

# **‘If the State Considers’: Self-Judging Clauses in International Dispute Settlement**

*Robyn Briese\* & Stephan Schill\*\**

## **Abstract**

Self-judging clauses constitute a crucial hinge between State sovereignty, international cooperation and international dispute resolution. Their function and effect are, however, only tentatively theorized and the operation of such clauses has only occupied a minor place in the jurisprudence of international courts and tribunals. This paper, therefore, considers the nature of self-judging clauses in international law and provides a general framework to better understand their function and effect. It focuses, in particular, on their effect on international dispute settlement and argues that self-judging clauses, generally, do not oust the jurisdiction of international courts or tribunals, but affect the standard of review that courts and tribunals have to apply vis-à-vis State action.

(23,658 words including footnotes)

---

Senior Lawyer, Office of General Counsel, Australian Government Solicitor; former Law Clerk to Vice-President Awn Shawkat Al-Kahsawneh and Judge Shi Jiuyong, International Court of Justice; BSc/LLB (Hons) Australian National University.

\* Rechtsanwalt (admitted to the bar in Germany); Attorney-at-Law (New York); International Arbitration Law Clerk to The Honorable Charles N. Brower, Arbitrator, 20 Essex Street Chambers, London; First and Second Legal State Exam (Bavaria, 2001, 2003); LL.M. in European and International Economic Law (Universität Augsburg, 2002); LL.M. International Legal Studies (New York University, 2006); Dr. iur. (Johann Wolfgang Goethe Universität Frankfurt am Main, 2008).

# Table of Contents

<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. A GENERAL FRAMEWORK FOR SELF-JUDGING CLAUSES.....</b>	<b>3</b>
A. DEFINING SELF-JUDGING CLAUSES.....	4
B. THE VALIDITY OF SELF-JUDGING CLAUSES.....	5
C. DETERMINING THE EXISTENCE OF SELF-JUDGING CLAUSES.....	6
D. DISCRETION VERSUS DEFERENCE.....	10
E. A TAXONOMY OF SELF-JUDGING CLAUSES.....	16
1. <i>Clauses Concerning the Restriction of, or Derogations from, International Obligations...</i>	<i>16</i>
2. <i>Exit-Clauses from International Obligations.....</i>	<i>20</i>
3. <i>Clauses Pertaining to the Jurisdiction of an International Court or Tribunal.....</i>	<i>21</i>
4. <i>Clauses Concerning Reservations to International Treaties.....</i>	<i>23</i>
<b>III. AVOIDING ABUSE: SELF-JUDGING CLAUSES IN INTERNATIONAL DISPUTE SETTLEMENT.....</b>	<b>24</b>
A. MECHANISMS TO HOLD STATES ACCOUNTABLE FOR VIOLATIONS OF SELF-JUDGING CLAUSES.....	25
B. SELF-JUDGING CLAUSES AND INTERNATIONAL DISPUTE SETTLEMENT.....	27
1. <i>Self-Judging Clauses before the International Court of Justice.....</i>	<i>27</i>
2. <i>Self-Judging Clauses in the GATT/WTO-System.....</i>	<i>33</i>
3. <i>Self-Judging Clauses in Investment Treaty Arbitration.....</i>	<i>47</i>
C. TOWARDS A GENERAL STANDARD OF REVIEW FOR SELF-JUDGING CLAUSES?.....	50
<b>IV. CONCLUSION.....</b>	<b>55</b>

# I. Introduction

International law today is in a state of transformation. One of the elements of this transformation is the proliferation of international dispute settlement bodies that help to settle uncertainty about the extent of international law obligations and ensure compliance with them, as well as increasing recourse to established international dispute settlement bodies such as the International Court of Justice (ICJ).<sup>1</sup> This development shifts international law from a simple tool to co-ordinate inter-State relations, to an instrument that creates global orders for an emerging international society.<sup>2</sup> It coincides with the decline of sovereignty as the focal point of traditional international law and the move from unilateral and bilateral structures to multilateralism.<sup>3</sup>

Certainly, residues of the State - and sovereignty-centered international law - persist or even challenge this development. One of these residues is the inclusion of provisions in international instruments by means of which States reserve a right to non-compliance with international legal obligations in certain circumstances, predominantly if

---

<sup>1</sup> A surge of literature has developed that focuses on the implications of this development for the international legal system. See, for example, LAURENCE R. HELFER/ANNE-MARIE SLAUGHTER, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L. J. 273 (1997); BENEDICT KINGSBURY, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. Int'l L. & Pol. 679 (1999); JONATHAN I. CHARNEY, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. Int'l L. & Pol. 697 (1999); CESARE P.R. ROMANO, *The Proliferation of International Judicial Bodies: The Piece of the Puzzle*, 31 N.Y.U. J. Int'l L. & Pol. 709 (1999); ROGER P. ALFORD, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 Am. Soc'y Int'l L. Proc. 160 (2000); SHANE SPELLISCY, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 Colum. J. Transnat'l L. 143 (2001); LUCY REED, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?*, 96 ASIL Proc. 219 (2002). See also the remaining contributions to a symposium held at New York University School of Law in October 1998 on the proliferation of international courts and tribunals, in 31 N.Y.U. J. Int'l L. & Pol. 697-933 (1999).

<sup>2</sup> Cf. ANGELIKA EMMERICH-FRITSCH, *Vom Völkerrecht zum Weltrecht*, pp. 686 et seq. (2007).

<sup>3</sup> See BRUNO SIMMA, *From Bilateralism to Community Interest in International Law*, 250 Recueil des Cours 217 (1994).

the State in question considers compliance to harm its sovereignty, security, public policy – or more generally – its essential interests.<sup>4</sup> These so-called “self-judging clauses” appear relatively frequently in numerous international treaties, including treaties on mutual assistance, trade and investment, or private international law and arbitration.

Despite their pervasiveness, self-judging clauses have, however, not played a major role in international dispute resolution, apart from passing reference in ICJ jurisprudence and decisions of tribunals of the International Centre for the Settlement of Investment Disputes (ICSID). Furthermore, although the effect, scope and nature of self-judging clauses have been discussed with respect to specific treaty regimes, there is little writing and theory on self-judging clauses as a general phenomenon in international treaty practice. Yet, this disregards the important function self-judging clauses play in international cooperation.

This paper considers the nature of self-judging clauses in international law through an analysis of existing jurisprudence and State practice. It begins by outlining a definition of self-judging clauses and by categorizing them according to their function in international legal instruments. It then focuses on the *problematique* of self-judging clauses, namely the fact that States, while attempting to establish cooperative links by entering into international obligations, reserve to themselves the right to unilaterally declare such obligations to be non-binding if the State in question determines that its essential interests are at stake and, according to its determination, should take precedence over international law.

As such, self-judging clauses constitute the focal point of conflicting national interests and international cooperation.<sup>5</sup> They have a potential for misuse and thus a

---

<sup>4</sup> See SUSAN ROSE-ACKERMAN/BENJAMIN BILLA, *Treaties and National Security*, 40 N.Y.U. J. Int'l L. & Pol. 437 (2008).

<sup>5</sup> HANNES L SCHLOEMANN/STEFAN OHLHOFF, “*Constitutionalization*” and *Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 A.J.I.L. 424, 426 (1999) (observing that “[n]ational security is the Achilles’ heel of international law. Wherever international law is created, the issue of national security gives rise to some sort of loophole, often in the form of an explicit national security exception. The right of any nation-state to protect itself in times of serious crisis by employing otherwise unavailable means has been a bedrock feature of the international legal system. As long as the notion of sovereignty exerts power within this evolving system, national security will be an element of, as an exception to, the applicable international law.”)

potentially destructive effect on international cooperation, even though they were originally conceived of to provide an exit-valve from international cooperation only in the limited cases necessary to secure further international cooperation. Consequently, the paper will consider how self-judging clauses can be interpreted in order to reconcile the effort to further international cooperation with the interest of States in reserving certain areas of specific concern to their self-determination. In this context, we consider that dispute settlement mechanisms play a special role in implementing and applying self-judging clauses and in fine-tuning the relations between unilateralism and international cooperation. Particular focus will thus be given to the clauses' function and effect on international dispute resolution.

The paper analyses various treaty regimes in which self-judging clauses can be found, in particular the World Trade Organization (WTO) system and international investment treaties, and the existing international jurisprudence, in order to determine the effect of self-judging clauses on international dispute settlement mechanisms. It will particularly focus on the question of whether self-judging clauses oust the jurisdiction of such bodies or whether the clauses' effect is limited to affecting the standard or nature of review. The paper concludes by considering whether self-judging clauses are indeed the Achilles heel of international law, which impede increasing international cooperation, or rather an important safeguard to its continued development.<sup>6</sup>

## II. A General Framework for Self-Judging Clauses

Self-judging clauses appear frequently in various contexts in international relations. They are in fact so pervasive that it is surprising that such clauses have not yet been treated in a comprehensive manner. Indeed, theory regarding the function and scope of self-judging clauses is currently limited to individual clauses in specific treaty regimes.<sup>7</sup> We attempt, by contrast, to understand them as a general phenomenon of the

---

<sup>6</sup> See HANNES. L. SCHLOEMANN/STEFAN. OHLHOFF, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 A.J.I.L. 424, 426 (1999).

<sup>7</sup> See the areas and literature discussed *infra* under Part III.

law of international treaties and international cooperation. In this section, we start by proposing a definition of self-judging clauses as well as a classification to categorize State practice relating to self-judging clauses.

### **A. Defining Self-Judging Clauses**

There is currently no generally accepted definition of self-judging clauses. However, existing State practice and jurisprudence by international courts and tribunals provides for a structural framework on the basis of which a definition can be distilled.

At the most general level, self-judging clauses have the function of allowing a State to enter into international cooperation on the basis of binding international obligations, while at the same time retaining the power to escape from such obligations in certain circumstances, most frequently if the State determines that it would harm its sovereignty, security, public policy, or more generally, its essential interests to abide by them. It constitutes a safety valve for reconciling international cooperation and a State's occasional preference for unilateralism within cooperative regimes.

Two factors are characteristic of self-judging clauses. First, the clauses grant a State discretion to unilaterally opt out (in a non-technical and broad sense) from an international obligation, including through exceptions to treaty obligations, justifications for breaches, circumstances precluding wrongfulness and full derogations from treaty regimes, as well as through control over the power that mechanisms of international governance have over a State, in particular the power of an international dispute settlement body like the ICJ.<sup>8</sup> As a consequence, self-judging clauses allow for the playing out of *unilateral considerations* in an international regime that is generally based on cooperation between States, be it bilateral or multilateral.

---

<sup>8</sup> Forms of global governance that exercise normative constraints over States are, however, not limited to classical forms of international cooperation, but today include numerous international actors and forms, including international organizations, inter-governmental bodies, hybrid public-private, or purely private bodies, etc. See BENEDICT KINGSBURY/NICO KRISCH/RICHARD B. STEWART, *The Emergence of Global Administrative Law*, 68 L. & Contemp. Probs. 15 (2005). See also WYBO P. HEERE (ed.), *From Government to Governance - The Growing Impact of Non-State Actors on the International and European Legal System* (2004). It is, thus, conceivable that self-judging clauses also have the effect of shielding a State from such mechanisms of global governance.

Secondly, the evaluation of whether the elements for such an opt-out are given is not established fully objectively from an external point of view, but primarily, and potentially in a non-reviewable or not fully reviewable fashion, from the point of view of the State concerned. In other words, the determination of whether the self-judging elements of a clause are fulfilled is not effectuated from the point of view of an independent third-party, such as an international court or tribunal, another treaty-based supervisory body, or the other Contracting Party or Parties. Rather, self-judging clauses allow for the subjective evaluation of the State claiming the derogation and, thus, grant it discretion. A self-judging clause is thus a means for the State invoking its operation to retain the power of interpretation of the clause, in full or in part. It safeguards certain sovereign interests, or framed more positively, the States' self-determination with respect to certain crucial matters when engaging in international cooperation.

### **B. The Validity of Self-Judging Clauses**

The tension between unilateralism and international cooperation that is inherent in the operation of self-judging clauses has led to the question whether such clauses are at all admissible. Indeed, some have suggested that self-judging clauses negate the quality of an international obligation as a legal obligation. For example, Judge Lauterpacht in his Separate Opinion in the *Norwegian Loans Case* considered that a self-judging exception to a declaration under Article 36(2) ICJ Statute (the so-called Optional Declaration) was:

“invalid as lacking in an essential condition of validity of a legal instrument. This is so for the reason that it leaves to the party making the Declaration the right to determine the extent and the very existence of its obligation. The effect of the French reservation relating to domestic jurisdiction is that the French Government has, in this respect, undertaken an obligation to the extent to which it, and it alone, considers that it has done so. This means that it has undertaken no obligation. An instrument in which a party is entitled to determine the existence of its obligation is not a valid and enforceable legal instrument of which a court of law can take cognizance. It is not a legal instrument. It is a declaration of a political principle and purpose.”<sup>9</sup>

While Judge Lauterpacht's argument was limited to a self-judging clause in a declaration concerning the jurisdiction of the ICJ, his point could be equally relevant as a

---

<sup>9</sup> Separate Opinion of Judge Sir Hersch Lauterpacht, *Certain Norwegian Loans Case (France v. Norway)*, ICJ Reports 1957, pp. 44, 48.

general proposition concerning the conflict between unilateralism and international cooperation. However, one cannot equate questions of the validity of self-judging reservations to unilateral declarations under Article 36(2) of the ICJ Statute with general questions about the validity of self-judging provisions contained in international treaties. With respect to treaties, there is technically no conflict between unilateralism and bi- or multilateralism, as States consented in the treaty to allow the influence of unilateral considerations to a certain extent. Nonetheless, Lauterpacht's Separate Opinion highlights the difficult task of reconciling the benefits which States see in self-judging clauses and the potential for their misuse which may undermine effective international cooperation.

### **C. Determining the Existence of Self-Judging Clauses**

Since international cooperation, and in fact the very essence of international law, presupposes that States agree to restrict parts of their sovereignty by entering into international obligations,<sup>10</sup> the existence of self-judging clauses or self-judging elements in an international treaty or other declaration cannot be presumed. Rather, as Article 31(1) of the *Vienna Convention on the Law of Treaties* (VCLT)<sup>11</sup> suggests, international treaties have to be interpreted primarily objectively, that is to say based on the ordinary and objective sense of the terms and not with a view to the States' subjective intentions.<sup>12</sup>

---

<sup>10</sup> At the same time, however, the very fact of entering into a treaty is an exercise of sovereignty. See *Case of the S.S. Wimbledon*, 1923 P.C.I.J. (Ser. A) No. 1, p. 25 (stating that "the right of entering into international agreements is an attribute of sovereignty").

<sup>11</sup> [1974] ATS 2; UNTS Vol 1155, p. 331.

<sup>12</sup> PAUL REUTER, *Introduction to the Law of Treaties*, p. 96 (2<sup>nd</sup> ed. 1995) ("The primacy of the text, especially in international law, is the cardinal rule of any interpretation" even though "the purpose of interpretation is to ascertain the intention of the parties from a text"); IAN SINCLAIR, *The Vienna Convention on the Law of Treaties*, p. 115, (2<sup>nd</sup> ed. 1984) (stating, *inter alia*, that the interpretative methodology endorsed by Arts. 31 and 32 VCLT was "clearly based on the view that the text of a treaty must be presumed to be the authentic expression of the intentions of the parties" ); JEAN-MARC SOREL, *Article 31 (Convention de Vienne de 1969)*, in: OLIVIER CORTEN/PIERRE KLEIN (eds.), *Les Conventions de Vienne sur le droit des traités – Commentaire article par article*, Vol. II, (2006), para. 48 (stating that "[l]a Convention de Vienne donne priorité à l'interprétation textuelle"); D. P. O'CONNELL, *International Law*, Vol. I, p. 255 (2<sup>nd</sup> ed. 1970) (stating that Art. 31(1) VCLT "embodies the literal and teleological techniques of interpretation").

Furthermore, the very essence of an international obligation presupposes that cooperation rather than unilateralism is created by entering into international treaty obligations.

In principle, self-judging clauses thus have to be included expressly, that is to say by using drafting techniques and language that clearly state that discretion for unilateral consideration of the scope and applicability of a provision is granted to the Contracting Parties.<sup>13</sup> The way the grant of this discretion is expressed in international treaties is usually by including language like “if the State considers” or wording to a similar effect.<sup>14</sup>

So for example, a treaty for cooperation and mutual assistance in criminal matters, which was the focus the ICJ’s recent decision in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (4 June 2008), contained an article providing that assistance in proceedings relating to criminal offences:

“may be refused [...] **if the requested State considers** that the execution of the request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests.”<sup>15</sup>

This provision establishes a subjective test of whether the exception is applicable in any given circumstances and assigns the power of definition and interpretation to the State refusing cooperation.

A self-judging clause can be contrasted with a non self-judging clause. For instance, another exception to the duty to grant assistance in proceedings related to criminal matters in the same Mutual Assistance Convention allows assistance to be refused:

“if the request concerns an offence which is not punishable under the law of both the requesting State and the requested State”.<sup>16</sup>

---

<sup>13</sup> For an analysis of the difference between discretion and deference see Part D below.

<sup>14</sup> I.e. language such as “in the State’s opinion”; “if the State determines”, etc.

<sup>15</sup> Article 2(c) of the 1986 *Convention on Mutual Assistance in Criminal Matters between the Government of the Republic of Djibouti and the Government of the French Republic* (Mutual Assistance Convention) (emphasis added).

<sup>16</sup> Article 2(b) Mutual Assistance Convention.

This provision does not include the words “if the State considers” or language to similar effect. The provision rather posits an objective test of whether the exception is applicable in any given circumstances. It does not, unlike the provision discussed earlier, assign the power of definition and interpretation to the State concerned and does not leave it with any discretion.

The importance of the wording of treaty provisions in determining whether clauses, or certain elements of them, are self-judging has found prominent expression in the jurisprudence of the ICJ. Referring to the *1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua*, which contained a clause providing that “the present Treaty shall not preclude the application of measures [...] necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests”,<sup>17</sup> the ICJ held:

“Article XXI defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court... The text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action ‘which it considers necessary for the protection of its essential security interests’, in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of ‘necessary’ measures, not of those considered by a party to be such.”<sup>18</sup>

The ICJ again emphasized the importance of the wording of a clause in this context when it stated shortly thereafter in the same case:

“whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized (paragraph 222 above), purely a question for the subjective judgment of the party; the text does not refer to what the party ‘considers necessary’ for that purpose”.<sup>19</sup>

---

<sup>17</sup> See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports, 1986, p. 14, para. 221.

<sup>18</sup> *Ibid.*, para. 222.

<sup>19</sup> *Ibid.*, para. 282. This line of argument was confirmed by the Court in *Case Concerning Oil Platforms* in relation to a similar clause in the *Treaty of Friendship, Commerce and Navigation between the United States and Iran*, where the Court stated:

The ICJ, therefore, clearly accepted that clauses in international treaties can be self-judging. It also seems to suggest that such clauses could exclude any review by an international court of whether the State in question can rely on the exception to or justification for a breach of an international obligation. In any case, the ICJ required that the self-judging nature of the clause be apparent from its wording.

Recent decisions by arbitral tribunals constituted under the 1965 *Convention on the Settlement of Investment Disputes between States and Nationals of Other Countries*<sup>20</sup>(ICSID Tribunals), dealing with the question of whether Argentina was able to escape from obligations entered into under various investment treaties based on a specific emergency clause in the applicable investment treaty, have also adopted the position that self-judging clauses have to be framed explicitly in order to grant a State discretion in the determination of a clause's scope of application. These decisions drew a distinction between a simple reference to "measures necessary for the protection of essential security interests" in the investment treaty under consideration and "measures that the State considers to be necessary for the protection of essential security interests". They held that the latter clause is self-judging, while the former is not.<sup>21</sup>

---

"whether a given measure is 'necessary' is 'not purely a question for the subjective judgment of the party' and may thus be assessed by the Court." See ICJ Reports 2003, p. 161, para. 43 (quoting *Military and Paramilitary Activities in and Against Nicaragua*, ICJ Reports 1986, p. 14, para. 222).

<sup>20</sup> [1991] ATS 23, World Bank, Document ICSID/2.

<sup>21</sup> See *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, May 12, 2005, paras. 366 *et seq.*, 44 I.L.M. 1205 (2005); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para. 212 *et seq.*; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of Sept. 28, 2007, para. 379-385 (speaking of a presumption in favor of non-self-judging clauses: "Truly exceptional and extraordinary clauses, such as a self-judging provision, must be expressly drafted to reflect that intent, as otherwise there can well be a presumption that they do not have such meaning in view of their exceptional nature"); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of May 22, 2007 para. 335-339. These cases are discussed further below in Part II3.

## D. Discretion versus Deference

Discretion granted by self-judging clauses is to be distinguished from deference that international courts and tribunals grant in various contexts to the manner in which a State chooses to execute its international obligations. Although international courts and tribunals often use the term deference and discretion interchangeably, the concepts differ. The difference is that discretion involves the entitlement of the State to determine, within certain limits, the content of the self-judging aspects of a treaty clause. The interference by a third-party dispute-resolver with that State's entitlement would be unlawful. While deference also grants a certain margin of appreciation to a State within which the dispute resolver does not scrutinise the decision, this margin of appreciation is based on the self-restraint of the court or tribunal and does not stem from an entitlement of the State. Overstepping the margin of appreciation would, thus, not be unlawful.

In practice, however, both deference and the discretion provided by self-judging clauses function similarly and lead to a reconciliation between State sovereignty and court-monitored international cooperation. This can be illustrated, for example, with respect to treaty clauses pertaining to national security, reactions to emergencies and the like that are not self-judging, but in the scrutiny of which international dispute settlement bodies have exercised restraint. Article 15(1) of the *European Convention on Human Rights* is such a provision.<sup>22</sup> It provides:

---

<sup>22</sup> UNTS, Vol. 382, No. 5476. Another example is Art. 297 (ex-Art. 224) of the *Treaty Establishing the European Community* (ECT), which provides: "Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war or serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purposes of maintaining peace and international security." Cf. also Advocate-General Jacobs' Opinion on *Commission v. Greece*, Case C-120/94, ECR (1996), p. 1513 *et seq.* (arguing that that Art. 297 "raises the fundamental issue of the scope of the Court's power to exercise judicial review in such situations. Clearly it cannot be argued... that the matter is non justiciable... The scope and intensity of the review that can be exercised by the Court is however severely limited on account of the nature of the issues raised. There is a paucity of judicially applicable criteria that would permit this Court, or any other court, to determine whether serious international tension exists and whether such tension constitutes a threat of war...").

“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

This provision is not self-judging, because, in order to apply, it must be objectively established that there is a war or other public emergency and that measures taken in derogation from the Convention’s obligations are “strictly necessary”. Notwithstanding an objective approach to its interpretation, the European Court of Human Rights (ECHR) regularly grants a wide margin of appreciation to Member States when determining whether a State’s measures fell under this emergency exception.<sup>23</sup> The ECHR established that although the State’s opinion as to the applicability of the exception is not expressly referred to in the clause, it remains relevant in the context of concepts such as “public emergency” and the “necessity” of the measure to overcome the emergency. In effect, the differences with a self-judging clause are subtle. Yet, the ECHR’s margin of appreciation is based on the institution’s self-restraint rather than the recognition that the ECHR is under an international obligation to limit its standard of scrutiny.<sup>24</sup> Indeed, depending on the circumstances, deference accorded under the margin of appreciation doctrine can range from a very deferential approach to a fairly robust review of the legitimacy of a State’s action.<sup>25</sup>

<sup>23</sup> See *Ireland v. United Kingdom*, ECtHR, Ser. A, No. 25, Judgment rendered on Jan. 1, 1978), para. 207: “It falls in the first place to each Contracting State, with its responsibility for ‘the life of [its] nation’, to determine whether that life is threatened by a ‘public emergency’ and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”; *Brannigan and McBride*, ECtHR, Ser. A. No. 258-B (Judgment rendered on 26 May 1993), para 43. See further CHRISTOPH ASHAUER, *Die Menschenrechte im Notstand*, 45 ARCHIV DES VÖLKERRECHTS 400, 418-421 (2007).

<sup>24</sup> See YUVAL SHANY, *Towards a General Margin of Appreciation Doctrine in International Law*, 16 E.J.I.L. 907, 914 (2005) (observing that “[u]ltimately, it would be for international courts to determine whether deference to national authorities is warranted, and to what extent.”).

<sup>25</sup> See ATILLA ARDA, *Member States’ Right to Derogate from the European Treaties: A Commentary on Article 297 TEC*, in: MATTHEW BENDER (ed.), *Smit & Herzog on the Law of the European Union* (2006), available at: <http://ssrn.com/abstract=925570>; MARTIN TRYBUS, *The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions*, 39 Common Market Law Review

There are a number of rationales for the exercise of such self-restraint relating to the legitimacy and capacity of international courts and tribunals.<sup>26</sup> These rationales apply in situations of *normative flexibility*, that is in situations where “the international norms to be applied are open-ended or unsettled”, or in other words “provide limited conduct-guidance and preserve a significant ‘zone of legality’ within which States are free to operate”.<sup>27</sup> Norms falling into this category are generally standard-type norms, like concepts such as “reasonable”, “proportional” or “necessary”<sup>28</sup>, or broad subject-based concepts such as “public emergency”, “security”, “essential interests” or “*ordre public*”.<sup>29</sup> As can be seen from the above list, in international law, such broad concepts most frequently relate to areas considered fundamental to a State’s sovereignty and which State’s have traditionally viewed as unsuitable for judicial assessment.<sup>30</sup>

---

1347, 1368-1369 (2002) for a discussion of the spectrum of deference accorded when interpreting exceptions to the ECT.

<sup>26</sup> See YUVAL SHANY, *Towards a General Margin of Appreciation Doctrine in International Law*, 16 E.J.I.L. 907, 908 (2005) for a discussion of the rationales for and against the application of a margin of appreciation. See also *Handyside v. The United Kingdom*, ECtHR, Ser. A, No. 24 (Judgment rendered on 7 Dec. 1976), para. 48 (stating that “[t]he view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements.”).

<sup>27</sup> YUVAL SHANY, *Towards a General Margin of Appreciation Doctrine in International Law*, 16 E.J.I.L. 907, 910 (2005).

<sup>28</sup> *Ibid.*, at 914-915.

<sup>29</sup> See e.g. WTO Panel Report *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling)*, WT/DS285/R adopted 20 April 2005, para. 6.461: “the content of these concepts [i.e. public morals and public order] for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical, and religious values.... Members should be given some scope to define and apply for themselves the concepts of ‘public morals’ and ‘public order’ in their respective territories, according to their own systems and scales of values.” For a more detailed discussion of this case see NICOLAS F DIEBOLD, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. Int’l Econ. L. 43 (2007).

<sup>30</sup> See e.g. ROBERT Y JENNINGS, *Recent Cases on ‘Automatic’ Reservations to the Optional Clause*, 7 Int’l & Comp. L. Quart. 349, 362 (1958) (arguing that “national security is a matter of which the government is sole trustee. It is eminently a matter on which an international court can have no useful opinion.”).

The application of a margin of appreciation for reasons of deference does not mean, however, the absence of any substantive judicial review. Indeed, international courts continue to review national decisions both for good faith and reasonableness/proportionality.<sup>31</sup> In light of this, discretion under a self-judging clause may well give greater flexibility to States than that which is accorded under a deference based margin of appreciation doctrine.<sup>32</sup> This is particularly the case in light of the fact that self-judging clauses are typically, although not always,<sup>33</sup> linked to standard-based norms and/or concepts such as “essential [security] interests”, “emergencies” or “*ordre public*” and an international court or tribunal may be required both to respect the State’s express discretion and to decide to accord the State a level of deference in reviewing a challenged national decision.

It is important to note that not all international courts and tribunals accord a margin of appreciation to States when interpreting standard-based norms or concepts such as “essential [security] interests”, “emergencies” or “*ordre public*”. Thus, in both the *Gabčíkovo-Nagymaros Project* case,<sup>34</sup> which concerned the customary international law concept of necessity as a circumstance precluding the wrongfulness of an act not in con-

---

<sup>31</sup> YUVAL SHANY, *Towards a General Margin of Appreciation Doctrine in International Law*, 16 E.J.I.L. 907, 910 (2005).

<sup>32</sup> See SUSAN ROSE-ACKERMAN/BENJAMIN BILLA, *Treaties and National Security*, 40 N.Y.U. J. Int’l L. & Pol. 437, 448 (2008) (observing that “some treaties do give states more leeway to define necessity by stating that a Party can take steps that ‘it considers necessary’ and providing that tribunals will scrutinize these steps only for good faith.” – internal citations omitted). See also discussion in Part IIC below.

<sup>33</sup> See, for example, Article 2(a) of the Mutual Assistance Convention relating to the right to refuse assistance “if the request concerns an offence which the requested State considers a political offence, an offence connected with a political offence, or a fiscal, customs or foreign exchange offence”. This illustrates that the discretion granted under self-judging clauses is not necessarily and intrinsically tied to certain subject matter.

<sup>34</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7.

formity with an obligation under international law,<sup>35</sup> and the *Oil Platforms* case,<sup>36</sup> which relevantly involved the invocation of self-defence, the ICJ appeared not to grant to the States concerned any margin of appreciation, although the concepts of necessity and self-defence both include standard-type norms, and self-defence involves security concerns.

In the *Gabčíkovo-Nagymaros Project* case, Hungary argued that the question of whether necessity and its elements, as specified in Art. 25 ILC ASR, applied was to be determined by the State invoking necessity. However, the ICJ held that these aspects were for it to determine, on the basis of an objective appreciation of the facts.

The Court thus made clear, that necessity, as an exception to an international legal obligation, did not allow for the unilateral determination of the existence and scope of this exception. It observed:

“The Court considers, first of all, that the state of necessity... can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft "in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception - and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness . . .". Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.”<sup>37</sup>

Consequently, the Court “endeavour[ed] to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.”<sup>38</sup>

---

<sup>35</sup> See Article 25 of the International Law Commission Articles on State Responsibility (ILC ASR)), which reflects customary international law and provides: “1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”

<sup>36</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, p. 161.

<sup>37</sup> See ICJ Reports 1997, pp. 7, 40, para. 51.

<sup>38</sup> *Ibid.*, p. 41, para. 52.

In the *Oil Platforms* case, the ICJ stated, against the United States' argument that it should be accorded a measure of discretion in respect of its application of measures to protect its essential security interests, that "the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any 'measure of discretion'".<sup>39</sup>

In the first case, the ICJ's stricter approach could be justified by the context, object and purpose of the necessity exception.<sup>40</sup> In the second case, the ICJ's stricter approach could be justified by the *jus cogens* status of the prohibition on the use of force and the consequent strict interpretation of exceptions to such a prohibition.<sup>41</sup> Nonetheless, when compared to the jurisprudence of the ECHR, these examples serve to illustrate that the extent of the margin of appreciation granted is not solely dependent on the presence of standard-based norms or the subject matter of the exception, but also on the context in which the exception is found and on the nature of the action taken in reliance on the exception. Alternatively, these examples provide evidence that (in contrast to the discretion provided by self-judging clauses which in our view international courts and tribunals must respect) the deference accorded in the presence of standard-based norms or the subject matter of essential [security] interests, varies from court to court and from clause to clause.

---

<sup>39</sup> ICJ Reports 2003, p. 161, 196, para. 73.

<sup>40</sup> See the *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* in YBILC (2001) vol II, Part Two, in particular at p. 83: "Necessity may constitute a circumstance precluding wrongfulness under certain very limited circumstances."

<sup>41</sup> See also Separate Opinion of Judge Kooijmans, ICJ Reports 2003, para. 46: "Confronted with this threat to its essential security interests the United States decided (unlike other States) no longer to use diplomatic and other political pressure, but to opt for a reaction which involved the use of force. By doing so, it opted for the means the use of which must be subjected to strict legal norms, since the prohibition of force is considered to have a peremptory character. The measure of discretion to which the United States is entitled is therefore considerably more limited than if it had chosen, for instance, the use of economic measures." See also YUVAL SHANY, *Towards a General Margin of Appreciation Doctrine in International Law*, 16 E.J.I.L. 907, 931-933 (2005).

## **E.A Taxonomy of Self-Judging Clauses**

Self-judging clauses appear in numerous international treaties, including in treaties on mutual assistance, on trade and investment, as well as in treaties relating to private international law and arbitration, and many others. Subject-matter related classification of such clauses would allow a study of the areas in which self-judging clauses are primarily used and enable an assessment of the kind of State interests that are most often protected. However, such a study would not only require a full or near-to-full review of the existing international treaty practice, but would also add little to a functional understanding of the clauses in reconciling unilateralism and State interests with international cooperation. For these reasons, we consider a functional taxonomy to be preferable. Against this background, self-judging clauses can be classified into four categories: (1) clauses concerning the restriction of, or derogation from, international obligations, (2) clauses permitting exit from an entire treaty regime, (3) clauses providing for limitations to the consent of States to international dispute settlement, and (4) clauses concerning reservations to international treaties.

### ***1. Clauses Concerning the Restriction of, or Derogations from, International Obligations***

By far the majority of self-judging clauses allow for unilateral determinations concerning restrictions of or exceptions to international obligations. This category of self-judging clauses allows - *ex post* and based on a legal basis in the treaty in question – an intrinsic exception or limitation to a State’s international obligation. This category of clauses allows for the “partial exit” from an international obligation while remaining in general under the scope of applicability of the respective treaty regime as such.

For example, the 1958 New York *Convention for the Recognition and Enforcement of Foreign Arbitral Awards*<sup>42</sup> contains a broadly framed exception to the obligation to recognise and enforce foreign arbitral awards. Its Article V(2)(b) provides:

---

<sup>42</sup>

[1975] ATS 25, UNTS, Vol. 330, p. 3.

“Recognition and enforcement of an arbitral award may also be refused **if the competent authority in the country where recognition and enforcement is sought finds that:**

- (a) [...]
- (b) The recognition and enforcement of the award would be contrary to the public policy of that country.” (emphasis added)

This clause is clearly self-judging as it permits the enforcement State to derogate from one of the two central obligation under the Convention, namely the obligation to recognise and enforce foreign arbitral awards, if the competent State agency - generally the courts of the State concerned - determines that recognition and enforcement would be contrary to that State’s public policy. Article V(2)(b), therefore, not only allows a State to derogate from its treaty obligation based on the amorphous concept of public policy, but also clearly assigns the authority to determine and interpret the scope of this exception to the authorities of the State concerned.

Accordingly, the public policy exception to the recognition and enforcement of international arbitral awards under Article V(2)(b) of the New York Convention is viewed as “the greatest single threat to the use of arbitration in international commercial disputes”<sup>43</sup> or as a “loophole” undermining the binding nature of international arbitration<sup>44</sup> “based on the ease with which a court might disregard a foreign arbitral award for virtually any reason, however persuasive, simply by finding that enforcement of the award would conflict with the public policy of the forum. Such action by courts would undermine the arbitral award enforcement process, and weaken international commercial arbitration as a method of dispute settlement.”<sup>45</sup> Equally, the public policy

---

<sup>43</sup> JOEL R. JUNKER, *The Public Policy Defence to Recognition and Enforcement of Foreign Arbitral Awards*, 7 Cal. W. Int’l L. J. 228 (1977).

<sup>44</sup> See e.g. *Parsons & Wittemore Overseas Co. v. Société Générale de l’Industrie du Papier [RAKTA]*, 508 F.2d 969, 974 (2d Cir. 1974); KITIGAWA, *Contractual Autonomy in International Commercial Arbitration*, in: PIETER SANDERS (ed.), *International Arbitration*, pp. 132, 139 (1967); DONALD B. STRAUS, *Arbitration of Disputes between Multinational Corporations*, 24 Arb. J. 228, 233-234 (1968).

<sup>45</sup> JOEL R. JUNKER, 7 Cal. W. Int’l L. J. 228 (1977). See more generally on the public policy exception under the New York Convention DONALD FRANCIS DONOVAN, *International Commercial Arbitration and Public Policy*, 27 N.Y.U. J. Int’l L. & Pol. 645 (1995); DARYL DeVALERIO ANDREWS, *The Public Policy Exception to Arbitral Finality*, 12 Boston U. Pub. Int. L. J. 461 (2003); HOWARD M. HOLTZMANN/JOSEPH E. NEUHAUS, *A Guide to the UNCITRAL Model Law on Commercial Arbitration: Legislative History and*

defence has been criticized as suffering “conceptually from being an expression of ultimate sovereign power in international commercial arbitration, which paradoxically is disfavored by the courts because of its inherently provincial and parochial nature.”<sup>46</sup>

In practice, however, these fears generally do not materialize. The refusal to recognise and enforce foreign arbitral awards on the basis of the enforcement State’s public policy are not only rather rare;<sup>47</sup> but courts in most States also interpret the concept of public policy restrictively, by recognizing the importance of the Convention’s aim to allow for cross-border enforcement of arbitral awards and the contribution that effective dispute settlement by arbitration makes towards furthering trans-border commercial activities.<sup>48</sup> Notwithstanding, a State that decided to adopt a broad reading of the public policy exception under Art. V(2)(b) of the New York Convention would be entitled to do so from the perspective of its treaty obligation.

It may thus also be a question of the subject matter of a self-judging exception that determines to what extent this type of clause actually undermines efforts at

---

*Commentary*, London, Kluwer (1989).

<sup>46</sup> JOEL R. JUNKER, 7 Cal. W. Int’l L. J. 228, 245-246 (1977) (referring specifically to the interpretation of the public policy exception by U.S. courts).

<sup>47</sup> NINA GUMZEJ, *Public Policy in Recognition and Enforcement of Foreign Arbitral Awards*, unpublished LL.M. Thesis Central European University Budapest, p. 1 (2002); PIETER SANDERS, *A Twenty Years’ Review of the Convention on the Recognition and Enforcement of Arbitral Awards*, 13 Int’l Law. 269, 270 (1979).

<sup>48</sup> See for a broad comparative study GUMZEJ (see *supra* footnote 47) (concluding on p. 34 that “most countries involved in the analysis recognise the need to restrict the scope of their domestic public policy in enforcement proceedings”). See also the literature cited in GUMZEJ, p. 3 fn. 10. On the scope of the public policy exception in Sweden see LARS HEUMAN/GÖRAN MAILLQVIST, *Swedish Supreme Court Refuses to Enforce an Arbitral Award Pursuant to the Public Policy Provision of the New York Convention*, 20 J. Int’l Arb. 493 (2003); for the same in the legal system of New Zealand see AMOKURA KAWHARU, *The Public Policy Ground for Setting Aside and Refusing Enforcement of Arbitral Awards – Comments on the New Zealand Approach*, 24 J. Int’l Arb. 491 (2007). See also TROY L. HARRIS, *The “Public Policy” Exception to enforcement of International Arbitration Awards Under the New York Convention*, 24 J. Int’l Arb. 9 (2007) (passim); ALAN REDFERN/MARTIN HUNTER, *Law and Practice of International Commercial Arbitration* 457 (3<sup>rd</sup> ed. 1999). Furthermore, various attempts exist to define the public policy exception in terms of a transnational public policy rather than national policy considerations. See GUMZEJ (see *supra* footnote 32), pp. 141-146. Cf. also FERNANDO MANTILLA-SERRANO, *Towards a Transnational Procedural Public Policy*, 20 Arb. Int’l 333 (2004); RICHARD H. KREINDLER, *Approaches to the Application of Transnational Public Policy by Arbitrators*, 4. J. World Inv. 239 (2003).

international cooperation. It is, for example, very likely that self-judging clauses in the context of the recognition of foreign arbitral awards are less detrimental to international cooperation than self-judging clauses in the context of disarmament. Self-judging clauses in less sensitive areas of international cooperation may for that very reason also be less necessary as an instrument to convince States of the benefits of cooperation.<sup>49</sup>

Article V(2)(b) of the New York Convention is an entirely self-judging clause. However, not all self-judging clauses share this characteristic. Some treaty provisions combine self-judging and non-self-judging elements. Exceptions in trade treaties are a good example. Article 2102(1) of the *North American Free Trade Agreement* (NAFTA), for example, provides that:

“... nothing in this Agreement shall be construed: [...]

(b) to prevent any Party from taking any actions that **it considers** necessary for the protection of its essential security interests:

- (i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,
- (ii) taken in time of war or other emergency in international relations, or
- (iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices”.

This clause grants discretion to the State to determine whether a certain measure is necessary to protect the State’s essential security interests. Discretion in this context definitely relates to the determination of the necessity of a measure to protect a particular security interest, but potentially also relates to the determination of the essential State interest itself.<sup>50</sup> It does not, however, cover the further elements that limit what the action taken by the State may relate to or in what circumstances action may be taken. It can thus be objectively determined by a court or tribunal whether the action taken by the

---

<sup>49</sup> See, for example, the self-judging clauses dealing with the sensitive area of disarmament mentioned *infra* Part 2.

<sup>50</sup> See discussion in relation to the interpretation of GATT Article XXI in Part II2 below.

State relates to traffic in arms, to policies concerning nuclear weapons or is taken in a time of war or other emergency in international relations, as envisaged by sub-clauses (i) through (iii).

## ***2.Exit-Clauses from International Obligations***

Self-judging clauses can also take the form of permanent exit-clauses concerning an entire treaty regime. Unlike the first category, such exit-clauses allow a State to exit the cooperative system entirely rather than simply being limited to restrictions of the international obligations assumed under the system. They thus allow the State to put itself outside the law established by the fabric of obligations of the specific regime in question and therefore go beyond the effect of the first category of self-judging clauses.

Yet, this category of self-judging clauses seems to be rather rare. One example is Article X(1) of the *Treaty on the Non-Proliferation of Nuclear Weapons* (Non-Proliferation Treaty) which provides:

“Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty **if it decides** that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.”<sup>51</sup>

This provision allows a State to unilaterally terminate its obligations under the treaty without any apparent restrictions to the political considerations and national interests at stake. The only restriction one can give to the interpretation of the clause is that the self-judging decision of the State only relates to the appreciation that extraordinary events have “jeopardized” its supreme interests. It may be arguable that the State’s self-judging discretion does not extend to the fact that a “supreme interest” must be at stake.<sup>52</sup>

---

<sup>51</sup> *Treaty on the Non-Proliferation of Nuclear Weapons* (1968), UNTS Vol. 729 p.169 (emphasis added).

<sup>52</sup> See further the discussion in Part II2 below.

Notwithstanding the breadth of this treaty provision, there are, however, mechanisms in place that attempt to keep States within the system of international cooperation. Thus, when North Korea signaled its intention to withdraw from the Non-Proliferation Treaty based on Article X(1) of the treaty, three States - the Russian Federation, the United Kingdom and the United States - protested and questioned whether the stated reasons of North Korea constituted extraordinary events related to the subject matter of the treaty. In addition, the Security Council passed a non-binding decision urging North Korea to reconsider its announced withdrawal from the treaty,<sup>53</sup> a recommendation North Korea ultimately followed.

The restraints resting upon North Korea – or any other Member States for that matter – in this context were primarily political, not legal. They consisted of the requirement to give reasons and the ability of Member States to mobilize the Security Council in order to encourage a State attempting to rely on a self-judging exit-clause to stay within the system and to urge further international cooperation.

One can draw two conclusions from this episode. First, the reaction of the three nuclear powers can be seen as in principle recognizing North Korea's discretion to judge whether a right to withdraw existed, but that this discretion might not be absolute. Secondly, it shows that the prevention of potential misuse of self-judging treaty provisions can be achieved by a number of different mechanisms and instruments, depending on the subject matter of the treaty in question and depending on the existence of alternative institutions that Contracting Parties can rely on in order to prevent self-judging clauses from having too broad an effect .

### ***3. Clauses Pertaining to the Jurisdiction of an International Court or Tribunal***

Another area in which clauses containing “if the State considers” type wording can be found is that of Optional Declarations recognising the jurisdiction of the ICJ under Article 36(2) of the Statute of the Court. Declarations excluding from the jurisdiction of the ICJ “disputes with regard to matters which are essentially within the domestic

<sup>53</sup> Security Council Resolution 825 (1993), May 11, 1993, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N93/280/49/IMG/N9328049.pdf?OpenElement>.

jurisdiction of [State X] as determined by the Government of [State X]” can currently be found in the Optional Declarations of Malawi (1966), Mexico (1947), Liberia (1952), the Philippines (1972) and Sudan (1958).<sup>54</sup> They were previously more widespread, having been initiated by the United States in 1946 through the so-called Connally Amendment.<sup>55</sup>

The Connally Amendment and its self-judging exception to the ICJ’s jurisdiction was viewed by the United States as “purport[ing] to confer upon the United States the unreviewable power to decide, in a case in which it is an interested party, whether the World Court legally has jurisdiction over the case”<sup>56</sup> and, as such, intended to constitute a “veto power over the Court’s jurisdiction”<sup>57</sup> that was subject to no review at all.

These reservations have been the subject of significant academic commentary and important questions have been raised about their validity, particularly in light of Article 36(6) of the ICJ Statute, which provides that the ICJ is to settle disputes relating to its jurisdiction.<sup>58</sup> Similar clauses also exist with respect to jurisdictional issues in regard of other international dispute settlement fora.<sup>59</sup>

---

<sup>54</sup> See at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

<sup>55</sup> See on the Connally Amendment: ARTHUR LARSON, *The Facts, the Law, and the Connally Amendment*, 1961 Duke L. J. 74 (1961); LEO GROSS, *Bulgaria Invokes the Connally Amendment*, 56 A.J.I.L. 357 (1962); see also ROBERT Y. JENNINGS, *Recent Cases on “Automatic” Reservations to the Optional Clause*, 7 Int’l & Comp. L. Quart. 349 (1958); C.H.M. WALDOCK, *The Plea of Domestic Jurisdiction Before International Legal Tribunals*, 31 Brit. Ybk. Int’l L. 96 (1954); HUBERT H. HUMPHREY, *The United States, the World Court and the Connally Amendment*, 11 Va. J. Int’l L. 310 (1971).

<sup>56</sup> ARTHUR LARSON, *The Facts, the Law, and the Connally Amendment*, 1961 Duke L. J. 74, 75 (1961).

<sup>57</sup> *Ibid.*, at 76.

<sup>58</sup> See e.g. RENATA SZAFARZ, *The Compulsory Jurisdiction of the International Court of Justice*, Martinus Nijhoff Publishers, the Netherlands, pp. 52-55 (1993); JEROME B. ELKIND, *Non-appearance before the International Court of Justice - Functional and Comparative Analysis*, Martinus Nijhoff Publishers, Dordrecht pp. 124-168 (1984); BERTRAN MAUS, *Les Reserves dans les déclarations d’acceptation de la juridiction obligatoire de la Cour Internationale de Justice*, Librairie E. Droz, Geneve, pp. 149-163 (1959). See also *supra* Part B.

<sup>59</sup> See MICHAEL J. HAHN, *Vital Interests and the Law of the GATT: An Analysis of GATT’s Security Exception*, 12 Mich. J. Int’l L. 558, 561-562 (1991) (observing that “[t]he ‘well known reservation in the 1903 Anglo-French treaty concerning vital interests, independence, honor and third-party interest’ became a model for more than a hundred treaty clauses which excluded from arbitration sensitive issues and, as a practical effect, left it to the State to determine unilaterally if a particular dispute was fit to be submitted to final and binding arbitration” – internal citations omitted).

As express and unilateral reservations to jurisdiction, however, they are different in nature to self-judging exceptions to treaty obligations. For this reason, as well as reasons of scope, they will not be considered any further in this paper, although some of the analysis below is arguably equally relevant to such clauses. This refers in particular to the questions of the scope of review of such clauses in international dispute settlement. Indeed, provided that one considers such clauses as in principle valid,<sup>60</sup> the same framework of analysis should, in our view, apply to self-judging clauses pertaining to jurisdiction, as applies to clauses concerning restrictions of substantive treaty provisions. The validity of such clauses, in turn, will depend on the framing of the procedural framework of the dispute settlement mechanism in question.

#### *4. Clauses Concerning Reservations to International Treaties*

Unlike self-judging clauses concerning restrictions of international obligations, or clauses allowing for derogations from an entire treaty regime, self-judging clauses pertaining to reservations to international treaties aim at avoiding *ex ante* a State becoming bound by an international obligation. One example of a partly self-judging reservation is the reservation that the United States attached to its ratification of the *Convention on the Prevention and Punishment of the Crime of Genocide*:<sup>61</sup>

“[t]hat nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States **as interpreted by the United States**”.<sup>62</sup>

Even though this reservation is connected to limitations based on the Constitution of the United States and arose from concerns about the potential impact of international obligations on the federal structure of the United States, it is self-judging in that it refers to the determination of the scope of the United States Constitution by the United States. As constitutional provisions are often open to interpretation, such a reservation has to be regarded as equivalent to a fully self-judging clause. Accordingly, Italy protested against

---

<sup>60</sup> See the discussion in Part B. above.

<sup>61</sup> [1951] ATS 2, 78 U.N.T.S. 277.

<sup>62</sup> See 28 I.L.M. 754, 774 (1988) (emphasis added). See also *ibid.*, 770 *et seq.*, 776 (concerning the discussion in the U.S. Senate regarding the framing of this reservation).

the United States reservation to the Genocide Convention arguing that it created uncertainty about the scope of the obligations assumed by the United States.<sup>63</sup>

The validity of such self-judging reservations is indeed questionable as they attempt to make the creation of an international obligation dependent upon the unilateral determination of a State, without however - and this is the difference to treaty provisions mentioned above - having allowed other States to explicitly agree to such self-judging exceptions. Instead, self-judging reservations have the potential to eviscerate the object and purpose of the treaty obligations and to deny their quality as binding law.<sup>64</sup> In view of the specific problems relating to their validity, this category of self-judging clauses will also not be dealt with any further in this paper. Yet, provided that such clauses are valid, a similar framework of analysis as the one proposed in Part III could apply.

### **III. Avoiding Abuse: Self-Judging Clauses in International Dispute Settlement**

As self-judging clauses grant discretion to States to determine unilaterally certain elements that allow them to exit from or even avoid the coming into existence of an international obligation, there is a potential for misuse of such clauses. This policy aspect most probably informed Judge Lauterpacht's Separate Opinion in the *Norwegian Loans* case.<sup>65</sup> Similarly, State parties to international treaties that contain self-judging clauses are aware of the potential for abuse and often include specific mechanisms to restrict their operation. Indeed, many treaty regimes that contain "self-judging" clauses, contain

---

<sup>63</sup> Cf. Multilateral Treaties Deposited with the Secretary-General (Status as of Dec. 31, 1993), UN Doc. ST/LEG/SER.E/12, p. 95.

<sup>64</sup> See, for example, General Comment No. 24 (52) on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, UN Cod. CCPR/C/21/Rev.1/add.6, 11 Nov. 1994, 15 Human Rights L. J. 464 (1994). See also THOMAS GIEGERICH, *Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien*, 55 ZaöRV/Heidelberg J. Int'l L. 713 (1995).

<sup>65</sup> See *supra* Section B.

additional procedural and institutional safeguards in order to prevent States from availing themselves of such clauses in a way that is arbitrary, defeats the object and purpose of the treaty regime or is, more generally, adverse to international cooperation. Examples include duties to give reasons and the duty to notify other contracting parties or, if existent, treaty organs.

### **A. Mechanisms to Hold States Accountable for Violations of Self-Judging Clauses**

Duties to give reasons constitute an important safeguard in this context. For instance, many mutual assistance treaties provide that a State that refuses assistance must give reasons for such a refusal.<sup>66</sup> The function of this requirement is not only to inform other Contracting Parties of a refusal to cooperate. It also enables the requesting State to ascertain whether the requested State's refusal remains within whatever limits there may be to the self-judging determination in question. The duty to provide reasons has, thus, been recognized by the ICJ in the *Djibouti v. France* case as an important factor in connection with the existence of self-judging clauses.<sup>67</sup>

Other treaty regimes include more detailed procedural safeguards. The self-judging exception to a State's obligation to produce documents to the International Criminal Court (ICC) in case of concerns of the requested State as to national security is a good example of this. Such requests may be refused in accordance with Article 72 of the ICC Statute which provides for refusal:

“(1) ...in any case where the disclosure of the information or documents of a State would, **in the opinion of that State**, prejudice its national security interests.

---

<sup>66</sup> See, for example, Art. 17 of the Mutual Assistance Convention between Djibouti and France.

<sup>67</sup> See *Case Concerning Certain Questions Of Mutual Assistance In Criminal Matters (Djibouti v. France)*, Judgment of June 4, 2008, paras. 149-156, and concerning the remedies for a violation, paras. 203-204. At para 152, the Court, in finding that France failed to comply with its duty to give reasons noted that the obligation in Art. 17 of the Mutual Assistance Convention: "allows the requested State to substantiate its good faith in refusing the request. It may also enable the requesting State to see if its letter rogatory could be modified so as to avoid the obstacles to implementation enumerated in Article 2."

- (2) ...when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that **it is of the opinion** that disclosure would prejudice its national security interests.” (emphasis added).

While ICC Statute Article 72 constitutes a self-judging exception, the Statute has taken care to restrict its application in order to encourage international cooperation in order to provide effective and efficient criminal prosecution. Thus ICC Statute Article 72(5) provides for a number of ways to reconcile the national security concerns the requested State feels are at stake and the interest of the Court in being able to avail itself of necessary information. After an initial refusal by the State, there is an additional procedural step in which the requested State and the ICC attempt to reach a consensus by negotiation. To the extent that this second step does not produce a result, the requested State is required under ICC Statute Article 72(6) to give “specific reasons” for withholding information. Furthermore, there are, as Rose-Ackerman/Billa point out, additional institutional interrelations:

“If the Court determines that the information is necessary and relevant, other options are available. The Court can request further consultations that may involve *ex parte* or in camera hearings, refer the matter to the Assembly of State Parties or the UN Security Council for resolution, or make factual inferences at the trial.”<sup>68</sup>

Independent of the specific make-up of the institutional interrelations of the ICC with the requested State relying on the self-judging clause, it clearly emerges that uncontrollable and unreviewable discretion of the requested State is not envisaged by ICC Statute Article 72 as it may lead to an abuse of self-judging discretion and the evisceration of the object and purpose of the entire treaty regime. Institutional safeguards are, thus, often constructed to minimize the invocation of self-judging clauses. The dynamics surrounding North Korea's announced withdrawal from the Non-Proliferation Treaty illustrate a similar concern.<sup>69</sup>

---

<sup>68</sup> ROSE-ACKERMAN/BILLA, 40 N.Y.U. J. Int'l L & Pol. pp. 476-478 (2008).

<sup>69</sup> See *supra* Part 2.

## **B. Self-Judging Clauses and International Dispute Settlement**

Similarly, court monitoring can function as a mechanism to reconcile State sovereignty, and the protection of the State's discretion under a self-judging treaty exception, with the need to hold States accountable for potential abuses of this discretion. The question thus arises as to the legitimate role of international courts and tribunals when faced with the contested invocation of a self-judging clause in order to deny the existence of a breach of an international obligation. Do self-judging clauses exclude the jurisdiction of an international court or tribunal, and thus prevent such a body from looking into the question of whether a State is entitled to invoke a self-judging exception, or, by contrast, do such clauses merely limit the standard of review of the dispute settlement body?

Although international jurisprudence on self-judging clauses is limited, such clauses have occupied international courts and tribunals occasionally and have generated some State practice in the context of third-party dispute settlement. Further the legitimate role of dispute settlement vis-à-vis specific self-judging clauses has been the subject of a number of articles. We review here the jurisprudence of the ICJ, ICSID tribunals and dispute settlement in the GATT/WTO, as well as State practice and academic analysis relevant to self-judging clauses.

### ***1. Self-Judging Clauses before the International Court of Justice***

Although a number of international judicial or arbitral decisions had touched on the interpretation of self-judging clauses, none of the cases had actually involved the application of a self-judging clause until the recent ICJ decision in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* (4 June 2008). Rather suggestions about the interpretation of self-judging clauses had been made *obiter dictum* in the context of analyzing non self-judging clauses.

Thus, as mentioned above in Part C, in *Military and Paramilitary Activities in and against Nicaragua*,<sup>70</sup> the ICJ was called upon to interpret the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, Article

<sup>70</sup> ICJ Reports 1986, p. 14.

XXI of which provided that it did not preclude the application of measures “necessary to protect [a State’s] essential security interests.” The ICJ held that it had jurisdiction to determine whether measures taken by one of the parties fell within that exception, reasoning as follows:

“That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it “considers necessary for the protection of its essential security interests”, in such fields as nuclear fission, arms, etc. The 1956 Treaty to the contrary speaks simply of “necessary” measures, not of those considered by a party to be such.”<sup>71</sup>

This *a contrario* reasoning as to jurisdiction suggests that if the ICJ had been confronted with a self-judging clause such as GATT Article XXI, it might have found that it did not have jurisdiction to determine whether measures taken by one of the Parties fell within such an exception.

This suggestion, however, was not followed in the *Djibouti v. France* case. The case relevantly involved a complaint by Djibouti that France had breached its obligations under Article 3 of the Mutual Assistance Convention by failing to transmit the record relating to the investigation into the death of a French national on Djiboutian territory requested by Djibouti in a letter rogatory transmitted to France pursuant to the Convention.<sup>72</sup> France contested this, arguing that it could validly rely on the exception provided for in Article 2(c) of the Mutual Assistance Convention. This exception allows for assistance to be refused “**if the requested State considers** that the execution of the

---

<sup>71</sup> *Military and Paramilitary Activities Case*, ICJ Reports 1986, p. 14, para. 222; see also para. 282; see also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 2003, p. 161, para. 43.

<sup>72</sup> A brief background to this matter is as follows: Judge Borrel died in suspicious circumstances in Djibouti in 1995 while seconded as a Technical Adviser to the Ministry of Justice in Djibouti. The Djiboutian judicial investigation upheld a theory of suicide. An investigation into the Judge’s death was then opened in France and is ongoing. In 2004, subsequent to the French investigation implicating a number of Djiboutian government officials - including the current President of Djibouti - in the murder of Judge Borrel, the government of Djibouti decided to reopen the judicial investigation in Djibouti and sought transmission of the French file by way of letter rogatory.

request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests.”<sup>73</sup>

Indeed, the investigating French judge responsible for deciding whether or not to execute the letter rogatory under the Mutual Assistance Convention refused to transmit the file citing Article 2(c) of the Convention and stating that transmission of the file was considered to be “contrary to the essential interests of France”, in that the file contained declassified “defence secret” documents, together with information and witness statements in respect of another case in progress.<sup>74</sup> In the proceedings, France argued that in light of the sensitive nature of penal affairs and their tight link to State sovereignty, Article 2(c) should be interpreted as providing for the State, and the State alone, to decide in accordance with procedures under its internal law whether or not a particular instance of mutual assistance would prejudice its essential interests.<sup>75</sup> Djibouti contested this, arguing that the Court must at least review the invocation of Article 2(c) for good faith.<sup>76</sup>

The ICJ accepted that Article 2(c) conferred a wide discretion on a State in deciding to refuse mutual assistance, but held that the exercise of discretion under Article

---

<sup>73</sup> Clauses similar to this can be found in many bilateral and multilateral treaties on mutual assistance, as well as in bilateral and multilateral treaties dealing with extradition. See e.g. *Council of Europe Convention on Cybercrime* (2001) ETS 185; Art 27(4) *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988) [1993] ATS 4, UNTS Vol. 1582, No. 1-27627; *Convention against Transnational Organized Crime* (2000), [2004] ATS 12, UNTS Vol. 2225, No. 39574; *Convention against Corruption* (2003), [2006] ATS 2, UNTS Vol. 2349, No. 42146; *International Convention for the Suppression of the Financing of Terrorism* (1999) [2002] ATS 23, UNTS Vol. 2178 No. I-38349; *International Convention for the Suppression of Terrorist Bombings* (1997), [2002] ATS 17, UNTS Vol. 2149 No. I-37517; *European Convention on Mutual Assistance in Criminal Matters* (1959), UNTS Vol. 472, p 185; *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union* (2000) OJ C 197/1 114; *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (1990), [1997] ATS 21, UNTS Vol. 1862, No. I-31704.

<sup>74</sup> See *soit-transmis* of 8 February 2005 as described in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, para. 147.

<sup>75</sup> CR 2008/5, Translation, p. 5, para. 12, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=93&case=136&code=djf&p3=2>.

<sup>76</sup> CR 2008/6, Translation, p. 33, para. 15, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=93&case=136&code=djf&p3=2>. See also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, para. 135.

2(c) remained subject to the obligation of good faith codified in Article 26 of the VCLT. In doing so, the Court drew a parallel between the concept of good faith and the concept of *abus de droit* discussed in earlier decisions of the Permanent Court of International Justice (PCIJ).<sup>77</sup> The ICJ further held that it could review France's actions for good faith and that France, therefore, needed to show that the reasons for its refusal to execute the letter rogatory fell within those allowed for in Article 2.<sup>78</sup> The ICJ then outlined one of the reasons provided by the instructing judge for refusing to execute the letter rogatory (that relating to the file containing declassified 'defence secret' documents) and held that it fell within the ambit of Article 2(c) of the Mutual Assistance Convention. On this basis, the Court found that France had relied on Article 2(c) in good faith.<sup>79</sup> It can be seen from this reasoning, that the Court interpreted good faith to permit only a very limited review. All that needed to be established was that one of the reasons provided by the instructing judge for refusing to transmit the file fell within the ambit of Article 2(c).

In a separate declaration, Judge Keith analysed the standard of review applicable to self-judging clauses in greater detail. He considered that the decision not to grant mutual assistance should be reviewed against the closely related principles of good faith, *abus de droit* and *détournement de pouvoir*. He held that those principles required the

---

<sup>77</sup> The requirement of good faith derives from the customary law principle of *pacta sunt servanda* and is reflected not only in VCLT Article 26, but also in VCLT Article 31(1). It finds further reflection in the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* (GA Res 2624, U.N GAOR Supp (No 28) at 121 UN Doc. A/80298 (1971)). In the *Nuclear Tests Case*, the ICJ recognized that good faith is one of the basic principles governing the creation and performance of legal obligations, whatever their source (*Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974, pp. 457, 473).

<sup>78</sup> See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, para. 147 (stating that “[t]he Court begins its examination of Article 2 of the 1986 Convention by observing that, while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties (see *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A*, p. 30, and *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167...)). This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2.” See also *ibid.*, para. 135.

<sup>79</sup> *Ibid.*, paras. 147-148, 202.

responsible State agency to exercise the power for the purpose for which it was conferred (and not in a manner that frustrated the object and purpose of the treaty) and without regard to improper purposes or irrelevant factors.<sup>80</sup> In this context, he cited the Court's statement in the *Gabčíkovo-Nagymaros Project* that the good faith obligation in Article 26 of the VCLT "obliges the Parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized".<sup>81</sup>

After identifying the object and purpose of the Mutual Assistance Convention as being for the Parties to afford each other the widest measure of judicial assistance in criminal matters (see Article 1), Judge Keith considered whether the reasons given by the instructing judge satisfied the requirements of good faith. He found that they did not in two respects. First, the instructing judge appeared to have regard to factors that did not fall within the scope of Article 2(c). These factors were (1) her view that the letter rogatory was an abuse of process and (2) the refusal of certain Djibouti officials to respond to a witness summons in separate but related proceedings.

Second, in determining that the file could not be transferred in its entirety due to the presence of certain declassified documents, the instructing judge made no assessment of the likely prejudice the release of these documents would present to national security, nor did she give any reason why it would not be enough to withhold just the 25 declassified documents. Judge Keith considered that the judge's failure to consider transferring part of the file, or requesting that Djibouti particularize its request, amounted to a failure to have proper regard to the purpose of the Convention.<sup>82</sup> On this basis, Judge Keith concluded that the French judge had not complied with the Convention in making her decision under Article 2(c) and was yet to make a decision, in accordance with law, in response to the letter rogatory. In the event, however, Judge Keith found that Djibouti's delay in challenging this failure precluded any positive remedy and he, therefore, voted with the majority in declining to uphold the Republic of Djibouti's final submissions in respect of Article 2(c) of the Mutual Assistance Convention.

<sup>80</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Declaration of Judge Keith of 4 June 2008, para. 6.

<sup>81</sup> Judgment, ICJ Reports 1997, p. 79, para. 142.

<sup>82</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Declaration of Judge Keith of 4 June 2008, paras. 8-9.

The review undertaken by Judge Keith in his declaration bears significant resemblance to the common law grounds of judicial review available for an improper exercise of administrative decision-making power in many Commonwealth countries,<sup>83</sup> one codification of which can be found in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>84</sup> Indeed, the requirements he cites reflect section 5(2)(a) (taking an irrelevant consideration into account in the exercise of a power), section 5(2)(b) (failing to take a relevant consideration into account in the exercise of a power); and section 5(2) (c) (an exercise of a power for a purpose other than a purpose for which the power is conferred) of that Act.

Many of the other grounds of review listed in section 5(2) of the *Administrative Decisions (Judicial Review) Act* such as an exercise of a discretionary power in bad faith, an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case, an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power, and any other exercise of a power in a way that constitutes an abuse of the power, would also seem to fall neatly within the concept of good faith decision-making or the concept of *abus de droit / détournement de pouvoir* in the context of reviewing a discretionary self-judging clause in an international treaty.

Further, assuming that the unreasonableness test is interpreted as one directed to the question of whether the principles of "just administrative action" have been met,<sup>85</sup> such review is targeted not at the substantive assessment by a State of whether an action is necessary to counter a threat to its essential [security] interests, but at the process by which the decision is arrived at in light of the purpose of the law under which the power is exercised. It therefore respects the subjective aspect of the phrase "if the State considers" while providing concrete questions by which to assess good faith.

---

<sup>83</sup> Also described as grounds of judicial review available for abuse of discretionary power and/or irrationality, see e.g. PHILIP A JOSEPH, *Constitutional and Administrative Law in New Zealand* p. 870, 885, 931 (3<sup>rd</sup> ed. 2007).

<sup>84</sup> For a foundational case on these grounds of review at common law see *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 K.B 223.

<sup>85</sup> See HARRY WOOLFN/JEFFREY JOWELL /ANDREW LE SUEUR, *De Smith's Judicial Review* p. 544 (6<sup>th</sup> ed. 2007); MARK ARONSON/BRUCE DYER/MATTHEW GROVES, *Judicial Review of Administrative Action*, p. 340 (3<sup>rd</sup> ed. 2004)

As a review of the legality of the decision and not of the merits, this form of review does not authorise an international dispute settlement body to “step into the shoes” of the State and remake the decision.<sup>86</sup> Nor does this form of review trespass into areas of which the State is the “sole trustee”.<sup>87</sup> Instead, such a standard of review upholds a State’s discretion in determining its own essential interests and the circumstances in which they may be prejudiced or require protection, as envisaged by a self-judging clause. At the same time, such a standard of review ensures that State discretion is not misused by imposing procedural controls through an independent international dispute settlement body.

From an analysis of the *Djibouti v France* case, it is thus possible to say that the ICJ has taken the position that self-judging clauses do not oust its jurisdiction, but that the invocation of such a clause is subject to good faith review. The majority judgment does not elaborate on what it means by good faith review. The test applied resembles a “touch and feel” type test. In comparison, Judge Keith suggests a number of concrete questions that may be asked in order to assess good faith. These questions bear a close resemblance to the questions applied in judicial review of administrative discretion for improper purpose at the domestic level in many Commonwealth countries.

## ***2. Self-Judging Clauses in the GATT/WTO-System***

Article XXI of the General Agreement on Tariffs and Trade (GATT) is arguably the self-judging clause that has received the most international and academic attention.<sup>88</sup>

---

<sup>86</sup> Indeed, in the case of the procedural grounds of review, a finding that a State has exercised its power improperly and has yet to make a decision according to law does not prevent the State from making the same substantive decision when it remakes the decision, if that same decision can be reached when the power is exercised for a proper purpose, taking into account all and only relevant considerations and having regard to the specific circumstances of the case.

<sup>87</sup> See ROBERT JENNINGS, *Recent Cases on the "Automatic" Reservations to the Optional Clause*, 7 ICLQ 349, 363 (1958) where he argues that national security is such a matter and is a category not capable of any kind of judicial assessment. For an analysis of how review of an improper exercise of administrative decision-making power relating to national security can legitimately be undertaken at the domestic level see CHRIS FINN, *The Justiciability of Administrative Decisions: A Redundant Concept?*, 30 Fed. L. Rev. 239, 255-256 (2002).

It is replicated in Article XIV *bis* of the General Agreement on Trade in Services and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights.

Article XXI of the GATT relevantly provides:

“Nothing in this Agreement shall be construed:

- (a) to require any contracting party to furnish any information the disclosure of which **it considers** contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which **it considers** necessary for the protection of its essential security interests:
  - (i) relating to fissionable materials or the materials from which they are derived;
  - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
  - (iii) taken in time of war or other emergency in international relations”.<sup>89</sup>

The WTO Dispute Settlement Body (DSB) has not yet had occasion to interpret GATT Article XXI. Indeed, while the Article has been invoked in two disputes for which panels have been constituted since the creation of the WTO, both were ultimately resolved outside the WTO dispute settlement system - through negotiations in the case of a dispute between the European Union and the United States over the trade restrictive

---

<sup>88</sup> See e.g. HANNES. L. SCHLOEMANN/STEFAN. OHLHOFF, “*Constitutionalization*” and *Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 A.J.I.L. 424 (1999); MARKUS A. REITERER, *Article XXI GATT – Does the National Security Exception Permit “Anything under the Sun”*, 2 Austr. Rev. Inter'l & Eur. L. 191 (1997); PETER LINDSAY, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 Duke L. J. 1277 (2003); DAPO AKANDE/SOPE WILLIAMS, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365 (2003); cf. also ANDREW EMMERSON, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?*, 11 J. Int'l Econ. L. 135 (2008); NICOLAS F. DIEBOLD, *The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole*, 11 J. Int'l Econ. L. 43 (2007).

<sup>89</sup> Subsection (c) of Article XXI provides that nothing in the GATT shall be construed “to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.” The purpose of this clause is to ensure the primacy of UN measures under Chapter VII. The clause is not self-judging and is therefore not discussed further here. The legal texts of the WTO can be found at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#wtoagreement](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement).

aspects of the Helms-Burton Act<sup>90</sup> and by an agreement to resolve the underlying maritime delimitation dispute before the ICJ in the case of a tariff imposed by Nicaragua on all goods from Honduras and Colombia in protest against a maritime delimitation treaty between the two countries, which Nicaragua considered to encroach on its territorial rights.<sup>91</sup>

As discussed above, the only judicial consideration of the Article is to be found in the ICJ's decision in the *Military and Paramilitary Activities in and against Nicaragua*,<sup>92</sup> which suggested that a self-judging clause constitutes a bar to jurisdiction, but was not followed in *Djibouti v. France* in this respect. In order to determine whether interpreting a self-judging clause as a bar to jurisdiction is justified in the context of the GATT, it is, therefore, useful to apply general principles of treaty interpretation directly to Article XXI, and to consider the *travaux préparatoires* for the GATT and State practice since 1947.<sup>93</sup>

---

<sup>90</sup> *Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996* §302(a), Pub.L No, 104-114, 110 Stat. 785 reprinted in 35 ILM 357 (1996). This Act was enacted following the downing of two U.S. light planes off the Cuban coast by Cuban military aircraft, which were apparently acting under a standing order of the Cuban government. Amongst other things, it creates penalties for foreign companies “trafficking” in property confiscated in Cuba from American citizens by Castro. The measures have been described as having a similar effect to a secondary boycott (see JOSEPH V. WALKER, *The Legality of Secondary Boycotts Contained in the Helms-Burton Act under International Law*, 3 DePaul Dig. Int’L L. 1, 2-4 [1997]).

<sup>91</sup> See PETER LINDSAY, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure*, 52 Duke L. J. 1277, 1304-1310 (2003). See also *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, ICJ, Judgment of 13 December 2007, and *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* ICJ, Judgment of 8 October 2007.

<sup>92</sup> ICJ Reports 1986, p. 14.

<sup>93</sup> In the author's view the dispute resolution system that existed under the GATT prior to 1994 with the ability of one of the States concerned to veto any decision taken is better characterised as State practice rather than as the decisions of an international dispute settlement body.

- **Article XXI as a bar to jurisdiction?**<sup>94</sup>

Article 31(1) of the VCLT, which reflects customary international law, provides that all treaties are to be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. Article 32 of the VCLT permits recourse to the *travaux préparatoires* to confirm the meaning of a clause or to ascertain its meaning where the clause is ambiguous.

It could be argued that an interpretation of Article XXI having regard only to the ordinary meaning of the phrase “it considers” would seem to reserve to the State invoking the exception the whole discretion to decide whether the criteria of Article XXI are met and hence deny the jurisdiction of the DSB. However, when taking into account the object and purpose of the WTO agreements – to create a reciprocal system of trading rights – it is obvious that any interpretation of this exception must also take into account the effect that the invocation of an exception such as Article XXI has on other WTO Member States and on the substantive rights of these members as granted under the WTO agreements.<sup>95</sup>

Such a balance is partially reflected in the fact that Article XXI does not set out a general national security interest exception but rather requires measures taken to relate to the disclosure of information, “fissionable materials”, “traffic in arms” or be “taken in times of war or other emergency in international relations”. However, the need for such a

---

<sup>94</sup> For a more detailed analysis of this question see HANNES. L. SCHLOEMANN/STEFAN OHLHOFF, *Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 A.J.I.L. 424, 438-441 (1999).

<sup>95</sup> See WESLEY A. CANN JR. *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 Yale J. Int'l L. 413 (2001) (noting that in the absence of such a balance “Article XXI will continue to serve as a generally unspoken basis for the unilateral imposition of restrictive trade measures for non-economic purposes. These measures, often imposed without identifiable standards and without any accountability or effective retaliatory remedy, undermine the cooperative integrative purposes of the world trade system. These kinds of trade restrictions perpetuate a power-based approach to international relations that generates an unacceptable imbalance between the realities of national sovereignty and the spirit of a more multilateral form of global economic governance”).

balance would also favour an interpretation of Article XXI that subjects it to the normal dispute settlement procedures applicable under the GATT.

In addition, the *travaux préparatoires* to Article XXI show that while it was generally agreed that the national security exception needed to be broad, it was also recognized that its application was to be subject to the normal dispute settlement procedures.<sup>96</sup> It should be noted, however, that the normal dispute settlement procedures at the time the GATT was negotiated were of a political rather than of a judicial nature and based on the consensus by the GATT Council. It is only over the course of time that the panel procedure developed and evolved from a consensus-based procedure to the procedure of reversed consensus under the Dispute Settlement Understanding (DSU) in GATT 1994. Nonetheless, when the DSU was agreed in 1994, no specific exception was made to the comprehensive jurisdiction of the DSB in respect of Article XXI. In light of the absence of such an express exception to jurisdiction and the stated purpose of the DSU of “strengthening the multilateral system”, it appears that it was intended that Article XXI would be subject to the strengthened dispute settlement system.

Although the application of general principles of interpretation and a consideration of the *travaux préparatoires* suggest that the self-judging nature of Article XXI is not a bar to the jurisdiction of the DSB, it is also useful to consider whether subsequent State practice may require this interpretation to be modified. Indeed under Article 31(3) of the VCLT any subsequent practice in the application of a treaty which establishes the agreement of the parties is to be taken into account in interpreting the treaty.

State practice under the GATT prior to the 1994 Uruguay Round suggests that a significant number of States – in particular the United States, Canada, Japan, New Zealand, Australia, and the European Union interpreted the self-judging nature of Article XXI either as a bar to the jurisdiction of any third party dispute resolution mechanism, or as rendering reliance on Article XXI entirely non-justiciable.<sup>97</sup> However, this position was not universally held as is evidenced by the number of times this issue arose, in the

---

<sup>96</sup> See *Analytical Index - Guide to GATT Law and Practice*, Vol. II, p. 705 (6<sup>th</sup> ed. 1995); MICHAEL J. HAHN, *Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558, 565-569, 611 (1991).

context of Article XXI(b)(iii) (measures that the State considers necessary for the protection of its essential security interests in times of war or other emergency in international relations) under the dispute settlement mechanism of Article XXIII.

Thus in 1949, a Czechoslovak complaint against United States national security export controls was discussed at the Third Session of the GATT Contracting Parties. The British delegate stated that “every country must be the judge in the last resort on questions relating to its own security”, although self-restraint was advocated to avoid undermining the GATT.<sup>98</sup> On the other hand, Czechoslovakia argued that Article XXI was subject to interpretation within the usual procedure and was not a *carte blanche* for a Contracting Party to escape its obligations.<sup>99</sup> Ultimately, the Czechoslovak complaint was rejected without this difference of opinion being resolved.

Later, in 1961, on the accession of Portugal to the GATT, Ghana justified its continued boycott of Portuguese goods by reference to the constant threat to the peace of the African continent posed by Portugal’s presence in Angola. While seeking to bring its action within the scope of Article XXI, Ghana also stated that “under [Article XXI] each contracting party was the sole judge of what was necessary in its essential security interests”.<sup>100</sup>

Further, during the 1982 Falkland crisis, the European Community and European Community Member States, Australia and Canada justified trade restrictions against Argentina on the basis of Article XXI. During the Council discussion of these restrictions the European Community representative stated that “The exercise of these [inherent] rights [of which Article XXI was a reflection] constituted a general exception

---

<sup>97</sup> The difference between an argument that a self-judging clause is a bar to jurisdiction and an argument that a self-judging clause is non-justiciable is not discussed further in this paper, because the authors’ take the view that no treaty subject matter is categorically immune from review. Justiciability ‘is too vague and inarticulate a concept... the only legitimate variables should be in delineating the grounds of review which might be appropriate for any particular circumstance, and in calibrating the intensity of scrutiny’; see MARK ARONSON/BRUCE DYER/MATTHEW GROVES, *Judicial Review of Administrative Action*, p. 145 (3<sup>rd</sup> ed. 2004); CHRIS FINN, *The Justiciability of Administrative Decisions: A Redundant Concept?*, 30 Fed. L. Rev. 239 (2002).

<sup>98</sup> GATT/CP.3/SR.22 (June 8 1949) at 7.

<sup>99</sup> GATT/CP.3/SR.22 (June 8 1949) at 6.

<sup>100</sup> SR.19/12, p. 196.

which required neither notification, justification or approval... this procedure showed that every contracting party was – in the last resort – the judge of its exercise of these rights”.<sup>101</sup> Similar statements were made by Canada, Australia and the United States, with the latter emphasizing that the GATT Contracting Parties had no power to question the judgment of a party as to what is necessary to protect its security interests.<sup>102</sup> These countries considered that the GATT was not the appropriate forum for the discussion of trade measures taken for the purpose of protecting essential security interests.

However, a number of countries also raised objections to the European Community’s refusal to substantiate its claim that the trade restrictions against Argentina were covered by Article XXI. For example, although the Brazilian delegate agreed that each State retained the prerogative to define its essential security interests, he considered that the European Community should still be required to demonstrate that the requirements of Article XXI were fulfilled.<sup>103</sup>

The dispute about the trade restrictions against Argentina finally led to the GATT Council “Decision concerning Article XXI of the General Agreement” of 30 November 1982 which provided *inter alia* that the Contracting Parties should be informed to the

---

<sup>101</sup> See *Analytical Index – Guide to GATT Law and Practice*, Vol II, pp. 600-601 (6<sup>th</sup> ed. 1995).

<sup>102</sup> *Ibid.* This approach to self-judging clauses is consistent with the position that the United States adopted with respect to the Connolly Amendment, which conditioned U.S. consent to the jurisdiction of the ICJ under its Optional Declaration (see discussion above in Part 3). Cf. ABRAHAM D. SOFAER, *The United States and The World Court*, 80 Am. Soc’y Int’l L. Proc 204, 207 (1986) (stating when discussing the official position of the United States that “[e]ven though we had pledged never to invoke our Connolly reservation in bad faith to cover a manifestly international dispute, we were compelled to acknowledge that its invocation in any case would be binding as a matter of law”); see also D. W. GREIG, *Nicaragua and the United States, Confrontation over the Jurisdiction of the International Court*, 62 Brit. Ybk. Int’l L. 119, 181-213 (1991) (pointing out that the United States only deviated from the position that self-judging clauses excluded any review by third-party dispute settlement bodies on one occasion in ICJ proceedings, a position it later sought to withdraw, in arguing that the Connolly Amendment did not allow “arbitrary determination[s], in bad faith” and thus permitted judicial control to the extent such limits were surpassed). Unlike the United States, other States, such as Norway, have consistently taken the position that self-judging aspects of Optional Declarations were subject to good faith review; see GREIG, 62 Brit. Ybk. Int’l L. 119, 184 (1991).

<sup>103</sup> See MICHAEL J. HAHN, *Vital Interests and the Law of the GATT: An Analysis of GATT’s Security Exception*, 12 Mich. J. Int’l L. 558, 573-574 (1991).

fullest extent possible of trade measures taken under Article XXI and also affirmed that when action is taken under Article XXI, all Contracting Parties affected by such action retain their full rights under the GATT. This decision, while not a model of clarity, suggests that the dispute resolution procedure provided for in Article XXIII would apply even if Article XXI is invoked.<sup>104</sup>

In 1985, a panel was constituted by the GATT Council to consider Nicaragua's challenge to the GATT-consistency of the trade embargo imposed against it by the United States. The United States argued that the measures were justified under GATT Article XXI(b)(iii) because "the policies and actions of the Government of Nicaragua constitute an unusual and extraordinary threat to the national security and foreign policy of the United States" giving rise to a national emergency.<sup>105</sup> The United States further argued that the terms of Article XXI precluded a panel from examining the validity of the United States' invocation of Article XXI.<sup>106</sup>

Nicaragua contested both aspects of this position arguing that Article XXI could not be applied in an arbitrary fashion, that there had to be some correspondence between the measures adopted and the situation giving rise to such adoption and that the Contracting Parties were competent to judge whether a situation of "war or other emergency in international relations" existed.<sup>107</sup> Delegates from other countries also considered that it was not plausible that a small country with limited resources could constitute an extraordinary threat to the national security of the United States.<sup>108</sup> Further, the representative of India considered that a Contracting Party having recourse to Article

---

<sup>104</sup> It also reinforces the importance of the provision of reasons as a mechanism of control; see Part IIA above.

<sup>105</sup> GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986, para 3.1.

<sup>106</sup> United States – Trade Measures Affecting Nicaragua – Communications from the United States, GATT Doc. L/5803 (May 29, 1985).

<sup>107</sup> *Analytical Index - Guide to GATT Law and Practice*, Vol. II, p. 603 (6<sup>th</sup> ed. 1995).

<sup>108</sup> GATT Council, *Minutes of Meeting Held May 29, 1985*, GATT Doc. C/M/188 (June 28, 1985), p. 7.

XXI(b)(iii) should be able to demonstrate a genuine nexus between its security interest and the trade action taken.<sup>109</sup>

In light of the United States objections, the panel was established with a limited mandate which prevented it from judging or examining the validity or motivation for the invocation of Article XXI by the United States.<sup>110</sup> Nonetheless, the Panel noted:

“If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? If the Contracting Parties give a panel the task of examining a case involving an Article XXI invocation without authorising it to examine the justification of that provision, do they limit the adversely affected contracting party's right to have its complaint investigated in accordance with Article XXIII:2?”<sup>111</sup>

The final pre-WTO invocation of Article XXI occurred in 1991. The European Community invoked Article XXI to restrict trade with the civil war torn States of the former Socialist Federal Republic of Yugoslavia.<sup>112</sup> At Yugoslavia's request a panel was established to consider the dispute. While the panel proceedings were ultimately suspended in June 1993 due to uncertainty about the member status of the new Federal Republic of Yugoslavia, it is interesting to note that no objection was made by the

---

<sup>109</sup> *Ibid.*, at 11.

<sup>110</sup> See GATT Panel Report, *United States – Trade Measures Affecting Nicaragua*, L/6053, 13 October 1986.

<sup>111</sup> *Ibid.*, para. 5.17. The Panel also noted at para. 5.18 that the “Decision concerning Article XXI of the General Agreement” of 30 November 1982 referred to the possibility of a formal interpretation of Article XXI of the GATT and recommended that the Contracting Parties take into account the concerns raised by the Panel in any further consideration of the matter.

<sup>112</sup> See *Analytical Index - Guide to GATT Law and Practice*, Vol. II, p. 705 (6<sup>th</sup> ed. 1995) p 604. The European Community decided on 11 November to adopt trade measures against Yugoslavia "on the grounds that the situation prevailing in Yugoslavia no longer permits the preferential treatment of this country to be upheld." On 2 December, the Community and its member states decided to apply selective measures in favour of "those parties which contribute to progress toward peace". Economic sanctions or withdrawal of preferential benefits from Yugoslavia were also taken by Australia, Austria, Canada, Finland, Japan, New Zealand, Norway, Sweden, Switzerland, and the United States.

European Community to the establishment of the panel on the grounds that it had invoked Article XXI.<sup>113</sup>

Since the establishment of the WTO, as mentioned briefly above, two Panels have nearly had to decide how GATT Article XXI should be interpreted. While in both cases, the issue was settled, it is interesting to note that in the dispute over the Helms-Burton Act, statements made by United States officials in the context of the dispute suggest that the United States continues to maintain the position that Article XXI of the GATT is a jurisdictional defence or in other words that the invocation of the national security exception is entirely within the discretion of the State invoking it and that a WTO panel does not have competence to decide on the validity of its invocation.<sup>114</sup>

Thus, while a number of States have expressed, and continue to express, the view that the self-judging aspect of Article XXI has the effect that the DSB could not review the invocation of Article XXI, other States contest this view arguing that there must be some external limits placed on the invocation of Article XXI. Further, the 1982 “Decision concerning Article XXI of the General Agreement” suggests that the dispute settlement provisions of Article XXIII remain applicable to Article XXI. In light of this, it cannot be argued that State practice establishes an agreement of the parties to interpret an invocation of Article XXI as not being subject to control by the DSB.

In conclusion, it is arguable that, despite the *obiter dictum* in the *Military and Paramilitary Activities* decision, Article XXI, as a matter of law, is not a bar to the jurisdiction of the DSB. Rather, the words “it considers” in Article XXI play a role in relation to the standard of review applied by the DSB. As no DSB decisions have been taken in respect of Article XXI, it is to the opinions of academic commentators that this paper now turns to consider how Article XXI may affect the standard of review.

---

<sup>113</sup> For a more detailed discussion of these disputes see HANNES. L. SCHLOEMANN/STEFAN OHLHOFF, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 A.J.I.L. 424, 432-434 (1999).

<sup>114</sup> *Ibid.*, at 430; WERNER MENG, *Extraterritoriale Jurisdiktion in der US-amerikanischen Sanktionsgesetzgebung*, 8 EuZW 423, 426 (1997).

- **Article XXI and the standard of review**

All academic commentators agree that the words "it considers" in Article XXI(b) relate at most to the phrase "necessary for the protection of its essential security interests" and that the requirements listed in paragraphs (i) to (iii) are objective standards the satisfaction of which is reviewable by the DSB.<sup>115</sup> All commentators also agree that reviewing whether a measure "relates to fissionable materials" or "relates to traffic in arms" (Article XXI(b)(i) and (ii)) requires the application of more certain legal criteria than reviewing whether a measure "is taken in time of war or other emergency in international relations" (Article XXI(b)(iii)). In this respect, Schloemann and Ohlehoff, Akande and Williams, and Reiterer suggest that, when reviewing whether this latter requirement is met, and particularly its second aspect (emergency in international relations), the DSB should accord States a margin of appreciation.<sup>116</sup> Hahn by contrast considers that both the terms "war" and "emergency in international relations" have a clear meaning in general international law and, therefore, their existence can be objectively reviewed by the DSB without granting States a margin of appreciation. Hahn considers that an "emergency in international relations" exists where the Party against which the action is directed has committed an international delict and countermeasures would be permissible.<sup>117</sup> In light of the objective nature of sub-paragraphs (i) to (iii) in Article XXI(b), Schloemann and Ohlehoff consider that a State relying on such an

<sup>115</sup> See MICHAEL J. HAHN, *Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558, 584-588 (1991); HANNES. L. SCHLOEMANN/STEFAN OHLHOFF, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 A.J.I.L. 424, 444-446 (1999); DAPO AKANDE/SOPE WILLIAMS, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365, 399-402 (2003); MARKUS A. REITERER, *Article XXI GATT – Does the National Security Exception Permit "Anything Under the Sun"*, 2 Austr. Rev. Int'l Eur. L. 19, 201-202 (1997).

<sup>116</sup> HANNES. L. SCHLOEMANN/STEFAN OHLHOFF, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 A.J.I.L. 424, 446 (1999); DAPO AKANDE/SOPE WILLIAMS, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365, 400-402 (2003); MARKUS A. REITERER, *Article XXI GATT – Does the National Security Exception Permit "Anything Under the Sun"*, 2 Austr. Rev. Int'l Eur. L. 191, 211 (1997). With respect to the margin of appreciation see the discussion at **D** above.

<sup>117</sup> MICHAEL J. HAHN, *Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558, 593-594 (1991).

exception must make available to other Parties sufficient information to show that these requirements are met (subject of course to the right to withhold information under Article XXI(a)).<sup>118</sup>

Commentators take slightly different positions, however, when it comes to the manner in which the DSB should review a State's determination that withholding information under Article XXI(a) or taking another measure under Article XXI(b) is "necessary for the protection of its essential security interests". This phrase, or at least the concept of necessity, is the aspect of the exception to which the phrase "it considers" applies. All commentators agree that this aspect of the exception remains subject to good faith review, but they differ in terms of what good faith review entails.

Hahn considers that the principle of good faith "requires parties who are in a special legal relationship to refrain from dishonesty, unfairness and conduct that takes undue advantage of another".<sup>119</sup> He notes that a good faith test is loose and not easy to apply or administer, but that it is nonetheless a routinely applied test. He considers the principle to be closely related to customary international law principle of *abus de droit*, which provides that the exercise of a right for the sole purpose of evading an obligation or of causing injury is unlawful. Applying the principle of good faith, taking into account the context, object and purpose of the GATT, Hahn considers that if a measure taken under Article XXI is challenged before the DSB, the State relying on the Article must (in addition to establishing one of the objective prerequisites discussed above in the context of Article XXI(b)) demonstrate that the essential security interest identified by the State is not in fact the protection of a "vital industry" (or indeed any other protectionist measure). This is because the protection of "vital industries" can be secured through other Articles in the GATT and is not intended to be covered by Article XXI and because protectionism goes against the primary object and purpose of the GATT.<sup>120</sup> Apart from this restriction, however, all that a State would need to demonstrate is (i) under Article

---

<sup>118</sup> HANNES. L. SCHLOEMANN/STEFAN OHLHOFF, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 A.J.I.L. 424, 446 (1999).

<sup>119</sup> MICHAEL J. HAHN, *Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558, 5999 (1991).

<sup>120</sup> *Ibid.*, at 596-597.

XXI(a), a *bone fide* belief that disclosure of certain information would be contrary to its essential security interests, and (ii) under Article XXI(b), a *bone fide* belief that an essential security interest was threatened and that the measure taken was necessary for its protection.<sup>121</sup>

Schloemann and Ohlehoff take the view that the definition of essential security interests, “as a function of the state’s understanding of its sovereignty and the legal position it entails, are essentially subjective”.<sup>122</sup> However, they agree with Hahn that Article XXI does not serve to protect economic security interests and that DSB review is appropriate to prevent abuse of Article XXI in this manner. Schloemann and Ohlehoff go further, however, stating that:

“A requirement of a minimum degree of proportionality between the threatened individual security interest and the impact of the measure taken on the common interest in the functioning of the multilateral system can be deduced from both the term ‘essential’ and, more generally, the function of Article XXI in the WTO system as a remedy for serious hardships emanating from outside the WTO’s immediate regulatory realm.”<sup>123</sup>

On this basis, they conclude that the DSB could also find that the assertion that certain security interests are essential is disproportionate.

Schloemann and Ohlhoff analyse the effect of the words “it considers” separately from the definition of a State’s “essential security interests”. They consider that the words “it considers” allocate a substantial discretion to the State in its choice of means but that this right is still subject to objective limits and a form of proportionality test; that is where “a risk to defined interest does not exist, or a measure will have no effect on protecting the interests it is meant to protect, the corresponding State action cannot be justified under Article XXI”.<sup>124</sup> In contrast to Hahn, Schloemann and Ohlhoff thus consider the self-judging aspect of Article XXI to have a lesser impact on the applicable

---

<sup>121</sup> *Ibid.*, at 599-601.

<sup>122</sup> HANNES. L. SCHLOEMANN/STEFAN OHLHOFF, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 A.J.I.L. 424, 443 (1999).

<sup>123</sup> *Ibid.*, at 445. The authors note however that in the case of Article XXI(a) little room is left for third party interpretative efforts beyond good faith in light of the broadness of the provision.

<sup>124</sup> *Ibid.*, at 443.

standard of review then the subject matter of Article XXI (the protection of essential security interests).

Cann, on the other hand, suggests that before the question of what is required by good faith review is even raised, the DSB has jurisdiction to establish whether the dispute in truth involves a security issue. In other words, Cann suggests that the phrase “it considers” extends only to whether the measure is “necessary” and not to the definition of an “essential security interest”.<sup>125</sup> He further suggests that good faith can be tested by considering whether more than one nation is posing a substantially similar threat to the essential security interests of another nation, but sanctions have not been imposed against all such nations. Discrimination between similar States would thus be an indicator of bad faith.<sup>126</sup>

Finally, Akande and Williams adopt the lowest standard of review. They consider that a proportionality test fails to respect the self-judging aspect of Article XXI and that good faith review is limited to establishing:

- whether a member State genuinely considers that the measure it is taking is related to the protection of its essential security interests; and
- whether it considers the taking of the measure to be proportionate to the protection of those interests in that it considers that there are serious and compelling reasons for taking the measures.<sup>127</sup>

Akande and Williams argue that such an approach would still allow the DSB to detect and prevent capricious invocations of Article XXI.

---

<sup>125</sup> WESLEY A. CANN JR., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 *Yale J. Int'l L.* 413, 468 (2001).

<sup>126</sup> *Ibid.*, at 452.

<sup>127</sup> DAPO AKANDE/SOPE WILLIAMS, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 *Va. J. Int'l L.* 365, 392 (2003).

### ***3. Self-Judging Clauses in Investment Treaty Arbitration***

Various other multilateral and bilateral investment and free trade agreements also contain similar self-judging clauses that are similar to GATT Article XXI. NAFTA Article 2102(1), for example, provides that:

“... nothing in this Agreement shall be construed:

(a) to require any Party to furnish or allow access to any information the disclosure of which **it determines** to be contrary to its essential security interests;

(b) to prevent any Party from taking any actions that **it considers** necessary for the protection of its essential security interests:

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations, or

(iii) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; ...<sup>128</sup>

According to the Statement of Administrative Action in the United States’ NAFTA Implementation Act of 1993, this exception is “self-judging” in nature but must be used in good faith:

“Article 2102 governs the extent to which a government may take action that would otherwise be inconsistent with the NAFTA in order to protect its essential security interests. ... *The national security exception is self-judging in nature, although each government would expect the provisions to be applied by the other in good faith.*”<sup>129</sup>

---

<sup>128</sup> *North American Free Trade Agreement (NAFTA)*, signed Dec, 17, 1992, entry into force Jan. 1, 1994, 32 ILM 296 and 695 (1993). For similar provisions, see also the Australia – Thailand Free Trade Agreement [2005] ATS 2 which incorporates Article XXI of the GATT. See further Arts. 196-198 of the ECT and the discussion of these clauses in MARTIN TRYBUS, *The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions*, 39 Common Market Law Review 1347 (2002).

<sup>129</sup> Reprinted in H.R. DOC. 103-159, 666 (emphasis added). Under NAFTA Article 1138(1), a State’s decision to invoke the national security exception to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party is expressly excluded from the NAFTA dispute settlement mechanism. This, however, is

Still other multilateral and bilateral investment and free trade agreements contain self-judging essential security interest exceptions that are broader in scope as these clauses do not limit the subject matters to which they apply. For example, Article 22(2) of the *Australia-United States Free Trade Agreement* simply provides:

“Nothing in this Agreement shall be construed: 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>130</sup>

None of these self-judging exceptions have been the subject of international dispute settlement. However, a non-self judging exception similar in structure to the *Australia-United States Free Trade Agreement* clause cited above has been the subject of dispute settlement under the auspices of ICSID. In that context, a number of Tribunals have expressed, albeit by way of *obiter*, views on jurisdiction and the applicable standard of review when it comes to self-judging clauses.

Article XI of the Bilateral Investment Treaty (BIT) between Argentina and the United States provides:

“This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, 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>131</sup>

---

stated to be without prejudice to the applicability or non-applicability of the dispute settlement provisions to other actions taken by a Party pursuant to Article 2102. Both the Statement of Administrative Action and Article 1138(1) are seemingly calculated to maintain ambiguity about the competence of the NAFTA dispute settlement body with respect to Article 2102. See further PETER LINDSAY, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 Duke L. J. 1277, 1300-1301 (2003).

See also NAFTA Article 1012 an exception relating to the disclosure of information necessary for the protection of essential security in interests in the context of government procurement and including a self-judging aspect and Article 607 dealing with energy-related national security measures and which does not include any self-judging terminology

<sup>130</sup> [2005] ATS 1, available at [http://www.austlii.edu.au/au/other/dfat/treaties\\_/2005/1/chapter\\_22.html](http://www.austlii.edu.au/au/other/dfat/treaties_/2005/1/chapter_22.html). See also Article 18 of the 2004 United States Model Bilateral Investment Treaty, available at <http://www.state.gov/documents/organization/38710.pdf>.

<sup>131</sup> Art. XI of the *Treaty between the United States and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, November 11, 1991, 31 I.L.M. 124 (1992).

In light of the non-self-judging nature of this clause, the ICSID Tribunal in *CMS v. Argentina* found that it was not limited to a review assessing whether the State in question had acted in good faith, but that the clause mandated “substantive review that must examine whether the state of necessity or emergency meets the conditions laid down by customary international law and the treaty provisions and whether it thus is or is not able to preclude wrongfulness”.<sup>132</sup>

The same reasoning was also applied in other ICSID arbitrations relating to the same treaty provision, namely *LG&E v. Argentina*, *Sempra v. Argentina* and *Enron v. Argentina*. However, each of the decisions also suggested that if the tribunals had been faced with self-judging clauses, they would have had the power to review the State’s decision based on a good faith analysis.<sup>133</sup> The Tribunal in *Enron v. Argentina*, for example, stated in regard of Article XI of the United States-Argentine BIT:

“this Article was understood to be self-judging to the extent that each party will be the sole judge of when the situation requires measures of the kind envisaged by the Article, subject only to a determination of good faith by tribunals that might be called upon to settle a dispute on this question. In the Respondent’s view, the gravity of the crisis faced amply justifies resorting to such measures which can only be considered as adopted in good faith.”<sup>134</sup>

The jurisprudence of ICSID tribunals therefore also underscores the view that self-judging clauses do not constitute bars to the jurisdiction of international dispute settlement bodies. The tribunals also agreed that the appropriate standard of review to apply was review for good faith. However, one Tribunal, in *LG&E*, suggested that good faith review would not differ significantly from the substantive review undertaken by the Tribunal in the context of the non-self-judging clause in Article XI of the United States-

---

<sup>132</sup> *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, May 12, 2005, para. 374, 44 I.L.M. 1205 (2005) (all decisions by arbitral tribunals cited are also available at <http://ita.law.uvic.ca>).

<sup>133</sup> See *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, Oct. 3, 2006, para. 214; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award of Sept. 28, 2007, para. 388; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of May 22, 2007 para. 339.

<sup>134</sup> *Enron*, para. 324.

Argentine BIT.<sup>135</sup> While, in our view this statement fails to recognise that self-judging clauses have a substantive effect on the standard of review, it demonstrates nevertheless that the Tribunal did not consider self-judging clauses to alter the nature and possibility of review as such, but rather affected the standard of review to be applied.

### **C . Towards a General Standard of Review for Self-Judging Clauses?**

While a number of countries, including the United States, almost consistently adopt the view that self-judging clauses are completely unreviewable and constitute a bar to the jurisdiction of international dispute settlement bodies, this argument is also rejected by numerous States and has never been accepted by any of the dispute settlement bodies that have been called upon to answer this question. In treaty regimes that confer a dispute settlement function on a third party (such as GATT/WTO and numerous investment treaties), such an approach is, in our view, justified in the absence of an express limitation to the jurisdiction of the dispute settlement body. In situations where a dispute settlement function is conferred on a third party by consent, whether as a result of an Optional Declaration, special agreement, or *forum prorogatum* (as was the case for the ICJ in *Djibouti v. France*), such an approach is equally justified in the absence of any express limitation to the jurisdiction of the dispute settlement body in the consent given. In the same way that a domestic court will not imply a limit to its jurisdiction into legislation, neither should an international dispute settlement body imply bars to jurisdiction into treaties unless the consent of the parties is clearly limiting in this regard.<sup>136</sup>

While self-judging clauses, without more, do not oust the jurisdiction of international dispute settlement bodies, it is clear that they affect the standard of review that the court or tribunal can apply. The ICJ and a number of ICSID Tribunals agree that

---

<sup>135</sup> *LG&E*, para. 214.

<sup>136</sup> See e.g. MARK ARONSON/BRUCE DYER/MATTHEW GROVES, *Judicial Review of Administrative Action*, pp. 91-94, 832-833 (3<sup>rd</sup> ed. 2004). This approach is consistent with the fundamental principle of dispute settlement and the general principle of law that no one may be a judge in his own cause (*nemo iudex in sua causa*). See HERSCH LAUTERPACHT, *The Development of International Law by the International Court*, pp. 158-164 (1958); BIN CHENG, *General Principles of Law as Applied by the International Court and Tribunals*, pp. 279-289 (1953).

the relevant standard of review is good faith. This position is also widely shared by academic commentators.<sup>137</sup> The question remains, however, what is meant by good faith review and how does good faith review differ from the review normally undertaken by international dispute settlement bodies?

Kolb describes good faith as a general principle of international law that has as its aim “to blunt the excessively sharp consequence sovereignty and its surrogates (e.g. the principle of consent, no obligation without consent) may have on international society, in ever-increasing need of cooperation”.<sup>138</sup> In the context of treaties, the principle of good faith protects the object and purpose of the treaty against acts intending or having the effect of depriving it of its use. Described as such, it is clear that good faith is a very general legal concept. For this reason it can be useful to “concretize” the principle of good faith in order to apply it to specific cases.<sup>139</sup> How then should this principle be “concretized” in the context of reviewing the invocation of self-judging clauses?

While some dispute settlement bodies and commentators appear to prefer not to over-theorise the principle of good faith,<sup>140</sup> others have suggested more concrete approaches to the content of good faith review as applicable to self-judging clauses. One

---

<sup>137</sup> See in the WTO context: MICHAEL J. HAHN, *Vital Interests and the Law of the GATT: An Analysis of GATT's Security Exception*, 12 Mich. J. Int'l L. 558, 599-601 (1991); HANNES. L. SCHLOEMANN/STEFAN OHLHOFF, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 A.J.I.L. 424, 444 (1999); DAPO AKANDE/SOPE WILLIAMS, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365, 389-392 (2003); in the ICSID context: WILLIAM BURKE-WHITE/ANDREAS VON STADEN, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Va. J. Int'l L. 307, 376-381 (2008) (concerning self-judging clauses in investment treaties); Cf. also concerning self-judging reservations in Optional Declarations under the ICJ Statute: D. W. GREIG, *Nicaragua and the United States, Confrontation over the Jurisdiction of the International Court*, 62 Brit. Ybk. Int'l L. 119, 181-213 (1991).

<sup>138</sup> ROBERT KOLB, *Principles as Sources of International Law (with Special Reference to Good Faith)*, 53 Neth. Int'l L. Rev. 1, 18 (2006).

<sup>139</sup> *Ibid.*, at 19-20 (stating that “the key to the life of great principles is the concept of ‘concretization’, which has not yet received the attention it deserves.”).

<sup>140</sup> See e.g. DAPO AKANDE/SOPE WILLIAMS, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 Va. J. Int'l L. 365 (2003) (limiting good faith review to establishing the genuineness of a State vis-à-vis the reasons stated for the measures taken (discussed in Part B above).

such approach has been to suggest reversing the burden of proof in the context of self-judging clauses as compared to that applied in the context of non self-judging clauses.<sup>141</sup>

Generally speaking, if one State alleges a breach of a treaty obligation and the other State relies on an exception to preclude a finding of internationally wrongful conduct, it is for the State alleging the breach to establish the breach and the State invoking the exception to establish the applicability of the exception. However, in public international law States are generally presumed to act in good faith.<sup>142</sup> In light of this presumption, it is arguable that if an international dispute settlement body is only entitled to review the invocation of a self-judging clause (i.e. the invocation of an exception) for good faith, then the State alleging the breach must also bear the burden of establishing bad faith on the part of the invoking State, rather than the State invoking the exception having to establish its good faith. Such a reversal of the burden of proof in relation to the invocation of the exception would confer significant flexibility on the State invoking the self-judging clause.<sup>143</sup>

This modification of the standard allocation of the burden of proof has, however, not been applied by any international dispute settlement body and particularly where the measure taken is justified to prevent prejudice to essential [security] interests - the subject of a majority of self-judging clauses - reversing the burden of proof would practically remove all accountability. This is because in such a sensitive area it will be often be

---

<sup>141</sup> See MARTIN TRYBUS, *The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions*, 39 *Common Market Law Review* 1347, 1361-1362 (2002)

<sup>142</sup> See e.g. ROMAIN YAKEMTCHOUK, *La Bonne Foi dans la conduite internationale des Etats*, pp. 67 *et seq.* (2002); GERALD FITZMAURICE, *The Law and Procedure of the International Court of Justice*, p. 615 (1986).

<sup>143</sup> See MARTIN TRYBUS, *The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions*, 39 *Common Market Law Review* 1347, 1361-1362 (2002) (discussing this approach in the context of the ECT: "Placing the burden of proof for having acted within that margin of discretion on the Member States compromises their flexibility to an extent that might be considered as contradicting the very attribution of this flexibility. It could be argued that there is no reason why the Member State should have to prove the legality of its measures and there is no authority for this requirement in the Treaty. The burden of proof for bad faith or arbitrariness could be placed on the Commission or other Member State challenging the legality of the measure. In order to safeguard the necessary flexibility there might be an argument for an evidentiary presumption in favour of the respective government including the benefit of any reasonable doubt.").

difficult, if not impossible, for the State seeking redress for the breach of an international obligation to obtain the information necessary to prove bad faith.

Alternatively, good faith review can be "concretized" as requiring the application of a margin of appreciation. Indeed, the statement by the tribunal in *LG&E*<sup>144</sup> suggesting that good faith review would not differ significantly from a substantive review undertaken by the Tribunal in the context of a non self-judging clause may reflect the Tribunal's view that:

- in light of the subject matter of the clause, it would grant Argentina a certain amount of deference and, hence, a margin of appreciation in any event; and
- the presence of a self-judging clause/discretion merely makes explicit and compulsory the granting of that same margin of appreciation.<sup>145</sup>

This also appears to be the approach adopted by Schloemann and Ohlehoff in their analysis of GATT Article XXI as they advocate the application of a proportionality test as an element of good faith review.<sup>146</sup> Such a proportionality test, which is also applied – although more strictly – in the context of the non self-judging exceptions in Article XX(a), (b) and (d) of the GATT,<sup>147</sup> is the basis of the margin of appreciation doctrine. Indeed the margin of appreciation doctrine is essentially a proportionality test applied with a degree of deference accorded to the State's own assessment of risks and feasible measures to address them.

---

<sup>144</sup> *LG&E*, para. 214.

<sup>145</sup> See J. B. ELKIND, *Non-appearance before the International Court of Justice - Functional and Comparative Analysis*, p. 122 (1984) for a slightly different analysis based on the concept of implicit and explicit self-judging clauses. Elkind defines explicit self-judging clauses as clauses which state in so many words that they are subject to the discretion of the State and implicit self-judging clauses as those clauses that deal with an area of law in which a State's assessment of its own requirements is generally held to be a major, if not the sole, criterion for assessing its content (e.g. essential [security] interests).

<sup>146</sup> Note that as commentators agree that sub-paragraphs (i) to (iii) of Article XIX are objective legal criteria that are not part of the self-judging aspect of the provision, though potentially subject to a margin of appreciation, they are not considered further in this Part.

<sup>147</sup> See NATHALIE BERNASCONI-OSTERWALDER ET AL., *Environment and Trade: A Guide to WTO Jurisprudence*, pp 148 ff (2006).

Not everyone agrees, however, that the same margin of appreciation should be applied in the context of self-judging and non self-judging clauses. For example, Shany argues that States should be granted a wider margin of appreciation in relation to self-judging clauses than with respect to comparably phrased non-self judging clauses.<sup>148</sup>

A final approach to “concretizing” good faith review is that suggested by Judge Keith in his declaration in *Djibouti v. France*. This involves applying a framework analogous to review for improper exercise of a discretionary administrative decision-making power under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to review of the invocation of self-judging clauses. The principles of good faith and *abus de droit* are clearly closely related to the concept of the proper exercise of a granted power.

This approach to good faith review has the benefit of providing an international dispute settlement body with a number of concrete questions it can ask to assess the legitimacy of the State’s invocation of the exception. The questions are general enough to cover many of the specific tests considered necessary by academic commentators.<sup>149</sup> and are given substantive content by an identification of the object and purpose of the treaty.<sup>150</sup> Further, as compared to the application of a margin of appreciation doctrine together with a proportionality test, the questions relate more clearly only to the process of decision-making rather than the to its substance and, thus, do not infringe the State’s sovereign discretion in relation to the self-judging aspect of the clause (i.e. the determination of which measures to take in the circumstances in question).<sup>151</sup>

---

<sup>148</sup> YUVAL SHANY, *Towards a General Margin of Appreciation Doctrine in International Law*, 16 E.J.I.L. 907, 916 (2005).

<sup>149</sup> For example, the factors raised in the context of GATT Art. XXI by MICHAEL J. HAHN, *Vital Interests and the Law of the GATT: An Analysis of GATT’s Security Exception*, 12 Mich. J. Int’l L. 558, 596-597 (protection of a ‘vital industry’) and WESLEY A. CANN JR., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 Yale J. Int’l L. 413, 468 (2001) (discrimination between States posing a similar threat) can be seen as indicators of improper purpose.

<sup>150</sup> Thus an identification of the object and purpose of the treaty allows an assessment of what circumstances are relevant and irrelevant to the exercise of a power and what is and is not a proper purpose for its exercise.

Review of the invocation of a self-judging clause on administrative judicial review type grounds such as those discussed above, where the finding of an international dispute settlement body will be that the invocation of the exception was not according to law and must, therefore, either:

- be abandoned and the treaty complied with; or
- invoked again according to law

can obviously only be applied in situations where the invocation of the self-judging clause is reversible. This may explain in part why non-reversible action such as the use of force in self-defence is not self-judging and hence subject to a stricter standard of review, where review is available.

## IV. Conclusion

Self-judging clauses have sometimes been perceived as a threat to international cooperation, because they allow States to invoke domestic interests in order to escape an international obligation and put its national domestic interests in center stage. The question has even been raised whether obligations subject to self-judging exceptions are legal obligations at all, and whether they should be admissible in a world where the interests of the international community are increasingly developing and binding States into a growing network of obligations.

Yet, if States agree to include such clauses in international treaties, whether bilateral or multilateral - and this is the case in at least two of the four categories we have

<sup>151</sup>

It is clear that depending on how an unreasonableness test is applied, it can become very similar to a proportionality test (see the discussions of unreasonableness and proportionality in MARK ARONSON/BRUCE DYER/MATTHEW GROVES, *Judicial Review of Administrative Action*, pp. 334-348 (3<sup>rd</sup> ed. 2004); PHILIP A JOSEPH, *Constitutional and Administrative Law in New Zealand* p. 931-946 (3<sup>rd</sup> ed. 2007); and *De Smith's Judicial Review* p. 551-590 (6<sup>th</sup> ed. 2007). However, what is contemplated here is an unreasonableness ground of review that is only established in situations where the decision to rely on the self-judging clause is “wholly unreasonable” or “clearly unsuitable and manifestly inappropriate” (see MARTIN TRYBUS, *The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions*, 39 *Common Market Law Review* 1347, 1358-1359 (2002)).

identified - self-judging clauses cannot be viewed as invalid so long as the fundamental basis for the binding nature of international law is consent. Self-judging clauses in the context of reservations to treaties and declarations concerning the submission of States to dispute-settlement mechanisms may, however, have to be regarded differently. In such contexts, unlike in the treaty context, there is no agreement between States allowing for discretion to determine when domestic interests may trump the interest in cooperating internationally.

If States agree to allow for unilateral considerations to trump international cooperation, there is no problem of incompatibility between unilateralism and international cooperation. Indeed, it is conceivable that self-judging clauses actually further international cooperation more than they impede it, because they provide exit-valves in areas where important national interests are at stake; interests of such importance that States might prefer not to cooperate at all than to concede permanent restrictions on their sovereignty in such domains.<sup>152</sup>

In our view, self-judging clauses are thus not, in and of themselves, the Achilles heel of international law but rather can have positive effects on international cooperation.

---

<sup>152</sup>

See ANDREW EMMERSON, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse*, 11 J. Int'l Econ. L. 135, 137 (2008) (arguing that: “[self-judging s]ecurity exceptions are the necessary legal linchpins to the WTO Agreements, mediating political exigencies, while simultaneously orchestrating international economic integration”). See also WESLEY A. CANN JR., *Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance Between Sovereignty and Multilateralism*, 26 Yale J. Int'l L. 413, 417 (2001). For a related argument see MARTTI KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument*, pp. 591-592 (Re-issue with Epilogue 2005) (“Indeterminacy is an absolutely central aspect of international law’s acceptability. It does not emerge out of carelessness or bad faith of legal actors (States, diplomats, lawyers) but from their deliberate and justified wish to ensure that legal rules will fulfil the purposes for which they were adopted. Because those purposes, however, are both conflicting as between different legal actors and unstable in time even in regard to single actors, there is always the risk that rules – above all “absolute rules” – will turn out to be over-inclusive and under-inclusive. The rules will include future cases we would not like to include and exclude cases that we would have wanted to include had we known of them when the rules were drafted. This fundamentally – and not just marginally – undermines their force. It compels the move to ‘discretion’ which it was the very purpose to avoid by adopting the rule format in the first place.”).

While a State should always consider whether inserting a self-judging clause into their treaty obligations makes sense from a policy perspective, in general the abuse of their exercise is rather what is problematic. We, therefore, suggest that it is necessary to find mechanisms to limit such abuse, or in other words to find an appropriate balance between the interests in international cooperation and the domestic interest in shielding certain national decisions from international law and international law limitations.

One mechanism, where it is available, is court-monitored dispute settlement concerning the exercise of discretion under self-judging clauses. This paper has examined several regimes containing both self-judging clauses and access to international courts or tribunals in order to assess how this mechanism of accountability can be operationalised. The practice of States and international courts and tribunals suggests that self-judging clauses do not oust the jurisdiction of a dispute settlement body, but instead affect the standard of review courts and tribunals must apply.

It is generally agreed that the standard required is that of good faith review, however the “concretization” of this standard has been approached in different ways (e.g. the suggestion to reverse the burden of proof; the margin of appreciation doctrine, or administrative law like review for improper purpose). While we have a preference for the administrative law approach to review of self-judging clauses discussed above as the grounds of review to apply in the context of review of self-judging clauses, we consider that it would not be wise to suggest a uniform standard of review of State action under self-judging clauses; that is uniform in that it could apply to self-judging clauses in any field of law.(such as international trade law, international investment, mutual assistance, etc) and before any dispute settlement body.

The standard of review that courts or tribunals should choose might properly be influenced by a number of aspects that are specific to the institutional set-up of the court or tribunal or the treaty regime within which the self-judging clause is located. Such institutional factors include the scope of State consent, the question of compulsory versus voluntary jurisdiction, the existence of compliance mechanisms, the similarities or disparities between the participating States, the subject matter of the treaty (i.e. protecting human rights versus commercial interests) and potentially a number of other factors. In

other words, the choice of the standard of review, as distinguished from the grounds of review, goes to the heart of how each dispute settlement mechanisms is set up and the system in which it operates – and perhaps also to how it views its role.

On balance, however, we consider that such fine-tuning of the standard of review can be integrated within a framework for the scrutiny of self-judging clauses by third-party dispute settlement mechanisms that is in principle based on analogies to judicial review under domestic law of discretionary decisions taken by administrative bodies. The capacity for such fine-tuning can be seen in the sliding scale approach to intensity of review adopted in New Zealand, and the three different levels of intensity of review applied in Canada.<sup>153</sup>

In conclusion, self-judging clauses are an important hinge in the interactions between unilateralism, international cooperation and court-monitored compliance and dispute settlement. The task for the dispute-resolver in this context is to develop an appropriate and acceptable balance between the recognized need for self-determination and international cooperation that will allow both to flourish. Courts and tribunals thus assume a crucial function in delimiting the realms of the national and international and help to transform the traditional State-centered view of international law into one of effective international cooperation.

---

<sup>153</sup>

See *De Smith's Judicial Review* p. 600-604 (6<sup>th</sup> ed. 2007).