\\_dispute\\_settlement/33\\_panel\\_kenkyukai/2MexicoGMCornUSMCA.pdf](https://www.meti.go.jp/policy/trade_policy/wto/3_dispute_settlement/33_panel_kenkyukai/2MexicoGMCornUSMCA.pdf)> accessed 31 August 2026; 邵洪範「【WTO 等国際通商判例解説④】メキシコー遺伝子組換え（GE）トウモロコシに関する措置－自由貿易、食料主権、先住民族の権利、そして科学の交錯－」RIETI Policy Discussion Paper Series 26-P-002（2026 年）84 頁 [Hongbum So, ‘WTO and International Trade Case Review Series No. 43: Mexico - Measures Concerning Genetically Engineered Corn: The Intersection of Free Trade, Food Sovereignty, Indigenous Rights, and Science’ (2026) RIETI

States-Mexico-Canada Agreement (USMCA) dispute in *Mexico – Genetically Engineered (GE) Corn* illustrates practical implications of integrating such an anti-abuse clause into a self-judging provision.

The dispute concerns Mexico's restriction on the use of genetically modified corn. Mexico argued that the measure was USMCA-consistent and relied, among other provisions, on Article 32.5, an exception concerning indigenous peoples providing as follows (emphasis added):

Provided that such measures are not used as a means of *arbitrary or unjustified discrimination* against persons of the other Parties or as a *disguised restriction* on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure *it deems necessary* to fulfill its legal obligations to indigenous peoples.

The exception contains self-judging language ('it deems necessary'),<sup>153</sup> combined with a chapeau-like proviso ('Provided that...'). Mexico argued that GE corn regulations were necessary to protect the cultural identity of indigenous peoples related to native corn, in accordance with its international and domestic obligations.<sup>154</sup> The structure parallels the IIA practice surveyed above ([Section III.C.3](#)), and the present case is likely to be instructive despite the difference in the interests at stake between protecting ESIs and protecting indigenous peoples.

After finding that the Mexican measure was inconsistent with several provisions on SPS measures and market access, the panel examined the indigenous peoples exception. On the one hand, it accepted Mexico's right to take measures protecting native corn 'to the extent it consider[ed] this linked to its obligations to the rights of indigenous peoples.'<sup>155</sup> On the other hand, it also highlighted that this right was subject to 'specific limitations' under the proviso.<sup>156</sup> It criticized the Mexican measures for being under-inclusive in two respects. First, the measures singled out GM corn, which was imported into the relevant market, without addressing other non-GM but non-native corn grown domestically or imported.<sup>157</sup> Second, they targeted only import authorizations and did not regulate the proliferation of GM corn after importation

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Policy Discussion Paper Series 26-P-002, 84 (in Japanese)]  
<<https://www.rieti.go.jp/jp/publications/summary/26030014.html>> accessed 31 August 2026.

<sup>153</sup> Kobayashi, 'Role of the Indigenous Exceptions' (n 152) 5.

<sup>154</sup> *Mexico – GE Corn* (n 152) [317]–[319].

<sup>155</sup> *Mexico – GE Corn* (n 152) [326].

<sup>156</sup> *Mexico – GE Corn* (n 152) [327].

<sup>157</sup> *Mexico – GE Corn* (n 152) [328].

through practices such as informal seed exchange.<sup>158</sup> For these reasons, the panel found a ‘disguised restriction on international trade’.<sup>159</sup>

On its face, the panel’s under-inclusiveness critique resembles that of the Appellate Body in *Brazil – Retreaded Tyres*. In that case, the Appellate Body held that Brazil failed to demonstrate that its exemption for imports from MERCOSUR members, while imports from other WTO Members remained restricted, bore a reasonable relationship to the objective of protecting public health and found an ‘arbitrary or unjustifiable discrimination’.<sup>160</sup> Since Article 32.5 regulates discrimination ‘against persons of the other Parties’, which could encompass discrimination in favor of domestic producers, it is worth asking why the *Mexico – GE Corn* panel did not apply the discrimination limb, which the US explicitly invoked, rather than the disguised restrictions limb. The choice may be less consequential, however, given that the three chapeau standards ‘impart meaning to one another’ and that a disguised restriction encompasses disguised discrimination.<sup>161</sup>

*Mexico – GE Corn* thus illustrates the tension created by combining self-judgment with a chapeau-like anti-abuse clause. The panel criticized the design of the Mexican measure, even while recognizing that the State ‘deemed’ it necessary to fulfill its obligations to indigenous peoples. An analogous IIA provision could also subject a national security measure to some objective review even though a tribunal may not second-guess the State’s judgment on the measure’s necessity. Whether that result constitutes a desirable safeguard or an unintended erosion of self-judgment ultimately depends on treaty drafters’ policy choice.

## **B. Prohibition on Obligation Avoidance**

The other substantive anti-abuse provision is the prohibition on avoiding treaty obligations, which is characteristic of Japanese BITs ([Section III.C.4](#)). The practice appears to date back to the prudential carve-out under GATS, which itself is an enigmatic provision ([1](#)). The interpretive conundrum persists, or even intensifies, when the rule is transplanted to the IIA context ([2](#)).

### **1. Origin in the Prudential Carve-Out**

The obligation-avoidance clause under Japanese IIAs typically provides that the invoking State ‘shall not use such measure [under the security exception] as a means of avoiding its obligations’. The similarity with the prudential carve-out under GATS is obvious: paragraph

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<sup>158</sup> *Mexico – GE Corn* (n 152) [329].

<sup>159</sup> *Mexico – GE Corn* (n 152) [326]–[330]. The Panel’s chapeau analysis under GATT art XX appears separately at [305]–[308].

<sup>160</sup> *Brazil - Retreaded Tyres* (n 147) [228].

<sup>161</sup> *US - Gasoline* (n 141) 25.

2(a) of GATS' Annex on Financial Services stipulates that, notwithstanding other GATS provisions, a WTO Member shall not be prevented from taking measures for prudential reasons. However, the second sentence also provides that:

Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.

When read strictly, the provision raises interpretive conundrums. First, the meaning of 'avoiding' treaty obligations is far from clear. If exceptions exist precisely to allow States to 'avoid' their obligations, the prohibition on obligation avoidance may seem to contradict the provision's very function. Second, the second sentence applies when the measures 'do not conform with' the provisions of GATS. However, if a Member is, under the first sentence, entitled to take a prudential measure, the measure should be regarded as treaty-compliant. This raises the question of how a measure permitted by the first sentence can simultaneously 'not conform with' the GATS. Third, while the first sentence permits prudential measures '[n]otwithstanding any other provisions,' one may well ask whether the phrase 'any other provisions' also encompasses the second sentence.

Despite these textual uncertainties, the carve-out has been interpreted as an exception that justifies potential violations of GATS provisions in *Argentina – Financial Services*, the only case where this provision was applied. As a threshold matter, the panel agreed to regard the carve-out as a 'justification for measures that are inconsistent with the GATS,' constituting an 'exception.'<sup>162</sup> The panel then deduced from paragraphs 1(a) and 2(a) three requirements for the exception to apply, namely that a State (i) takes a measure 'affecting the supply of financial services,' (ii) does so 'for prudential reasons,' and (iii) does not use it 'as a means of avoiding its commitments or obligations under the GATS.'<sup>163</sup> Since the panel found that the measures in question did not satisfy condition (ii),<sup>164</sup> it did not consider the meaning of the anti-avoidance proviso under condition (iii).<sup>165</sup> The Appellate Body also affirmed the carve-out's justificatory function, clarifying that the phrase '[n]otwithstanding any other provisions' justified 'inconsistencies with *any other provision* of the GATS.'<sup>166</sup>

These findings cleared some of the textual ambiguities. By treating paragraph 2(a) as a justification for measures otherwise inconsistent with the GATS, the panel and the Appellate Body effectively understood that the phrase 'do not conform with' referred to hypothetical

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<sup>162</sup> *Argentina - Measures Relating to Trade in Goods and Services* (Panel Report) WTO Doc No WT/DS453/R (circulated 30 September 2015, adopted 9 May 2016) [7.814].

<sup>163</sup> *Argentina - Trade in Goods and Services* (n 158) [7.818]–[7.826].

<sup>164</sup> *Argentina - Trade in Goods and Services* (n 158) [7.919]–[7.920], [7.943]–[7.944].

<sup>165</sup> *Argentina - Trade in Goods and Services* (n 158) [7.945].

<sup>166</sup> *Argentina - Measures Relating to Trade in Goods and Services* (Appellate Body Report) WTO Doc No WT/DS453/AB/R (circulated 14 April 2016, adopted 9 May 2016) [6.254] (emphasis original).

situations where a measure *would otherwise* be inconsistent with the GATS *but for* the prudential carve-out. On that reading, the panel and the Appellate Body treated the second sentence as imposing an *additional condition* for the exception to apply, so the sentence is not redundant. The same three-requirement structure also implicitly rejects the reading that the introductory words '[n]otwithstanding any other provisions' override the anti-avoidance sentence itself.

Yet, the answers were only partial, leaving fundamental questions unresolved. First, the substantive meaning of 'avoiding' obligations remains undefined. Second, and more fundamentally, it remains unclear whether non-compliance with the anti-obligation avoidance necessarily renders the exception unavailable. Unlike the chapeau of GATT Article XX, the anti-avoidance rule in paragraph 2(a) lacks conditional introductory phrases such as 'Subject to the requirement that' or 'Provided that.' A provision that simply states that measures 'shall not be used' to avoid obligations could alternatively be interpreted as imposing a distinct and independent obligation, whose breach would constitute a separate internationally wrongful act without necessarily rendering the invocation of the exception itself invalid.<sup>167</sup> The panel nevertheless treated the anti-avoidance rule as a substantive condition for the exception's availability, without separately addressing this alternative normative structure.<sup>168</sup>

## 2. Transposition to IIAs

The decisions in *Argentina – Financial Services* are insightful, but not dispositive, for interpreting the anti-avoidance clause in IIAs. If we follow the conditional construction adopted there, those decisions answer at least some of the textual problems. First, the relationship between the self-judging paragraph and the anti-avoidance clause need not be contradictory.

<sup>167</sup> A well-known example in international law is the notification obligation under Article 51 of the UN Charter discussed above ([Section II.C.3.b](#), n 104). Analogous distinctions are familiar in municipal law. German law, for example, distinguishes a requirement affecting legal effectiveness (*Wirksamkeitsvoraussetzung*) from a mere regulatory provision (*bloße Ordnungsvorschrift*), breach of which does not necessarily affect the validity of the regulated act: BVerwG, Beschluss vom 9 März 2012, 6 P 27.10, [11]. Cf also BGHZ 108, 364, 367–68 (27 September 1989, VIII ZR 57/89), distinguishing under §134 BGB between prohibitions whose '*Sinn und Zweck*' extends to the private-law validity of a transaction and mere *Ordnungsvorschriften*, breach of which leaves its validity unaffected. A comparable approach also exists in Japanese law for distinguishing '効力規定' (ie provisions affecting validity) from '取締規定' (ie regulatory provisions): in the absence of a consequence explicitly stipulated, the Japanese Supreme Court also looked to the '趣旨' (purpose) of the infringed rule to determine whether a breach affects the validity of the act: 最二判昭 52 年 6 月 20 日・民集 31 卷 4 号 449 頁 (岐阜商工信用組合事件) [*Miyagawa Co Ltd v Gifu Shoko Shinyo Kumiai*, Supreme Court, 20 June 1977, Minshu 31 (4) 449].

<sup>168</sup> This structural question remains even if the anti-avoidance rule is understood as an expression of the prohibition of *abus de droit* as discussed below ([Section IV.B.2](#)). Different conceptions of the abuse of rights and good faith can be found in the literature: cf Roberto Ago, 'Third Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility' UN Doc A/CN.4/246 and Add.1-3, [1971] II(1) YBILC 199, 221 para 68; Ulf Linderfalk, 'Good Faith and the Exercise of Treaty-based Discretionary Powers' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020) 259, 272–73.

When the exception provides that ‘nothing in this Agreement’ shall prevent a security measure, that justification is still subject to an additional anti-avoidance requirement. Second, the phrase ‘do not conform with’ can be read as ‘would not otherwise conform with.’ Following the GATS jurisprudence, this construction gives effect to both the security exception and the anti-avoidance paragraph.

The drafting of some Japanese IIAs makes it less clear whether this conditional construction applies to them. Japanese IIAs sometimes expressly make the self-judging security exception ‘subject to’ another treaty provision, such as a provision on protection from strife, while placing the anti-avoidance rule in a separate paragraph without making the former expressly ‘subject to’ the latter. This selective drafting may cast doubt on whether the anti-avoidance paragraph was intended to constitute an additional condition for the availability of the security exception (*expressio unius est exclusio alterius*).

In any event, what constitutes the prohibited ‘avoidance’ of treaty obligations remains uncertain. Trade law scholarship has proposed competing understandings. An approach Cantore describes as ‘mainstream’ draws on an analogy to the chapeaux of GATT Article XX and GATS Article XIV.<sup>169</sup> De Meester considers that the proviso ‘can be compared to the test applied in the introductory paragraph (the so-called “chapeau”)’ of the general exceptions and involves an inquiry into whether the measure bears a ‘*rational relationship* with the prudential goal.’<sup>170</sup> Cantore, however, persuasively cautions against pushing this analogy too far without the specific language of ‘arbitrary or unjustifiable discrimination’ or ‘disguised restrictions’ found in the GATT/GATS chapeaux.<sup>171</sup>

An alternative approach proposed by Cantore reads the provision more narrowly as ‘reaffirming the principle according to which Parties to a treaty shall not abuse their rights (*abus de droit*).’<sup>172</sup> Fukunaga reaches a similar conclusion from the ordinary meaning of the provision, noting that the GATS’ prudential carve-out ‘appears to exclude only measures *intentionally* employed to evade GATS commitments or obligations.’<sup>173</sup> Sakai, who considers that such a provision ‘does not change the essence’ of the exception, seems to align with this view.<sup>174</sup> Such a narrow reading is particularly persuasive in the IIA context, where treaty parties

<sup>169</sup> Carlo Maria Cantore, *The Prudential Carve-Out for Financial Services* (CUP 2018) 4.

<sup>170</sup> Bart De Meester, *Liberalization of Trade in Banking Services: An International and European Perspective* (CUP 2014) 212-13 (emphasis original).

<sup>171</sup> Cantore (n 169) 108.

<sup>172</sup> Cantore (n 169) 183.

<sup>173</sup> 福永有夏「アルゼンチン - 物品・サービス貿易に関する措置」WTO パネル・上級委員会報告書等研究会に関する調査研究報告書（2016 年）32-33 頁 [Yuka Fukunaga, ‘Argentina - Measures Relating to Trade in Goods and Services’ (METI WTO Panel Appellate Body Reports Study Group, FY2016 Research Report, 2017) 32-33 (in Japanese)] (author’s translation; emphasis original) <[https://www.meti.go.jp/policy/trade\\_policy/wto/3\\_dispute\\_settlement/33\\_panel\\_kenkyukai/2016/16-2.pdf](https://www.meti.go.jp/policy/trade_policy/wto/3_dispute_settlement/33_panel_kenkyukai/2016/16-2.pdf)> accessed 31 August 2026.

<sup>174</sup> Sakai (n 9) 14.

sometimes employ express prohibitions on arbitrary or unjustifiable discrimination and disguised restrictions elsewhere in the same treaty, while choosing the materially different language of obligation-avoidance for the security exception.

Yet the narrower interpretation raises a different question about the clause's independent function. In *Russia – Traffic in Transit*, the panel already inferred from the principle of good faith a requirement that Members 'not use the exceptions in Article XXI as a means to circumvent their obligations.'<sup>175</sup> If the anti-avoidance clause merely reaffirms the general prohibition of abuse of rights, the clause may add little and may even be redundant. Its express inclusion may invite tribunals to give the language more substantive effect, potentially justifying a more intrusive review of the State's self-judgment. How much more specific the inquiry becomes, however, is precisely what the text fails to say. Treaty drafters should therefore specify what form of abuse they intend to regulate rather than relying on an indeterminate formulation.

## V. Conclusion

Self-judging security exceptions have become increasingly prevalent in contemporary IIAs; in our corpus, 88.4% (84 of 95) of investment-applicable security-exception articles in IIAs signed in 2021–2025 contained self-judging action clauses. Moreover, many modern IIAs grant States discretion broader than GATT Article XXI contemplated. Some expand the circumstances in which security exceptions may be invoked, while others dispense with objective contextual requirements altogether, allowing States to take measures they consider necessary to protect ESI. Still others go even further by expressly providing for the non-justiciability of self-judgment.

States have also invoked these provisions in practice, where tribunals have struggled to find a proper balance. The tribunals in *Seda* and *Riverside* drew on WTO jurisprudence in applying good faith review despite the ostensibly significant discretion conferred on States under an American-style broad exception. Yet good faith should not be regarded as a panacea: without an objective contextual requirement like the one in GATT Article XXI, review may become substantially thinner than under WTO law. *Riverside* also illustrates the risks of arbitral law-making that can arise when a tribunal attempts to compensate for thin treaty discipline through creative interpretation.

This paper has shown that treaty practice provides another response to the problem: anti-abuse provisions attached to self-judging security exceptions. Although they have received little systematic attention, the article-level survey undertaken here shows they are neither exceptional nor uniform; 31.8% of self-judging action clauses in IIAs signed through 2015 and 26.9% of those in IIAs signed in 2016–2025 contain at least one control beyond those found in

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<sup>175</sup> *Russia - Traffic in Transit* (n 11) [7.133].

GATT Article XXI. These controls take various forms: heightened crisis thresholds; notification or consultation requirements; prohibitions on arbitrary, unjustifiable, or discriminatory application; prohibitions on disguised restrictions; prohibitions on obligation avoidance; and express references to good faith, reflecting different State policy preferences.

Anti-abuse clauses may substantively influence States' self-judging discretion, and their role should not be underestimated. This paper has paid particular attention to two categories of substantive controls. First, chapeau-like prohibitions on unjustifiable or arbitrary applications, or disguised restrictions, may re-import objective scrutiny of regulatory design and application. *Mexico – GE Corn* under the USMCA, which included a closely analogous self-judging exception to protect indigenous peoples, illustrates this possibility. Second, prohibitions of obligation-avoidance, typically found in Japanese IIAs, entail textual ambiguities. Read broadly, they could substitute for chapeau-like objective requirements, while a narrower interpretation confines their role to reaffirming the general principle of good faith and the prohibition on abuse of rights. The more substantive effect arbitrators seek to give such clauses, the greater the potential tension with the self-judging discretion the same provision confers.

Self-judging clauses are not inherently incompatible with objective requirements: treaty parties may deliberately entrust tribunals with assessing the design of measures ostensibly taken for security reasons or the intentions behind them. However, treaty parties and arbitral tribunals should carefully examine how and when anti-abuse devices interact with the self-judging structure of an exception. An excessively weak control may deprive an express safeguard of practical effect; an excessively intrusive one may re-import an objective necessity or proportionality inquiry that the parties deliberately excluded. Treaty drafters should specify what form of abuse they intend to control, under what requirements, and with what legal consequences. Anti-abuse clauses may even do harm when drafted without sufficient attention to the function they are meant to perform, leaving adjudicators to determine both the scope of State discretion and its limits. Treaty design therefore matters.