

“If the State Considers”: Self-Judging Clauses in International Dispute Settlement

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Abstract

- I. Introduction
- II. A General Framework for Analyzing Self-Judging Clauses
 1. Defining Self-Judging Clauses
 2. Determining the Existence of Self-Judging Clauses
 3. Discretion versus Deference
 4. A Taxonomy of Self-Judging Clauses
 - a. Clauses Concerning the Restriction of, or Derogations from, International Obligations
 - b. Exit-Clauses from International Regimes
 - c. Clauses Pertaining to the Jurisdiction of an International Court or Tribunal
 - d. Clauses Concerning Reservations to International Treaties
 5. Summary
- III. Avoiding Abuse: Self-Judging Clauses in International Dispute Settlement
 1. Non-Judicial Mechanisms to Hold States Accountable for Violations of Self-Judging Clauses
 2. Self-Judging Clauses and International Dispute Settlement
 - a. Self-Judging Clauses in the GATT/WTO-System
 - aa. Article XXI GATT: Barring Jurisdiction or Affecting the Standard of Review?
 - bb. Article XXI GATT: The Appropriate Standard of Review
 - b. Self-Judging Clauses in Investment Treaty Arbitration
 - c. Self-Judging Clauses before the International Court of Justice
 3. Summary

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- IV. Towards a General Standard of Review for Self-Judging Clauses
 - 1. Possible Concretizations of Good Faith Review
 - 2. Exploring the Domestic Administrative Law Analogy
 - a. Commonwealth Common Law Countries
 - b. The United States
 - c. France
 - d. Germany
 - e. Summary
 - 3. Applying the Domestic Administrative Law Analogy to Self-Judging Clauses
- V. Conclusion

Abstract

In aiming at reconciling the interest of states in international cooperation with a state's interest in safeguarding certain essentially national interests, self-judging clauses constitute a crucial hinge between state sovereignty and international cooperation. While such clauses have traditionally only occupied a minor place in the jurisprudence of international Courts and Tribunals, issues surrounding them appear increasingly often as international dispute settlement bodies proliferate and broaden their jurisdiction. However, their function, scope and effect in international dispute resolution are only tentatively theorized and not fully settled. This article, therefore, considers the nature of self-judging clauses in international law and provides a general framework to elucidate their function and effect. It focuses, in particular, on their function in 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 apply in relation to the state invoking the operation of such a clause.

I. Introduction

International law today is in a state of rapid growth and transformation. One of the elements of this development is the proliferation of international dispute settlement bodies that help to settle uncertainty about the extent of international obligations and to ensure compliance with them, as well as increasing recourse to established international dispute set-

tlement bodies such as the International Court of Justice (ICJ).¹ 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.² It coincides with a certain decline of sovereignty as the focal point of traditional international law and the move from unilateral and bilateral structures to multilateralism.³

At the same time, residues of 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 the state in question considers compliance to harm its sovereignty, security, public policy – or more generally – its essential interests.⁴ These so-called “self-judging clauses” appear relatively frequently in various types of international instruments, including treaties on mutual assistance, extradition, trade and investment, or private international law

¹ A surge of literature has developed that focuses on the implications of this development for the international legal system. See, for example, L. Helfer/A. Slaughter, “Toward a Theory of Effective Supranational Adjudication”, *Yale L. J.* 107 (1997), 273 et seq.; B. Kingsbury, “Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?”, *N.Y.U.J. Int’l L. & Pol.* 31 (1999), 679 et seq.; J. Charney, “The Impact on the International Legal System of the Growth of International Courts and Tribunals”, *N.Y.U.J. Int’l L. & Pol.* 31 (1999), 697 et seq.; C. Romano, “The Proliferation of International Judicial Bodies: The Piece of the Puzzle”, *N.Y.U. J. Int’l L. & Pol.* 31 (1999), 709 et seq.; R. Alford, “The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance”, *ASIL* 94 (2000), 160 et seq.; S. Spelliscy, “The Proliferation of International Tribunals: A Chink in the Armor”, *Colum. J. Transnat’l L.* 40 (2001), 143 et seq.; L. Reed, “Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?”, *ASIL* 96 (2002), 219 et seq. 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 *N.Y.U.J. Int’l L. & Pol.* 31 (1999), 697 et seq.

² Cf. A. Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht*, 2007, 686 et seq.

³ See B. Simma, “From Bilateralism to Community Interest in International Law”, *RdC* 250 (1994), 217 et seq.

⁴ See S. Rose-Ackerman/ B. Billa, “Treaties and National Security”, *N.Y.U.J. Int’l L. & Pol.* 40 (2008), 437 et seq.

and arbitration.⁵ By means of these clauses states 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.

To a certain extent, therefore, self-judging clauses allow states to reconcile their interest in establishing cooperative links with other states by entering into international obligations with the possibility of upholding certain national interests that are considered to be paramount from the domestic perspective. However, self-judging clauses also generate a tension between international cooperation, on the one hand, and unilateralism, on the other, as their existence may invite the state that is invoking such a clause *ex post* in a dispute with the other Contracting Party to make use of its discretion in a manner that is beyond what the Contracting States had originally anticipated. Potentially, the clauses can thus have a 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 bring about a cooperative regime. In light of this tension, self-judging clauses constitute the focal point of conflicting national interests and international cooperation and can be considered as “the Achilles’ heel of international law” that is left unshielded whenever international law and the protection of essential state interests collide.⁶

Despite their pervasiveness, self-judging clauses historically have not played a major role in international dispute resolution, apart from passing reference in older jurisprudence of the ICJ and in Panel decisions

⁵ The term “self-judging clause” is used as a short-hand term for the types of clauses under consideration in this article. This term is frequently used in the literature but should not be taken as implying that such clauses are entirely self-judging as will become apparent through this article.

⁶ H. Schloemann/ S. Ohlhoff, “‘Constitutionalization’ and Dispute Settlement in the WTO: National Security as an Issue of Competence”, *AJIL* 93 (1999), 424 et seq. (426) (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.”).

under the General Agreement on Tariffs and Trade (GATT). More recently, however, the invocation of self-judging clauses, or what one of the disputing parties has asserted to be a self-judging clause, has gained prominence in arbitral proceedings under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention)⁷ in proceedings relating to the Argentine economic crisis of 2001/2002⁸ and in the judgment by the ICJ in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.⁹ These proceedings have elucidated, but not settled, the many difficult issues surrounding the application of self-judging clauses in international dispute resolution.

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. This is despite the fact that such clauses appear to play an important function in reconciling the sometimes competing mechanics of protecting the national interest while furthering international cooperation, which, together with the increasing depth of international cooperation and progressing interactions of states in areas that traditionally have been considered as part of the inalienable domestic realm, means that the application of self-judging clauses will potentially increase in the years and decades to come, including in international dispute settlement.

In order to understand the nature and effect of self-judging clauses and to develop a doctrinal framework for their interpretation and application, this article begins, in Part II., by outlining a definition of self-judging clauses and by categorizing them according to their function in different international legal instruments. It is submitted that the specific characteristic of a self-judging clause is that it affords a state discretion, within the scope of application of the clause, to decide whether it gives primacy to the content of an international obligation or pursues its national interest contrary to cooperating internationally. This Part will

⁷ UNTS Vol. 575 No. 159 (entered into force 14 October 1966).

⁸ See under Part III. 2. b.

⁹ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, available via <<http://www.icj-cij.org>>. For a discussion of the case see notes 143 - 158 below and accompanying text. See further R. Briese/ S. Schill, "Djibouti v. France – Self-Judging Clauses Before the International Court of Justice", *Melbourne Journal of International Law* 10 (2009), 308 et seq.

not only give various examples of self-judging clauses, but will equally address how to distinguish them from non-self-judging clauses.

The article then considers, in Part III., how self-judging clauses can be interpreted and applied in international dispute settlement fora in order to reconcile the effort to further international cooperation with the unilateral interest of states in reserving certain areas of specific concern to their self-determination. This is done through an analysis of various treaty regimes in which self-judging clauses have been considered or applied in dispute settlement, in particular in the GATT/World Trade Organization (WTO) system, in arbitrations under international investment treaties, and by the ICJ. In this context, the analysis focuses particularly 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 article argues that existing state practice and international jurisprudence suggest that self-judging clauses do not oust the jurisdiction of a dispute settlement body, but rather affect the applicable standard of review. They do not provide the state invoking the clause with an unlimited and non-reviewable *carte blanche*. Rather the dispute settlement body retains the power to implement a "good faith review."

Accepting that "good faith review" is the generally applicable standard in the context of self-judging clauses, Part IV. of this article considers how this test can be applied in practice. In this context, the paper suggests that an analogy can be drawn between "good faith review" by international dispute settlement bodies and the standard of review applied by Courts in domestic legal systems in relation to discretionary decisions taken by administrative agencies. This analogy turns on the manner in which domestic administrative dispute settlement systems deal with and control the discretion granted to the executive branch of government. The analogy, it is argued, is appropriate in view of the presence of discretion as a central element both in the domestic administrative law context as well as at the international level as regards self-judging clauses. It arguably affords the state invoking the clause sufficient leeway to give primacy to its national interest while allowing a Court or Tribunal to curtail an abuse of discretion by implementing a range of primarily procedural limitations without questioning the content of the state's decision or weighing the domestic interest protected versus the interest in international cooperation of other international actors. Potentially, this analogy, which finds support in a significant number of domestic legal systems, can be the basis for developing a general standard of review for self-judging clauses that can be used in-

dependently of the subject matter of the specific self-judging clause concerned.

II. A General Framework for Analyzing 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.¹⁰ In an attempt to understand them as a general phenomenon of the law of international treaties and international cooperation this Part outlines the characteristics of self-judging clauses, proposes a definition of self-judging clauses and sets out a taxonomy of the types of self-judging clauses that currently exist.

1. Defining Self-Judging Clauses

Although, there is currently no generally accepted definition of self-judging clauses, existing state practice and jurisprudence by international Courts and Tribunals provide 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. It constitutes a safety valve for reconciling international cooperation and for 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 in-

¹⁰ See the areas and literature discussed below under Part III.

ternational governance have over a state, in particular the power of an international dispute settlement body like the ICJ.¹¹ 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.

Second, 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 from the point of view of the state concerned (even though a certain amount of review of this invocation may remain). 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 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.

Self-judging clauses can therefore be defined as provisions in international legal instruments by means of which states retain their right to escape or derogate from an international obligation based on unilateral considerations and based on their subjective appreciation of whether to make use of and invoke the clause *vis-à-vis* other states or international organizations.¹²

¹¹ 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 B. Kingsbury/ N. Krisch/ R. Stewart, “The Emergence of Global Administrative Law”, *Law & Contemp. Probs.* 68 (2005), 15 et seq. In this context, self-judging clauses thus have the effect of shielding a state from such mechanisms of global governance.

¹² We note that 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. While such concerns have some merit in the context of unilateral instruments (see below under II. 4. c. and II. 4. d.), where self-judging clauses are included in treaties, there is technically no conflict between unilateralism and bi- or multilater-

2. Determining the Existence of Self-Judging Clauses

Since undertaking international obligations presupposes that cooperation rather than the safeguarding of unilateralism is being provided for, the existence of self-judging clauses or self-judging elements in an international treaty or other declaration cannot be presumed. Rather, as the emphasis in article 31 (1) of the Vienna Convention on the Law of Treaties¹³ on the wording of a treaty provision in its context and in view of its object and purpose suggests, the terms of an international treaty have to make clear in an objective manner that the states in question intended to retain discretion in derogating from international law obligations based on their subjective evaluation of the circumstances under a self-judging clause.¹⁴ 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 the unilateral consideration of the scope and applicability of a provision is granted to the Contracting Parties.¹⁵ The way the grant of this discretion is expressed in international treaties is usually by including language such as “if the state con-

alism, as states have consented to allow the influence of unilateral considerations to a certain extent.

¹³ Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, UNTS Vol. 1155 No. 331 (entered into force 27 January 1980).

¹⁴ P. Reuter, *Introduction to the Law of Treaties*, 2nd edition 1995, 96 (“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”); I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition 1984, 115 (stating, *inter alia*, that the interpretative methodology endorsed by arts 31 and 32 of the Vienna Convention on the Law of Treaties 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”); J. Sorel, “Article 31 (Convention de Vienne de 1969)”, in: O. Corten/ P. 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, 2nd edition 1970, 255 (stating that article 31 (1) of the Vienna Convention on the Law of Treaties “embodies the literal and teleological techniques of interpretation”).

¹⁵ For an analysis of the difference between discretion and deference see Part II. 3. below.

siders” or wording that has a similar effect, i.e., language such as “in the state’s opinion”, “if the state determines”, etc.¹⁶

For example, a treaty for cooperation and mutual assistance in criminal matters, the Convention on Mutual Assistance in Criminal Matters between Djibouti and France,¹⁷ which was the focus of the ICJ’s decision in *Djibouti v. France*,¹⁸ 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.”¹⁹ (emphasis added)

As made clear by the wording of this clause, the Contracting Parties thereby established a subjective test of whether the exception is applicable in any given circumstances and assigned the power of definition and interpretation to the state refusing cooperation.

Self-judging clauses can be contrasted with non self-judging clauses. 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.”²⁰

¹⁶ Clauses that are implicitly self-judging, i.e., clauses that confer discretion upon a state to make use of a unilateral determination of obligations assumed under an international treaty will, by contrast, be rather exceptional, because one cannot presume that states intended to allow unilateral considerations to trump their effort in cooperation. To interpret a treaty provision as implicitly self-judging will thus require that the state parties’ intention to confer self-judging discretion on a state is otherwise clear. For a discussion about implicitly self-judging clauses in the context of a non-precluded-measures-clause in the U.S.-Argentine BIT see W. Burke-White/A. von Staden, “Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties”, *Va. J. Int’l L.* 48 (2008), 307 et seq. (381-386); J. Alvarez/ K. Khamsi, “The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime”, *Yearbook on International Investment Law & Policy* 1 (2009), 379 et seq. (417-426).

¹⁷ Mutual Assistance Convention, signed 27 September 1986, UNTS Vol. 1695 No. 297 (entered into force 1 August 1992).

¹⁸ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9.

¹⁹ Article 2 (c) of the Mutual Assistance Convention, see note 17.

This provision does not include the words “if the requested State considers” or similar language. Rather, the provision 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 also 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,²¹ which contained a clause providing that “the present Treaty shall not preclude the application of measures ... necessary to fulfil the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests,” 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. 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, on the contrary, speaks simply of ‘necessary’ measures, not of those considered by a party to be such.”²²

²⁰ Article 2 (b) Mutual Assistance Convention, *ibid.*

²¹ Treaty of Friendship, Commerce and Navigation (with Protocol), signed 21 January 1956, Nicaragua - United States, UNTS Vol. 367 No. 3 (entered into force 24 May 1958).

²² See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, 14 et seq. (116, para. 222). *Ibid.*, 141, para. 282 (reiterating the importance of the wording of a clause by observing that “whether a measure is necessary to protect the essential security interests of a party is not, as the Court has emphasized

The ICJ, therefore, attributed significance to the wording of international treaty provisions and inferred from the lack of specific terms that assigned the power of definition of what was “necessary ... to protect the state’s essential security interests” to the state invoking that clause that no self-judging aspects, which could limit the Court’s power of review, were intended by the Contracting Parties to the treaty in question. At the same time, the Court clearly accepted that clauses in international treaties could be self-judging.

A similar approach has been adopted in recent decisions by Investment Tribunals deciding investor-state disputes under bilateral investment treaties (BITs). The decisions concerned the question of whether Argentina was able to escape from its obligations under the BIT with the United States when taking measures during its economic crisis in 2001/2002 that negatively affected investors covered by the treaty in question. The decisions involved interpreting the specific emergency clause in that treaty which provided:

“This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.”²³

Argentina, in several investor-state proceedings, argued that this clause was self-judging and accordingly allowed Argentina to determine whether the measures it took during its economic crisis were necessary, free of review by an arbitral tribunal, and without engaging its international responsibility.²⁴ The Tribunals in the respective proceedings,

(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.”).

²³ Article XI of the Treaty between the United States and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed 11 November 1991, *ILM* 31 (1992), 124 et seq. (entered into force 20 October 1994).

²⁴ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 349-352; *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, para. 208-209; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award of 28 September 2007, para. 366-368; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007, para. 324-326; *Continental Casualty*

however, adopted the position that self-judging clauses had to be framed explicitly in order to grant a state discretion in the determination of the clause's scope of application. Similarly to the ICJ decision in the *Nicaragua* case, they drew a distinction between "measures necessary for the protection of essential security interests" and "measures that the state considers necessary for the protection of essential security interests" and held that the former clauses were not of a self-judging nature.²⁵ The Tribunal in *CMS v. Argentina*, for example, held that "when states intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly."²⁶ Similarly, the Tribunal in *Sempra v. Argentina* was of the view that "[t]ruly 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."²⁷ These decisions reinforce that there is a presumption against interpreting clauses in international treaties as self-judging unless such an intention finds a clear expression in the treaty text itself.

Company v. Argentine Republic, ICSID Case No. ARB/03/9, Award of 5 September 2008, para. 183 (all awards and decisions by arbitral tribunals are available via the Investment Treaty Arbitration website at <ita.law.uvic.ca> or the Investment claims website via <www.investmentclaims.com>). Cf. also J. Kurtz, *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis*, available via <www.jeanmonnetprogram.org/papers/08/080601.pdf> Jean Monnet Working Paper 2008, 30-31. See further also the discussion in the literature cited above at note 16.

²⁵ See *CMS v. Argentine Republic*, see note 24, para. 366-373; *LG&E v. Argentine Republic*, see note 24, para. 207-214; *Sempra v. Argentine Republic*, see note 24, para. 366-388; *Enron v. Argentine Republic*, see note 24, para. 324-339; *Continental Casualty v. Argentine Republic*, see note 24, para. 182-188. These cases are discussed further below in Part II. 4. b.

²⁶ *CMS v. Argentine Republic*, see note 24, para. 370.

²⁷ *Sempra v. Argentine Republic*, see note 24, para. 379; see further *ibid.*, para. 383 (stating that "that the language of a provision has to be very precise for it to lead to a conclusion about its self-judging nature"); very similar language can be found in *Enron v. Argentine Republic*, see note 24, para. 335-336.

3. Discretion versus Deference

In order to understand the effect of self-judging clauses on international dispute settlement bodies, it is also important to distinguish between the discretion that such a clause grants to states from the deference that international Courts and Tribunals grant in various contexts to a state in reviewing how that state has chosen to execute or derogate from its international obligations. Although international Courts and Tribunals sometimes 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, in this context, would be unlawful and thus *ultra vires*. Deference also grants a certain margin of appreciation to a state within which the dispute resolver does not scrutinize the state's decision. This margin of appreciation is, however, based on the self-restraint that the Court or Tribunal exercises *vis-à-vis* the state and does not reflect an entitlement of the latter. In consequence, overstepping the margin within which Courts and Tribunals pay deference is not unlawful and does not constitute an excess of power.

Certainly, in practice both deference and the discretion granted under self-judging clauses are functionally similar in reconciling state sovereignty and court-monitored international cooperation. This can be illustrated, for example, with respect to treaty clauses pertaining to national security and emergencies that are not self-judging, but in the scrutiny of which international dispute settlement bodies have exercised restraint. Thus, under article 15 (1) of the European Convention on Human Rights (ECHR),²⁸ the European Court of Human Rights (ECtHR) regularly pays deference to the decisions of states to derogate from the Convention without being mandated to do so.²⁹ Article 15 (1) ECHR provides:

²⁸ UNTS Vol. 213 No. 222, signed 4 November 1950 (entered into force 3 September 1953).

²⁹ Another example is article 297 (ex-article 224) of the Treaty Establishing the European Community (ECT), UNTS Vol. 298 No. 11, 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

“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.”

Based on a textual approach to interpretation, 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.” It does not, therefore, establish a self-judging carve-out for states. Notwithstanding this, the ECtHR regularly grants a wide margin of appreciation to Member States when determining whether a state’s measures fall under the emergency exception. Thus, in *Ireland v. United Kingdom* the Court stated:

“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.”³⁰

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 in *Commission v. Greece*, Case C-120/94, ECR 1996, 1513 et seq. (arguing that article 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 ...”).

³⁰ See *Ireland v. United Kingdom*, ECtHR, Ser. A, No. 25, Judgment of 1 January 1978, para. 207. See also *Brannigan and McBride*, ECtHR, Ser. A, No. 258-B, Judgment of 26 May 1993, para. 43. See further C. Ashauer, “Die Menschenrechte im Notstand”, AVR 45 (2007), 400 et seq. (418–421).

Although the state's appreciation regarding the applicability of the exception is not expressly referred to in article 15 (1) ECHR, the Court attributes to the state a considerable degree of deference. It considers the state in question to be best-placed to determine the existence of an emergency and the means to overcome it.

In effect, the differences between the practice of paying deference to state decisions under review and the function of self-judging clauses are subtle. Yet, the margin of appreciation the ECtHR grants under article 15 (1) ECHR is based on the institution's self-restraint rather than on the concept that the Court is legally required to limit its standard of scrutiny. Similarly, the respective degree of deference accorded depends on the circumstances at play and can range from a very deferential approach to a fairly robust review of the legitimacy of a state's action.³¹ Finally, the decision about the scope and the extent of deference is made by the dispute settlement body itself and can vary depending on the cir-

³¹ For example, in *The Observer v. United Kingdom*, *European Human Rights Reports* 14 (1992), 15 et seq. (218), Judge Morneilla noted, in a partly dissenting opinion, that “[i]t is true that the state's margin of appreciation is wider when it is a question of protecting national security than when it is a question of maintaining the authority of the judiciary by safeguarding the rights of the litigants.” By contrast, in cases alleging torture or inhuman or degrading treatment or punishment, such as *Chahal v. United Kingdom*, *European Human Rights Reports* 23 (1997), 413 et seq. (457), the ECtHR has held that no margin of appreciation exists. See also R. Macdonald, “The Margin of Appreciation”, in: R. Macdonald/ F. Matscher/ H. Petzold (eds), *The European System for the Protection of Human Rights*, 1993, 83, 84. See generally Y. Shany, “Towards a General Margin of Appreciation Doctrine in International Law”, *EJIL* 16 (2005), 907 et seq. (927) (enumerating as relevant factors for granting deference by an international Court or Tribunal the comparative advantage of local authorities, the indeterminacy of the applicable standard and the nature of the contested interests). For a discussion of the spectrum of deference accorded when interpreting exceptions to the EC Treaty see A. Arda, “Member States' Right to Derogate from the European Treaties: A Commentary on Article 297 TEC”, in: H. Smit/ P. Herzog/ C. Campbell/ G. Zagel (eds), *Smit & Herzog on the Law of the European Union*, 2nd edition 2006, Chapter 398, 1 et seq.; M. Trybus, “The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions”, *Common Market Law Review* 39 (2002), 1347 et seq. (1368-1369).

cumstances of the case before it,³² while the scope and extent of discretion is, in principle, determined by the Contracting Parties. Making changes to that scope and extent is, therefore, not within the power of the dispute settlement body.

There are a number of rationales for the exercise of self-restraint or deference relating to the legitimacy and capacity of international Courts and Tribunals.³³ 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.”³⁴ Norms falling into this category are generally standard-type norms, such as “reasonable”, “proportional” or “necessary”,³⁵ or broad subject-based concepts such as “public emergency”, “security”, “essential interests” or “*ordre public*.”³⁶ In international law, such broad concepts most frequently relate to areas consid-

³² See Shany, see note 31, 914 (observing that “[u]ltimately, it would be for international courts to determine whether deference to national authorities is warranted, and to what extent”).

³³ See Shany, see note 31, 908 for a discussion of the rationales for and against the application of a margin of appreciation. See also *Handyside v. United Kingdom*, ECtHR, Ser. A, No. 24, Judgment of 7 December 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.”).

³⁴ Shany, see note 31, 910.

³⁵ Shany, see note 31, 914 et seq.

³⁶ See e.g. *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (U.S.-Gambling)*, WTO Panel Report, 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 N. Diebold, “The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole”, *Journal of International Economic Law* 11 (2007), 43 et seq.

ered fundamental to a state's sovereignty and which states traditionally have viewed as unsuitable for judicial assessment.³⁷ Similar rationales also are the drivers behind the inclusion of self-judging clauses in international instruments, as self-judging clauses are most often found in instruments with an effect on such areas.³⁸ Yet, including self-judging clauses in international treaties, instead of relying on the deferential self-restraint of an international Court or Tribunal, seems to occur more frequently in less institutionalized and less integrated systems of international cooperation.

It is important to note, however, 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,³⁹ which concerned the customary international law concept of necessity as a circumstance precluding the wrongfulness of an act not in conformity with an obligation under international law,⁴⁰ and the *Oil Platforms* case,⁴¹ which relevantly involved the invocation of self-defense, the ICJ appeared not to grant to the states concerned any margin of appreciation, although the concepts of necessity and self-

³⁷ See e.g. R. Jennings, "Recent Cases on 'Automatic' Reservations to the Optional Clause", *ICLQ* 7 (1958), 349 et seq. (362) (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.").

³⁸ However, discretion granted under self-judging clauses is not necessarily and intrinsically tied to such areas. See, for example, article 2 (a) of the Mutual Assistance Convention, see note 17, 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."

³⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, 7 et seq.

⁴⁰ See article 25 of the ILC Articles on State Responsibility, 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."

⁴¹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 2003, 161 et seq.

defense both include standard-type norms, and self-defense involves security concerns.

In the *Gabčíkovo-Nagymaros Project* case, Hungary argued that the question of whether necessity and its elements applied, as specified in article 25 of the ILC's Articles on State Responsibility, 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 by the state invoking it. Instead, the Court observed that, because of its exceptional nature, "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."⁴² 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" and determined objectively, i.e., without paying deference to the state concerned, whether the substantive elements of necessity, namely the existence of a serious impairment of an essential interest were met, and whether Hungary's reaction was objectively necessary to protect these interests.⁴³

Similarly, in the *Oil Platforms* case, the ICJ endorsed an objective approach to questions of self-defense and national security without granting the state concerned any deference in the form of a non-reviewable domain of decision-making. Instead, against the United States' argument that it should be accorded certain discretion in respect of its application of measures to protect its essential security interests, the Court stated 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'."⁴⁴ Despite the subject matter and the normative flexibility of the elements under which self-defense is permissible, the Court chose an objective and fairly rigid standard of review of the measures taken by the United States.

⁴² See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, see note 39, 40, para. 51.

⁴³ *Ibid.*, 40, para. 52.

⁴⁴ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, see note 41, 196, para. 73.

Certainly, the ICJ's standard of review in the *Gabčíkovo-Nagymaros Project* case could be explained by the context, object and purpose of the necessity exception which applies only "under certain very limited circumstances."⁴⁵ Similarly, in the *Oil Platforms* case, the ICJ's strict scrutiny could be explained by the *jus cogens* status of the prohibition on the use of force and the strict interpretation of exceptions to such a prohibition that follows from it.⁴⁶ Nonetheless, when compared to the jurisprudence of the ECtHR as regards article 15 (1) 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.

While these examples show that the deference accorded in the presence of standard-based norms and in matters of essential (security) interests, varies from court to court and from clause to clause, they all concerned situations in which no expressly self-judging clause was involved. The strict scrutiny applied by the ICJ in the context of necessity and self-defense is strong evidence that the level of scrutiny applied by international dispute settlement bodies is not necessarily linked to, or a function of, the subject matter of an exception. Indeed these examples emphasize the difference between discretion under self-judging clauses and the deference occasionally paid by international dispute settlement bodies. Thus, an objective framing of exceptions to international obligations allows international Courts and Tribunals to review whether the elements of such exceptions are met without being required to pay def-

⁴⁵ See the Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in: *Yearbook of the International Law Commission* (2001) Vol. II, Part Two, 83. Similarly *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, see note 39, 40, para. 51 (stating that "the state of necessity ... can only be accepted on an exceptional basis").

⁴⁶ See also Separate Opinion of Judge Kooijmans, see note 41, 260, 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 Shany, see note 31, 931 et seq.

erence to the subjective assessment of the state invoking it. By contrast, in the presence of a self-judging clause, the state's subjective assessment must be respected so long as it falls within the bounds of the discretion conferred.

4. A Taxonomy of Self-Judging Clauses

Self-judging clauses appear in numerous international instruments, including in treaties on mutual assistance, extradition, and trade and investment, as well as in treaties relating to private international law and arbitration, and many others. As mentioned above, they are most often related to certain subject matters, such as the protection of national security or the safeguard of fundamental values and policy choices of a state. 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; it would also add little to a functional understanding of the clauses in reconciling unilateralism and state interests with international cooperation. Nor would such an analysis assist in analyzing their treatment in international dispute settlement. Consequently, this paper considers that a functional taxonomy is 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.

a. Clauses Concerning the Restriction of, or Derogations from, International Obligations

The majority of self-judging clauses allow for unilateral determinations concerning restrictions of or exceptions to international obligations. This category of clauses allows states a "partial exit" from an international obligation while the state generally remains under the scope of applicability of the respective treaty regime. The Contracting Parties, in other words, subject themselves fully to the legal regime established by the treaty in question, while maintaining limited carve-outs to their in-

ternational obligations in circumstances where they consider specific aspects pertaining to their sovereignty or self-determination to be negatively affected and do not, therefore, want to restrict their scope of action in that respect. For example, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)⁴⁷ contains a broadly framed exception to the obligation to recognize and enforce foreign arbitral awards. Its article V (2)(b) provides:

“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.”

This clause is clearly self-judging as it permits the enforcement state to derogate from one of the two central obligations under the Convention, namely the obligation to recognize and enforce foreign arbitral awards, if the competent state agency, i.e., generally the courts of the state concerned, finds that recognition and enforcement would be contrary to that state’s public policy. Article V (2)(b) of the New York Convention, 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 under article V (2)(b) of the New York Convention has been designated as “the greatest single threat to the use of arbitration in international commercial disputes”⁴⁸ or as a “loophole” undermining the binding nature of international arbitration⁴⁹ “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 pub-

⁴⁷ UNTS Vol. 330 No. 3, signed 10 June 1958 (entered into force 7 June 1959).

⁴⁸ J. Junker, “The Public Policy Defence to Recognition and Enforcement of Foreign Arbitral Awards”, *Cal. W. Int’l L. J.* 7 (1977), 228 et seq.

⁴⁹ See e.g. *Parsons & Wittemore Overseas Co. v. Société Générale de l’Industrie du Papier [RAKTA]*, 508 F.2d 969, 974 (2d Cir. 1974); Z. Kitigawa, “Contractual Autonomy in International Commercial Arbitration”, in: P. Sanders (ed.), *International Arbitration*, 1967, 132, 139; D. Straus, “Arbitration of Disputes between Multinational Corporations”, *The Arbitration Journal* 24 (1968), 228 et seq. (233-234).

lic policy of the forum.”⁵⁰ Equally, the public policy defense has been criticized as suffering “conceptually from being an expression of ultimate sovereign power in international commercial arbitration, which paradoxically is disfavoured by the courts because of its inherently provincial and parochial nature.”⁵¹ Accordingly, it is recognized that the interpretation of the scope of “public policy” under article V (2)(b) of the New York Convention is open to the unilateral determination of the Contracting Party invoking it and therefore constitutes a self-judging exception to the obligation to recognize and enforce foreign arbitral awards.

In practice, however, the fear that the self-judging leeway granted to states under article V (2)(b) of the New York Convention is destructive to international cooperation has proved to be largely unfounded. The refusal to recognize and enforce foreign arbitral awards on the basis of the enforcement of a state’s public policy is not only rather rare;⁵² Courts in most states also interpret the concept of public policy restrictively, by recognizing the importance of the Convention’s aim of allowing for cross-border enforcement of arbitral awards and the contribution that effective dispute settlement through arbitration makes towards furthering transborder commercial activities.⁵³ Nevertheless, a state de-

⁵⁰ Junker, see note 48, 228. See more generally on the public policy exception under the New York Convention D. Donovan, “International Commercial Arbitration and Public Policy”, *N.Y.U.J. Int’l L. & Pol.* 27 (1995), 645 et seq.; D. DeValerio Andrews, “The Public Policy Exception to Arbitral Finality”, *The Boston University Public Interest Law Journal* 12 (2003), 461 et seq.; H. Holtzmann/ J. Neuhaus, *A Guide to the UNCITRAL Model Law on Commercial Arbitration: Legislative History and Commentary*, 1989.

⁵¹ Junker, see note 48, 245 et seq.

⁵² N. Gumzej, *Public Policy in Recognition and Enforcement of Foreign Arbitral Awards*, unpublished LL.M. Thesis Central European University Budapest, p. 1 (2002) (on file, *inter alia*, with the Peace Palace Library in The Hague); P. Sanders, “A Twenty Years’ Review of the Convention on the Recognition and Enforcement of Arbitral Awards”, *The International Lawyer* 13 (1979), 269 et seq. (270).

⁵³ See for a broad comparative study Gumzej, see note 52, 34 (concluding 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, see note 52, 3, footnote 10. On the scope of the public policy exception in Sweden see L. Heuman/ G. Maillqvist, “Swedish Supreme Court Refuses to Enforce an Arbitral Award Pursuant to the Public Policy Provision of the New York Convention”,

ciding to adopt a broad reading of the public policy exception under article V (2)(b) of the New York Convention would be entitled to do so in view of the self-judging nature of that exception.

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),⁵⁴ 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

Journal of International Arbitration 20 (2003), 493 et seq.; for the same in the legal system of New Zealand see A. Kawharu, “The Public Policy Ground for Setting Aside and Refusing Enforcement of Arbitral Awards – Comments on the New Zealand Approach”, *Journal of International Arbitration* 24 (2007), 491 et seq. See also T. Harris, “The ‘Public Policy’ Exception to Enforcement of International Arbitration Awards under the New York Convention”, *Journal of International Arbitration* 24 (2007), 9 et seq.; A. Redfern/ M. Hunter, *Law and Practice of International Commercial Arbitration*, 3rd edition 1999, 457. See further the contributions to the “Special New York Convention Number” in *Journal of International Arbitration* 25 (2008), 647-912. Furthermore, there have been various attempts to define the public policy exception in terms of a transnational public policy rather than national policy considerations. See Gumzej, see note 52, 141 et seq. Cf. also F. Mantilla-Serrano, “Towards a Transnational Procedural Public Policy”, *Arbitration International* 20 (2004), 333 et seq.; R. Kreindler, “Approaches to the Application of Transnational Public Policy by Arbitrators”, *Journal of World Investment* 4 (2003), 239 et seq.

⁵⁴ North American Free Trade Agreement (NAFTA), signed 17 December 1992, entered into force 1 January 1994 *ILM* 32 (1993), 296 et seq. (296, 695).

nuclear weapons or other nuclear explosive devices.” (emphasis added)

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 security interest itself.⁵⁵ 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 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).⁵⁶

b. Exit-Clauses from International Regimes

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 providing for temporal or subject-matter restrictions to an international obligation. They allow the state to put itself outside the law established by the fabric of obligations of the specific treaty regime and thus go beyond the effect of the first category of self-judging clauses.

This category of self-judging clauses, however, is rare. One example is article X (1) of the Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty), which provides:

⁵⁵ See discussion in relation to the interpretation of GATT article XXI below under Part III. 2. a.

⁵⁶ See also *Continental Casualty v. Argentine Republic*, see note 24, para. 170-188 (distinguishing, as regards the invocation by Argentina that article XI of the U.S.-Argentine BIT was self-judging, between the non-self-judging element “essential security interests” and the aspect of discretion argued to be self-judging regarding whether measures taken to protect the state’s essential security interests were “necessary”). See, in particular, *ibid.*, para. 182 (stating that “[i]f Art. XI granted unfettered discretion to a party to invoke it, in good faith, in order to exempt a particular measure which the investor claims has breached its treaty rights from any scrutiny by a tribunal, then that tribunal would be prevented from entering further into the merits, after having recognized that an economic crisis such as the one experienced by Argentina in 2001-2002 qualified under Art. XI”).

“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.”⁵⁷ (emphasis added)

This provision allows a state to unilaterally terminate its obligations under the treaty without any apparent restrictions as to which kind of political considerations or national interests must be at stake. The only restriction potentially applicable to the interpretation of the clause is that the self-judging decision of the state relates only to the assessment that extraordinary events have “jeopardized” its supreme interests without encompassing a self-judging determination of what kind of “supreme interest” must be at stake.⁵⁸

Notwithstanding the breadth of this treaty provision, it is noteworthy that there are mechanisms in place that aim at keeping states within the treaty’s framework to ensure non-proliferation. For instance, when North Korea in 1993 signaled its intention to withdraw from the Non-Proliferation Treaty based on its article X (1),⁵⁹ 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.⁶⁰ In addi-

⁵⁷ Treaty on the Non-Proliferation of Nuclear Weapons, UNTS Vol. 729 No. 169, signed 1 July 1968 (entered into force 5 March 1970).

⁵⁸ See further the discussion in Part III. 2. a.

⁵⁹ See Democratic People’s Republic of Korea Withdraws from Non-Proliferation Treaty, *ILM* 32 (1993), 602 et seq. On the attempted withdrawal of North Korea from the Non-Proliferation Treaty and its background more generally see, for example, M. Newcomb, “Non-Proliferation, Self-Defense and the Korean Crisis”, *Vand. J. Transnat’l L.* 27 (1994), 603 et seq. (609-617); S. Carmody, “Balancing Collective Security and National Sovereignty: Does the United Nations Have the Right to Inspect North Korea’s Nuclear Facilities?”, *Fordham Int’l L. J.* 18 (1994), 229 et seq.; K. Malone, “Preemptive Strikes and the Korean Nuclear Crisis: Legal and Political Limitations on the Use of Force”, *Pacific Rim Law & Policy Journal* 12 (2003), 807 et seq. (816-822).

⁶⁰ NPT Co-Depositaries Statement, reprinted in letter dated 1 April 1993 from the Representatives of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America

tion, the Security Council passed a resolution urging North Korea to reconsider its announced withdrawal from the treaty,⁶¹ a recommendation North Korea ultimately followed after the United States had engaged in intensive bilateral negotiations.⁶²

This episode shows that the restraints resting upon North Korea – or any other Member State for that matter – in this context were primarily of a political rather than a legal nature. They consisted of the requirement to give reasons, scrutiny of those 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.⁶³ It also illustrates 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.

c. Clauses Pertaining to the Jurisdiction of an International Court or Tribunal

Another area in which clauses granting self-judging discretion to states can be found are instruments concerning a state's submission to the jurisdiction of an international Court or Tribunal. Thus, under the so-called Optional Declarations under Article 36 (2) of the Statute of the Court, states occasionally exclude from the ICJ's jurisdiction "disputes

addressed to the President of the Security Council, SCOR 48th Sess., Annex 2, Doc. S/25515 of 2 April 1993.

⁶¹ S/RES/825 (1993) of 11 May 1993.

⁶² See A. Dosseva, "North Korea and the Non-Proliferation Treaty", *Yale J. Int'l L.* 31 (2006), 265 et seq. (266).

⁶³ Cf. also A. Perez, "Survival of Rights under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards", *Va. J. Int'l L.* 43 (1994), 774 et seq. (suggesting that the self-judging nature of article X (1) of the Non-Proliferation Treaty provides for an absolute right to withdraw which, however, needs to be exercised in good faith and, above all, is embedded in a political process on the international level). But see G. Bunn/ J. Rhinelander, "The Right to Withdraw from the NPT: Article X Is Not Unconditional", *Disarmament Diplomacy* 79 (2005), available at <<http://www.acronym.org.uk/dd/dd79/79gbr.htm>>.

with regard to matters which are essentially within the domestic jurisdiction of [state X] as determined by the Government of [state X].” Such declarations currently can be found in the Optional Declarations of Malawi (1966), Mexico (1947), Liberia (1952), the Philippines (1972) and Sudan (1958).⁶⁴ They were previously more widespread, having been championed by the United States in 1946 in the so-called Connally Amendment.⁶⁵ The Connally Amendment with 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”⁶⁶ and, as such, intended to constitute a “veto power over the Court’s jurisdiction”⁶⁷ that was subject to no international review at all.

Self-judging reservations to Optional Declarations have been the subject of both judicial consideration and 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.⁶⁸ For example, Judge Lauterpacht in his Separate Opinion in the *Norwegian Loans*

⁶⁴ See at <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>>.

⁶⁵ See on the Connally Amendment A. Larson, “The Facts, the Law, and the Connally Amendment”, *Duke Law Journal* Volume 1961, 74 et seq.; L. Gross, “Bulgaria Invokes the Connally Amendment”, *AJIL* 56 (1962), 357 et seq.; see also Jennings, see note 37, 349; C. Waldock, “The Plea of Domestic Jurisdiction Before International Legal Tribunals”, *BYIL* 31 (1954), 96 et seq.; H. Humphrey, “The United States, the World Court and the Connally Amendment”, *Va. J. Int’l L.* 11 (1971), 310 et seq.

⁶⁶ Larson, see note 65, 75.

⁶⁷ *Ibid.*, see note 65, 76.

⁶⁸ See, for example, R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, 1993, 52-55; J. Elkind, *Non-appearance before the International Court of Justice – Functional and Comparative Analysis*, 1984, 124-168; B. Maus, *Les Réserves dans les déclarations d’acceptation de la juridiction obligatoire de la Cour Internationale de Justice*, 1959, 149-163, and the references cited in J. Crawford, “The Legal Effect of Automatic Reservations to the Jurisdiction of the International Court”, *BYIL* 50 (1979), 63 et seq., footnote 3. Note also that the Connally Amendment was severely criticized by the American Bar Association, *American Bar Association Journal* 32 (1946), 873 et seq., which subsequently urged the adoption of a new declaration; see *American Bar Association Journal* 33 (1947), 249 et seq. (430, 512).

case considered that a self-judging exception to a Declaration under Article 36 (2) of the ICJ Statute 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.”⁶⁹

As unilateral reservations to jurisdiction, Optional Declarations are, however, 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 article, although some of the analysis below is arguably equally relevant to such clauses, in particular as regards questions relating to the scope of review of such clauses in international dispute settlement. Indeed, provided that one considers such clauses as in principle valid, the same framework of analysis should apply to self-judging exceptions pertaining to jurisdiction as to clauses concerning restrictions of substantive treaty provisions.

Similar clauses also exist with respect to the jurisdiction of other international dispute settlement fora, although such clauses are generally found in treaties rather than unilateral instruments. Thus, numerous treaties concerning the arbitration of inter-state disputes concluded up until the early twentieth century contained clauses exempting disputes about vital interests from arbitral jurisdiction.⁷⁰ In more recent time, a

⁶⁹ *Certain Norwegian Loans (France v. Norway)*, Separate Opinion of Judge Sir Hersch Lauterpacht, ICJ Reports 1957, 9 et seq. (48). See also D. Greig, “Nicaragua and the United States, Confrontation over the Jurisdiction of the International Court”, *BYIL* 62 (1991), 119 et seq. (181-213).

⁷⁰ See M. Hahn, “Vital Interests and the Law of the GATT: An Analysis of GATT’s Security Exception”, *Mich. J. Int’l L.* 12 (1991), 558 et seq. (563) (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

similar reservation was included, for example, in the 2006 United States-Peru Free Trade Agreement, which provides that the agreement should not be construed so as “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,”⁷¹ further clarifying that “if a Party invokes [this clause] in an arbitral proceeding ... the tribunal or panel hearing the matter shall find that the exception applies.”⁷² This approach appears to provide virtually complete discretion to a State Party in invoking the security exception and also deprives an arbitral tribunal of the jurisdiction it would otherwise enjoy for disputes arising under the treaty. Unlike with self-judging ex-

the state to determine unilaterally if a particular dispute was fit to be submitted to final and binding arbitration” – internal citations omitted); see also K. Partsch, “Vital Interests”, *EPIL* 10 (1986), 526 et seq. (discussing the development of vital interests clauses in arbitration treaties and related reservations to the jurisdiction of the PCIJ and ICJ). See further *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Dissenting Opinion of Judge Oda, ICJ Reports 1986, 212, 224, para. 25 (discussing 29 bilateral treaties concluded from 1907 to the 1920s containing such reservations).

⁷¹ See article 22 (2)(b) of the Peru-United States Free Trade Agreement, <www.ustr.gov/Trade_Agreements/Bilateral/Peru_FTA/Final_Texts/Section_Index.html>, signed 12 April 2006 including such language, the Agreement follows article 18 (2) of the 2004 U.S. Model Bilateral Investment Treaty, reprinted in C. McLachlan/ L. Shore/ M. Weiniger, *International Investment Arbitration*, 2007, 393-416.

⁷² See footnote 2 to article 22 (2)(b) of the Peru-United States Free Trade Agreement, see note 71. Similarly, article 6.12 (4) of the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore provides that the invocation of the treaty’s security exception in an investment-related dispute “shall be interpreted in accordance with the understanding of the Parties on non-justiciability of security exceptions as set out in their exchange of letters, which shall form an integral part of this Agreement.” The accompanying exchange of letters contemplates that “any decision of the disputing Party taken on security considerations shall be non-justiciable in that it shall not be open to any arbitral tribunal to review the merits of any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.” See A. Newcombe/ L. Paradell, *Law and Practice of Investment Treaties – Standards of Treatment*, 2009, 495. Article 6.12 is fully reproduced *ibid.*, 490-491, footnote 38.

ceptions in unilateral Declarations under Article 36 (2) of the ICJ Statute, the validity of such agreed exceptions to the jurisdiction of arbitral tribunals should not be questionable as the Contracting State Parties have agreed to deprive the tribunal of jurisdiction in the circumstances listed and did not introduce such an exception unilaterally.

d. 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 from 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 Genocide⁷³ in which it declared

“[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.”⁷⁴ (emphasis added)

This reservation is self-judging in that it refers to the determination of the scope of the United States Constitution by the United States. Even though it arose out of concerns over the Convention’s internal implementation in view of the federal structure of the United States, it has to be regarded as a fully self-judging clause as constitutional provisions are often vague and open to a wide range of interpretations. Accordingly, Italy protested against the United States reservation to the Genocide Convention arguing that it created uncertainty about the scope of the obligations assumed by the United States.⁷⁵

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 discussed above – having

⁷³ UNTS Vol. 78 No. 277, signed 9 December 1948 (entered into force 12 January 1951).

⁷⁴ See *ILM* 28 (1988), 754 et seq. (774). See also *ibid.*, 770 et seq. (776) (concerning the discussion in the U.S. Senate regarding the framing of this reservation).

⁷⁵ Cf. Multilateral Treaties Deposited with the Secretary-General (status as of 31 December 1993), Doc. ST/LEG/SER.E/12, 95.

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.⁷⁶ In view of the specific problems relating to their validity⁷⁷ and given their rarity, this category of self-judging clauses will also not be dealt with any further in this article. Yet, provided that one considers such clauses to be valid, a similar framework of analysis as the one proposed in Part III. could apply.

5. Summary

In summary, self-judging clauses are provisions in international legal instruments by means of which states retain the right to escape or derogate from an international legal obligation based on unilateral considerations and based on their subjective appreciation of whether the circumstances required for the invocation of the clause exist. Such clauses are generally found in, but not limited to, treaties where issues of national security or other essential public policy interests arise. They also appear in unilateral Declarations, including reservations to international treaties and Optional Declarations accepting the jurisdiction of the ICJ. The self-judging nature of a clause is, in the vast majority of cases, apparent from the express words of the provision, i.e., words such as “if the state considers,” “in the state’s opinion” or “if the state determines.” Implicitly self-judging clauses, by contrast, are rare.

In general, self-judging clauses presuppose that the states concerned intended to retain discretion in the invocation and operation of such self-judging clauses. How such discretion has been dealt with, and should properly be dealt with, in international dispute settlement will

⁷⁶ See, for example, General Comment No. 24 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, Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, *Human Rights Law Journal* 15 (1994), 464 et seq. See also T. Giegerich, “Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien”, *ZaöRV* 55 (1995), 713 et seq.

⁷⁷ The validity of such self-judging reservations will have to be determined against the background of arts 19-23 of the Vienna Convention on the Law of Treaties, see note 13. See generally on the validity of reservations *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, 15 et seq.

be discussed in the following Part. It will focus in particular on the question of how international Courts and Tribunals have balanced the need to respect the discretion of a state relying on a self-judging exception, while also preventing an abuse of such provisions once a dispute has arisen.

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 obvious potential for the misuse of such clauses and a consequent undermining of international cooperation. State Parties to international treaties that contain self-judging clauses are aware of this potential for abuse and, in many cases, provide for varying mechanisms that either restrict the scope of the clauses themselves or aim at preventing their abuse. Indeed, many treaty regimes that contain self-judging clauses, also contain certain procedural and institutional safeguards in order to guard against the risk of states availing themselves of such clauses in a way that is arbitrary, defeats the object and purpose of the treaty regime and, in more general terms, is adverse to the efforts at international cooperation established by the respective treaty.

This Part will therefore discuss specific mechanisms that states have put in place in order to avoid the misuse of self-judging clauses, such as specific institutional frameworks that ensure that a state stays within the boundaries of the discretion granted under self-judging clauses or procedural safeguards, such as the duty to give reasons for invoking a self-judging clause. Its main focus, however, will be on how international dispute settlement bodies deal with the invocation of self-judging clauses in international treaties and thus perform the function, on the one hand, of safeguarding a state's right to exercise discretion under a self-judging clause and, on the other hand, of preventing abuse of any self-judging discretion. For this purpose, this Part will examine the jurisprudence of the GATT/WTO dispute settlement mechanism, of IC-SID Tribunals, and of the ICJ, in order to determine to what extent such clauses affect the jurisdiction of international dispute settlement bodies or modify the standard of review of the state's conduct in question.

1. Non-Judicial Mechanisms to Hold States Accountable for Violations of Self-Judging Clauses

One of the most common mechanisms used to avoid the abuse of self-judging treaty provisions are duties to notify Contracting Parties of the invocation of such a clause and duties to give reasons. Duties to give reasons constitute a particularly important safeguard. For instance, many mutual assistance treaties provide that a state that refuses assistance must give reasons for such a refusal.⁷⁸ 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, thus, has been recognized by the ICJ in *Djibouti v. France* as an important factor in assessing whether a state's exercise of discretion has stayed within the limits of the self-judging clause in question.⁷⁹

Other treaty regimes embed the duty to give reasons in a more sophisticated procedural framework. The self-judging exception to a state's obligation to produce documents to the International Criminal Court (ICC) in case of national security concerns is a good example. Under article 72 of the ICC Statute document production requests can be refused

- “(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.
- (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 con-

⁷⁸ See, for example, article 17 of the Mutual Assistance Convention, see note 17.

⁷⁹ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9, para. 149-156, and concerning the remedies for a violation, para. 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 article 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.” See also *ibid.*, Declaration of Judge Keith, para. 10.

firms that **it is of the opinion** that disclosure would prejudice its national security interests.” (emphases added)

While article 72 of the ICC Statute constitutes a self-judging exception, its application is subject to certain restrictions in order to encourage cooperation in providing the information required for the effective and efficient prosecution of international crimes. Thus, article 72 (5) of the ICC Statute provides ways to reconcile the national security concerns the requested state believes are at stake and the interest of the ICC in being able to obtain necessary information. Accordingly, after an initial refusal by the state, the requested state and the ICC will “seek to resolve the matter by cooperative means.” If this attempt remains unsuccessful, the requested state is required under article 72 (6) of the ICC Statute to give “specific reasons” for withholding information.

Apart from the procedure under article 72 of the ICC Statute there are further mechanisms the ICC can use, such as a referral of the matter to the Assembly of State Parties or the UN Security Council for resolution under arts 72 (7)(ii) and 87 (7) of the ICC Statute.⁸⁰ Thus, the institutional infrastructure, as well as the procedure established pursuant to article 72 of the ICC Statute, show that the discretion granted under self-judging clauses is not wholly uncontrollable and unreviewable. Rather, institutional safeguards are often put into place to limit the invocation of self-judging clauses.

⁸⁰ See Rose-Ackerman/ Billa, see note 4, 476-478.

Article 72 (7)(ii) ICC Statute provides:

“If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested state is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion.”

Article 93 (4) ICC Statute reiterates:

“In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.”

Article 87 (7) ICC Statute provides:

“Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”

Similarly, the dynamics surrounding North Korea's announced withdrawal from the Non-Proliferation Treaty in 1993 illustrate how the exercise of discretion granted under self-judging clauses can be channeled and restricted by the institutional context in which states cooperate, namely the inclusion of self-judging clauses in a multilateral regime that provides for the supervision by an international organization or facilitates inter-governmental negotiations.⁸¹

2. Self-Judging Clauses and International Dispute Settlement

Court monitoring can also function as a mechanism to reconcile state sovereignty, and the need to protect a 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 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. The question arising in this context is primarily whether self-judging clauses oust the jurisdiction of an international Court or Tribunal, and thus prevent the dispute settlement body from looking into whether a state is entitled to invoke a self-judging exception, or whether such clauses merely limit the standard of review that the dispute settlement body may apply. This question is of central importance because states that invoke a self-judging exception to an international treaty obligation regularly argue that their decision is not reviewable by the international Court or Tribunal seized by the other Contracting Party, while the other party to the dispute regularly argues that the Court or Tribunal retains at least some power to review.⁸²

Although international jurisprudence on the effect and function of self-judging clauses is not vast, such clauses have occasionally occupied international Courts and Tribunals and have generated some state practice in the context of independent third-party dispute settlement. This

⁸¹ See above Part II. 4. b., in particular the references cited in note 63.

⁸² See, for example, *Djibouti v. France (Oral Proceedings of France – Translation)* 25 January 2008, para. 12, available via <<http://www.icj-cij.org>> See also above note 24 on the position of Argentina in various ICSID arbitrations arguing that a treaty provision, which it claimed to be a self-judging non-precluded-measures-clause, ousted the jurisdiction of the arbitral tribunal seized of the matter.

section, therefore, analyzes the jurisprudence of the GATT/WTO dispute settlement mechanism, of ICSID Tribunals and of the ICJ and reviews state practice and academic commentary on the means of resolving conflicts about the invocation of self-judging clauses in international dispute settlement. This analysis suggests that self-judging treaty provisions, unless they are clearly framed to this effect,⁸³ do not oust the jurisdiction of international Courts and Tribunals, but merely affect the standard of review that may be applied. The applicable standard is generally recognized to be whether the state invoking a self-judging clause did so in good faith.

a. Self-Judging Clauses in the GATT/WTO-System

Unlike with other treaty regimes, the consideration given to self-judging clauses under the GATT and the WTO is quite extensive, with article XXI of the GATT having both generated dispute settlement practice and received considerable academic attention.⁸⁴ 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:

⁸³ Such a clear provision would be, for example, article 22 (2)(b) of the Peru-United States Free Trade Agreement. See above notes 71 and 72 and accompanying text.

⁸⁴ See e.g. Schloemann/ Ohlhoff, see note 6; M. Reiterer, “Article XXI GATT – Does the National Security Exception Permit ‘Anything under the Sun’”, *Austrian Review of International and European Law* 2 (1997), 191 et seq.; P. Lindsay, “The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?”, *Duke Law Journal* 52 (2003), 1277 et seq.; D. Akande/S. Williams, “International Adjudication on National Security Issues: What Role for the WTO?”, *Va. J. Int’l L.* 43 (2003), 365 et seq.; cf. also A. Emmerson, “Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?”, *Journal of International Economic Law* 11 (2008), 135 et seq.

- (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.”⁸⁵ (emphases added)

aa. Article XXI GATT: Barring Jurisdiction or Affecting the Standard of Review?

While not directly in question in the case, the ICJ made some *obiter dicta* statements concerning the effect of article XXI GATT in the *Military and Paramilitary Activities* case.⁸⁶ In that case, the ICJ was called upon to interpret the 1956 Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua, article XXI of which provided that it did not preclude the application of measures “necessary to protect [a state’s] essential security interests.”⁸⁷ The ICJ held that it had jurisdiction to determine whether measures taken by one of the Parties fell within that exception. The Court’s reasoning, however, appears to indicate that it would have declined jurisdiction, had article XXI GATT been the provision before it:

“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 implemen-

⁸⁵ UNTS Vol. 1867 No. 187. 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.

⁸⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, see note 22.

⁸⁷ Treaty of Friendship, Commerce and Navigation (with Protocol), see note 21.

tation 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.”⁸⁸

This position, however, does not find unequivocal support when dispute settlement practice under the GATT/WTO framework is considered. Although the WTO Dispute Settlement Body (DSB) has not yet had occasion to interpret article XXI GATT,⁸⁹ there is a significant amount of state practice arising from disputes under GATT 1947 relating to article XXI. On the one hand, this practice suggests that a significant number of members – in particular the United States, Canada, Japan, New Zealand, Australia, and the European Community – interpreted the self-judging nature of article XXI GATT in a similar manner to that hinted at by the ICJ in *Military and Paramilitary Activities*, that is as either a bar to the jurisdiction of any third-party dispute resolution mechanism, or as rendering reliance on article XXI GATT entirely non-justiciable.⁹⁰ On the other hand, this position was not universally held as evidenced by the Council discussions on the effect of article XXI (b)(iii) GATT every time a dispute arose involving measures for the

⁸⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, see note 22, 116, para. 222; see also *ibid.*, 141, para. 282. Similarly, see *Oil Platforms (Islamic Republic of Iran v. United States of America)*, see note 41, 183, para. 43.

⁸⁹ But cf. notes 109 and 110 and associated text below.

⁹⁰ 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 article, because the authors take the view that no treaty subject matter is categorically immune from judicial review in international law under concepts analogous to the political questions doctrine or other non-justiciability doctrines. 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 M. Aronson/B. Dyer/ M. Groves, *Judicial Review of Administrative Action*, 3rd edition 2004, 145; see also C. Finn, “The Justiciability of Administrative Decisions: A Redundant Concept?”, *Federal Law Review* 30 (2002), 239 et seq.

protection of a state's essential security interests in times of war or other emergency.⁹¹

In 1949, a Czechoslovak complaint against U.S. 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 he advocated self-restraint in order to avoid undermining the GATT.⁹² However, Czechoslovakia argued that article XXI GATT was subject to interpretation within the usual dispute settlement procedure and was not a *carte blanche* for a Contracting Party to escape its obligations.⁹³ Ultimately, the Czechoslovak complaint was rejected without, however, formally resolving this difference of opinion. Similarly, 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 stating that "under [Article XXI GATT] each contracting party was the sole judge of what was necessary in its essential security interests," Ghana nonetheless sought to bring its action within the scope of article XXI GATT.⁹⁴

Again during the 1982 Falkland crisis, the European Community (EC), the EC Member States, Australia and Canada justified trade restrictions against Argentina on the basis of article XXI GATT. During the Council discussion of these restrictions the EC representative stated that "[t]he exercise of these [inherent] rights [of which Article XXI GATT was a reflection] constituted a general exception 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."⁹⁵ 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.⁹⁶ These states

⁹¹ On the practice of the GATT dispute settlement practice regarding article XXI discussed in the following paragraphs see *GATT, Analytical Index: Guide to GATT Law and Practice*, 6th edition 1995, Vol. I, 599-610.

⁹² GATT/CP.3/SR.22 (8 June 1949), page 7.

⁹³ GATT/CP.3/SR.22 (8 June 1949), page 6.

⁹⁴ SR.19/12, page 196.

⁹⁵ See *GATT, Analytical Index*, see note 91, 600-601.

⁹⁶ *Ibid.* This approach to self-judging clauses conforms with the position the United States adopted with respect to the Connally Amendment, which

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 EC's refusal to substantiate its claim that the trade restrictions against Argentina were covered by article XXI GATT. For example, the Brazilian delegate, while agreeing that each state retained the prerogative to define its essential security interests, considered that the EC should still be required to demonstrate that the requirements of article XXI GATT were fulfilled.⁹⁷

The dispute about the trade restrictions against Argentina prompted the GATT Contracting Parties to adopt, on 30 November 1982, a "Decision concerning Article XXI of the General Agreement." It provided, *inter alia*, that the Contracting Parties "should be informed to the fullest extent possible of trade measures taken under Article XXI" and also affirmed that "[w]hen action is taken under Article XXI, all contracting parties affected by such action retain their full rights under the General Agreement."⁹⁸ While remaining somewhat opaque in this respect, the resolution suggests that the dispute resolution procedure provided for in article XXIII GATT would apply even if article XXI GATT is invoked.⁹⁹

conditioned the country's consent to the jurisdiction of the ICJ under its Optional Declaration. See discussion above under Part II. 4. c. Cf. A. Sofaer, "The United States and The World Court", *ASIL* 80 (1986), 204 et seq. (207) (stating, when discussing the official position of the United States, that "[e]ven though we had pledged never to invoke our Connally 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 Greig, see note 69, pointing out, however, at 184-185, that the United States deviated from the position that self-judging clauses excluded any review by third-party dispute settlement bodies on one occasion in the *Aerial Incident* case, when arguing that the Connally Amendment "does not permit the United States or any other State to make an arbitrary determination, in bad faith" and thus permitted judicial control to the extent such limits were surpassed (the United States later sought to withdraw from this position). 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, see note 69, 184.

⁹⁷ See Hahn, see note 70, 573-574.

⁹⁸ L/5426, 29S/23, reprinted in *GATT, Analytical Index*, see note 91, 605-606.

⁹⁹ It also reinforces the importance of providing reasons as a mechanism of control; see Part III. 1.

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 article XXI (b)(iii) GATT 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."¹⁰⁰ The United States further argued that the terms of article XXI GATT precluded a Panel from examining the validity of the United States' invocation of article XXI GATT.¹⁰¹

Nicaragua contested both aspects of this position arguing that article XXI GATT 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.¹⁰² 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.¹⁰³ Furthermore, the representative of India considered that a Contracting Party having recourse to article XXI (b)(iii) GATT should have to be able to demonstrate a genuine nexus between its security interest and the trade action taken.¹⁰⁴

In light of the United States' objections, the Panel that was to decide the dispute at issue was established with a limited mandate, which prevented it from judging or examining the validity of, or motivation for, the invocation of article XXI GATT by the United States.¹⁰⁵ 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 Contract-

¹⁰⁰ *United States – Trade Measures Affecting Nicaragua*, L/6053, GATT Panel Report, 13 October 1986, para. 3.1.

¹⁰¹ *United States – Trade Measures Affecting Nicaragua*, L/5803, Communications from the United States, 29 May 1985.

¹⁰² *GATT, Analytical Index*, see note 91, 603.

¹⁰³ GATT Council, *Minutes of Meeting Held May 29, 1985*, GATT Doc. C/M/188 (28 June 1985), 7.

¹⁰⁴ *Ibid.*, 11.

¹⁰⁵ See *United States – Trade Measures Affecting Nicaragua*, see note 100.

ing 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?"¹⁰⁶

This suggests that the Panel was of the view, that, even though its mandate was limited by the decision of the Contracting Parties establishing the Panel, such a limitation was not required by the self-judging aspects of article XXI GATT themselves, but merely resulted from the political processes at play in the Contracting Parties' reaching the necessary consensus to establish a Panel.

The final pre-WTO invocation of article XXI GATT occurred in 1991. The EC invoked article XXI GATT to restrict trade with the civil-war-torn states of the then Socialist Federal Republic of Yugoslavia in order to favor "those parties which contribute to progress toward peace."¹⁰⁷ A GATT Panel was established, at Yugoslavia's request, 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 EC to the establishment of the Panel on the grounds that it had invoked article XXI GATT.¹⁰⁸

Since the establishment of the WTO, requests have been made for the establishment of two Panels, which, if constituted, would have had to decide how article XXI GATT should be interpreted. However, both disputes 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 aspects

¹⁰⁶ 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.

¹⁰⁷ See *GATT, Analytical Index*, see note 91, 604-605. 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.

¹⁰⁸ For a more detailed discussion of the dispute see Schloemann/ Ohlhoff, see note 6, 432-434.

of the Helms-Burton Act,¹⁰⁹ and by an agreement to resolve the underlying maritime delimitation disputes 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 upon its territorial rights.¹¹⁰ It is interesting, however, to note that in the context of the dispute over the Helms-Burton Act, statements made by U.S. officials suggest that the United States continues to maintain the position that article XXI GATT is a jurisdictional defense 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.¹¹¹

Thus, while a number of states have expressed, and continue to express, the view that the self-judging aspect of article XXI GATT has the effect that the DSB is prevented from reviewing the invocation of article XXI GATT, other states contest this view arguing that there must be

¹⁰⁹ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 §302(a), Pub.L No., 104-114, 110 Stat. 785 reprinted in *ILM* 35 (1996), 357 et seq. This Act was enacted following the downing of two U.S. light planes off the Cuban coast by Cuban military aircrafts, 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. The measures have been described as having a similar effect to a secondary boycott, see J. Walker, “The Legality of Secondary Boycotts Contained in the Helms-Burton Act under International Law”, *DePaul Digest of International Law* 3 (1997), 1 et seq. (2-4). On the dispute between the United States and the EU regarding the implications of the Helms Burton Act under the GATT see R. Browne, “Revisiting ‘National Security’ in an Interdependent World: The GATT Article XXI Defense after Helms-Burton”, *Georgetown Law Journal* 86 (1997), 405 et seq.; C. Piczak, “The Helms Burton Act: U.S. Foreign Policy Toward Cuba, the National Security Exception to the GATT and the Political Question Doctrine”, *University of Pittsburg Law Review* 61 (1999), 287 et seq.

¹¹⁰ See *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, both available via <<http://www.icj-cij.org>>. See also Lindsay, see note 84, 1304-1310.

¹¹¹ Schloemann/ Ohlhoff, see note 6, 430; see also W. Meng, “Extraterritoriale Jurisdiktion in der US-amerikanischen Sanktionsgesetzgebung”, *Europäische Zeitschrift für Wirtschaftsrecht* 8 (1997), 423 et seq. (426).

some external limits placed on the invocation of that provision. Further, the 1982 “Decision concerning Article XXI of the General Agreement” suggests that the normal dispute settlement provisions remain applicable to article XXI GATT.¹¹² This latter position is also supported by the *travaux préparatoires* to article XXI GATT, which 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.¹¹³

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 consensus in 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 1994.¹¹⁴ Nonetheless, when the DSU was agreed in 1994, no specific exception was made to the henceforth comprehensive jurisdiction of the DSB in respect of article XXI GATT. The absence of such an express exception to jurisdiction and the stated purpose of the DSU of “strengthening the multilateral system” can be viewed as the Contracting Parties’ deliberate decision that article XXI GATT should be subject to the then newly strengthened dispute settlement system.¹¹⁵

The minimum conclusion to be drawn from the practice in dispute settlement under the GATT is, thus, that state practice cannot be interpreted as conclusively establishing an agreement of the Contracting Parties that the invocation of article XXI GATT is beyond any control by the DSB. Further, state practice in the context of agreeing amendments to the GATT/WTO regime rather suggests, despite the view of some Member States in the context of actual dispute settlement, that article XXI GATT, as a matter of law, does not constitute a bar to the jurisdiction of the DSB. Instead, the words “it considers” in that article play a role in relation to the standard of review to be applied – a standard that must respect the discretion accorded by article XXI GATT to each State Party to decide whether particular trade-restrictive measures

¹¹² See above notes 98 and 99 and accompanying text.

¹¹³ See *GATT, Analytical Index*, Vol. II, page 705; Hahn, see note 70, 565-569.

¹¹⁴ The principle of reversed consensus is enshrined in arts 16 (4), 17 (14) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

¹¹⁵ Cf. M. Matsushita/ T. Schoenbaum/ P. Mavroidis, *The World Trade Organization: Law, Practice and Policy*, 2nd edition 2006, 594-598.

are necessary for the protection of its essential security interests. This position has also been given recent support in the arbitration decision of *Sempra v. Argentina*. In that decision, the ICSID Tribunal stated:

“The Tribunal must also note that not even in the context of GATT Article XXI is the issue considered to be settled in favor of a self-judging interpretation, and the very fact that such article has not been excluded from dispute settlement is indicative of its non-self-judging nature.”¹¹⁶

bb. Article XXI GATT: The Appropriate Standard of Review

Likewise, academic commentators mostly agree that article XXI GATT does not oust the jurisdiction of the DSB, but instead affects the standard of review.¹¹⁷ In theorizing about how the standard of review is affected, they generally agree that the words “it considers” in article XXI (b) GATT 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 fully reviewable by the DSB.¹¹⁸ They also agree that reviewing whether a measure “relates to fissionable materials” or “relates to traffic in arms” in article XXI (b)(i) and (ii) GATT 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” in article XXI (b)(iii) GATT.¹¹⁹

¹¹⁶ See *Sempra v. Argentine Republic*, see note 24, para. 384. Note that when referring to the self-judging nature of a clause in its decision, the Tribunal in *Sempra v. Argentine Republic* was using that term as a synonym for a clause that bars jurisdiction or is non-justiciable. This is different to the manner in which the term self-judging is used in the remainder of this paper, which is a label for the type of clause under consideration.

¹¹⁷ See e.g. Hahn, see note 70, 584-588; Schloemann/ Ohlhoff, see note 6, 444-446; Akande/ Williams, see note 84, 399-402; Reiterer, see note 84, 201-202; differently R. Bhala, “National Security and International Trade Law: What the GATT Says, and What the United States Does”, *University of Pennsylvania Journal of International Economic Law* 19 (1998), 263 et seq. (268-279); Piczak, see note 109, 318-326.

¹¹⁸ See Hahn, see note 70, 584-588; Schloemann/ Ohlhoff, see note 6, 444-446; Akande/ Williams, see note 84, 399-402; Reiterer, see note 84, 201-202; Emmerson, see note 84, 145-146.

¹¹⁹ In light of this difference, Schloemann, Ohlhoff, Akande, Williams and Reiterer all suggested that when reviewing whether a measure “is taken in

Differences of opinion, however, arise as regards the manner in which the DSB should review a state's determination that withholding information under article XXI (a) GATT or taking another measure under article XXI (b) GATT is "necessary for the protection of its essential security interests." While agreement exists that the invocation of the self-judging elements in article XXI GATT is subject to "good faith review" by the DSB, different suggestions are made about what that standard of review entails for the practice of dispute settlement in the international trade regime.

Thus, on one approach the principle of good faith is said to "require[s] parties who are in a special legal relationship to refrain from dishonesty, unfairness and conduct that takes undue advantage of another."¹²⁰ This approach acknowledges that a good faith test is loose and not easy to apply or administer, but emphasizes that it is nonetheless a routinely applied test that is closely related to the 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.¹²¹ In order to live up to the principle of good faith, a state must, in addition to establishing the objective prerequisites in article XXI (b) GATT, such as the existence of an essential security interest, demonstrate, consistently with the object and purpose of the GATT, that any measure it has taken in reliance on article XXI GATT does not in fact serve protectionist purposes. This is apposite because the protection of "vital industries" is not the purview of article XXI, but can be secured through other means under the GATT,¹²² and because protectionist measures go against the primary object and purpose of the GATT.¹²³ Apart from this restriction, however, all that a state would need to demonstrate is a *bona fide* belief that either disclosure of

times of emergency in international relations," the DSB should accord states deference and a margin of appreciation. By contrast, Hahn argues the DSB should review the existence of such circumstances objectively and without deference because such terms have a clear meaning in general international law; see Schloemann/ Ohlhoff, see note 6, 446; Akande/ Williams, see note 84, 400-402; Reiterer, see note 84, 211; Hahn, see note 70, 593-594. See also the discussion about discretion, deference and subject matter above under Part II. 3.

¹²⁰ Hahn, see note 70, 599.

¹²¹ Hahn, see note 70, 599-600.

¹²² For example through waivers granted under article XXV, see Hahn, see note 70, 597; see also Schloemann/ Ohlhoff, see note 6, 444.

¹²³ Hahn, see note 70, 596-597.

certain information would be contrary to its essential security interests (article XXI (a) GATT), or that an essential security interest was threatened and the measure taken was necessary for its protection (article XXI (b) GATT).¹²⁴ This approach, therefore, focuses primarily on the subjective perception of the state invoking article XXI GATT, and stresses the connection with the GATT's object and purpose to prevent protectionism.

An alternative approach to testing good faith, that also relies on the object and purpose of the GATT, but in this case focuses on the equal treatment required by the most-favored-nation principle, is a consideration of whether more than one nation is posing a substantially similar threat to the essential security interests of another nation, and if so whether or not similar sanctions have been imposed against all such nations. If similar sanctions have not been imposed, so as to lead to discrimination between states posing a similar threat, this fact would be an indicator of the existence of bad faith.¹²⁵

While commentators generally agree that the definition of essential security interests, "as a function of the state's understanding of its sovereignty and the legal position it entails, [is] essentially subjective,"¹²⁶ such a subjective understanding of what constitutes an essential security interest does not mean that the validity of the invocation of article XXI is entirely subjective. Thus, some commentators, while acknowledging that the words "it considers" allocate a substantial discretion to the state in its choice of means and in defining what constitutes an "essential security interest," argue that this right is still subject to the objective limits of reasonableness in the form of a proportionality test:

"Security interests' that are 'essential' must be defined in good faith by the state invoking them. Whatever their exact reach, it seems clear that not just any noneconomic political or military motive can satisfy the condition of essentiality. 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

¹²⁴ Hahn, see note 70, 599-601.

¹²⁵ W. Cann, "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", *Yale J. Int'l L.* 26 (2001), 413 et seq. (452).

¹²⁶ Schloemann/ Ohlhoff, see note 6, 443.

XXI in the WTO system as a remedy for serious hardships emanating from outside the WTO's immediate regulatory realm. The test for proportionality, here as in other areas of the law, is the reasonableness of the measure in the context. While a state is relatively free to define its security interests, their classification in part as 'essential' must meet some higher standard in relation to other, 'normal' security interests. Again, there is no inherent reason why a panel should not review that determination, sorting out cases of clear unreasonableness, without otherwise interfering with the state's definitional prerogative."¹²⁷

On this basis, they conclude that the DSB could also find that a state's measures that were allegedly necessary to protect that state's essential security interests were disproportionate to the interest in upholding the multilateral trade regime. Thus, a measure would not conform to the good faith test 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."¹²⁸

Other commentators, by contrast, consider that such a test fails to respect the self-judging aspect of article XXI. They consider that an appropriate standard of review for good faith review is limited to establishing (1) whether a Member State genuinely considers that the measure it takes is related to the protection of its essential security interests, and (2) 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.¹²⁹ Such commentators argue that such an approach would still allow the DSB to detect and prevent capricious invocations of article XXI.¹³⁰

¹²⁷ Schloemann/ Ohlhoff, see note 6, 444-445 (noting, 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). See also Emerson, see note 84, 145-146 (stating that "[w]hile a member may have scope to determine what constitutes its own essential security interests – perhaps including human rights – the adequacy of the measure cannot be removed from judicial review. WTO Panels are competent to determine whether the trade measure, imposed in reliance on the exception, legitimately addresses the determined security threat. Panels must analyse whether the measures used by a member are in fact 'necessary' and arguably, when applied, are 'proportionate' to the determined threat.").

¹²⁸ Schloemann/ Ohlhoff, see note 6, 443.

¹²⁹ Akande/ Williams, see note 84, 392.

¹³⁰ Akande/ Williams, see note 84, 392.

Thus, while academic commentators on article XXI GATT generally agree that the appropriate standard of review for this self-judging clause is for lack of good faith, there is considerable variation on how this standard should be operationalized. The possibility of integrating some of these different approaches into a general standard of review for “good faith” is considered briefly in Part IV. below.

b. Self-Judging Clauses in Investment Treaty Arbitration

Another area where self-judging clauses play a certain role is in the area of investment treaties. In fact, various multilateral and bilateral investment treaties and free trade agreements contain self-judging clauses that are similar to article XXI GATT. Article 2102 (1) NAFTA, 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 ...”¹³¹ (emphases added)

¹³¹ North American Free Trade Agreement (NAFTA), see note 54. For similar provisions, see also the Australia – Thailand Free Trade Agreement, Australian Treaty Ser. 2005, No. 2, signed 5 July 2004 (entered into force 1 January 2005), which incorporates article XXI of the GATT. See further arts 196-198 of the Treaty Establishing the European Communities and the discussion of these clauses by Trybus, see note 31, 1347.

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."¹³²

Still other multilateral and bilateral investment treaties and free trade agreements contain self-judging essential security interest exceptions that are even broader in scope than article 2102 (1) NAFTA and do not limit the subject matters to which they apply. For example, article 22 (2) of the Australia-United States Free Trade Agreement provides:

"Nothing in this Agreement shall be construed to preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."¹³³

None of these self-judging exceptions have been the subject of international dispute settlement. However, in a number of investor-state disputes under bilateral investment treaties, several ICSID Tribunals have expressed, albeit by way of *obiter dictum*, views on the effect that a self-judging exception similar to the one in the Australia-United States Free Trade Agreement would have on the Tribunals' jurisdiction and standard of review. As article XI of the U.S.-Argentine BIT was not

¹³² Reprinted in H.R. DOC. 103-159, 666. 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 NAFTA dispute settlement. This, however, is 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 Lindsay, see note 84, 1300-1301.

¹³³ Australian Treaty Series 2005, No. 1, signed 18 May 2004 (entered into force 1 January 2005). For similar provisions see also above notes 71 and 72 and accompanying text.

found to be self-judging,¹³⁴ the Tribunals considered that they were not limited to assessing whether Argentina had acted in good faith in passing emergency measures to protect its financial, economic and social stability, but that they were to apply “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.”¹³⁵

Notwithstanding this conclusion, some of the Tribunals suggested, in *obiter dicta*, that had they been faced with a self-judging non-precluded-measures-clause, they would have had the power to review the state’s decision for good faith as Argentina had argued. The Tribunal in *LG&E*, for example, considered that “[w]ere [it] to conclude that the provision is self-judging, Argentina’s determination would be subject to a good faith review anyway.”¹³⁶ Similarly, the Tribunal in *Continental Casualty v. Argentina*, considered hypothetically that “[i]f Article XI [of the U.S.-Argentine BIT] granted unfettered discretion to a party to invoke it,” this discretion would be subject to “good faith,” while preventing a Tribunal “from entering further into the merits.”¹³⁷

The jurisprudence of ICSID Tribunals therefore also underscores the view that self-judging clauses do not constitute a bar to the jurisdic-

¹³⁴ For the text of article XI of the U.S.-Argentine BIT and the discussion on whether this provision was self-judging see above notes 23-27 and accompanying text.

¹³⁵ *CMS v. Argentine Republic*, see note 24, para. 374. Similarly *LG&E v. Argentine Republic*, see note 24, para. 212-213; *Sempra v. Argentine Republic*, see note 24, para. 388; *Enron v. Argentine Republic*, see note 24, para. 339; *Continental Casualty v. Argentine Republic*, see note 24, para. 187.

¹³⁶ *LG&E v. Argentine Republic*, see note 24, para. 214.

¹³⁷ *Continental Casualty v. Argentine Republic*, see note 24, para. 182. See also the discussion in *CMS v. Argentine Republic*, see note 24, para. 366-374, *Sempra v. Argentine Republic*, see note 24, para. 366-388, and *Enron v. Argentine Republic*, see note 24, para. 324-339, which all suggest sympathy for the position that, under a self-judging clause, a Tribunal is not deprived of jurisdiction, but can review the state’s measure for good faith. Thus, the Tribunal in *Enron v. Argentine Republic*, see note 24, para. 339, concluded “that Article XI is not self-judging and that judicial review in its respect is not limited to an examination of whether its invocation, or the measures adopted, were taken in good faith,” thus evoking the position expressed in an Expert Opinion of Anne-Marie Slaughter and William Burke-White and taken up by Argentina; see *ibid.*, para. 324. Similarly, *Sempra v. Argentine Republic*, see note 24, para. 388.

tion of international dispute settlement bodies. The Tribunals also agreed that the appropriate standard of review to apply would be good faith. However, apart from one decision, no Tribunal has considered in any detail how the standard of good faith review should be operationalized. The one Tribunal that did consider this issue, in *LG&E*, suggested that good faith review would “not significantly differ from the substantive analysis [the Tribunal] presented”¹³⁸ in the context of the non-self-judging clause in article XI of the U.S.-Argentine BIT.

In sum, the arbitral Tribunals that have commented to date on the effect of self-judging clauses in investor-state dispute settlement agree that the clauses, unless clearly framed otherwise, do not oust a Tribunal’s jurisdiction but merely lower the standard of review to good faith, instead of a full-bodied substantive review of whether the state’s measure in question meets the requirements of a treaty exception that is otherwise required under non-self-judging exceptions. The good faith standard, in their view also has the function of avoiding the misuse of invoking self-judging clauses as “this would conflict in principle with the agreement of the parties to have disputes under [a treaty] settled compulsory by arbitration.”¹³⁹

c. Self-Judging Clauses before the International Court of Justice

Although a number of international judicial or arbitral decisions had touched on questions relating to the interpretation of self-judging treaty clauses, none of those cases had actually involved the application of a self-judging clause until the recent ICJ decision in *Djibouti v. France*.¹⁴⁰ Prior to this decision, the Court had only considered the issue in *obiter dictum* in *Military and Paramilitary Activities*.¹⁴¹ In that decision, the ICJ seemed to suggest that a self-judging treaty provision would have pre-empted the Court’s jurisdiction.¹⁴²

However, in *Djibouti v. France* the Court did not follow this path. The case relevantly involved a complaint by Djibouti that France had breached its obligations under article 3 of the Mutual Assistance Con-

¹³⁸ *LG&E v. Argentine Republic*, see note 24, para. 214.

¹³⁹ *Continental Casualty v. Argentine Republic*, see note 24, para. 187.

¹⁴⁰ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9.

¹⁴¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, see note 22.

¹⁴² See above notes 86-88 and accompanying text.

vention by failing to transmit the record relating to the investigation into the suspected murder of a French judge on Djiboutian territory, which was requested by Djibouti in a letter rogatory transmitted to France under the Convention.¹⁴³ France denied any breach, 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 request is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests.”¹⁴⁴

¹⁴³ A brief background to this matter is as follows: the French Judge Bernard Borrel died under suspicious circumstances in Djibouti in 1995 while seconded as a Technical Adviser to the Djiboutian Ministry of Justice. 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 Djibouti’s head of state, in the murder of Judge Borrel, the government of Djibouti decided to reopen the judicial investigation and sought transmission of the French file by way of a letter rogatory. For a more detailed discussion of this case see Briese/Schill, see note 9.

¹⁴⁴ 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., Convention on Cybercrime, opened for signature 23 November 2001, UNTS Vol. 2296 No. 167 (entered into force 1 July 2004); Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, opened for signature 20 December 1988, UNTS Vol. 1582 No. 164 (entered into force 11 November 1990); United Nations Convention against Transnational Organized Crime, opened for signature 15 November 2000, UNTS Vol. 2225 No. 209 (entered into force 29 September 2003); United Nations Convention against Corruption, opened for signature 31 October 2003, UNTS Vol. 2349 No. 41 (entered into force 14 December 2005); International Convention for the Suppression of the Financing of Terrorism, opened for signature 9 December 1999, UNTS Vol. 2178 No. 197 (entered into force 10 April 2002); International Convention for the Suppression of Terrorist Bombings, opened for signature 15 December 1997, UNTS Vol. 2149 No. 256 (entered into force 23 May 2001); European Convention on Mutual Assistance in Criminal Matters, opened for signature 20 April 1959, UNTS Vol. 472 No. 185 (entered into force 12 June 1962); Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, opened for signature 29 May 2000, OJ C 197, 12 July 2009, p. 3 (entered into force 23 August 2005); Convention on Laundering, Search, Seizure and Confiscation of the Pro-

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 in particular article 2 (c) of the Convention and stating that transmission of the file was considered to be “contrary to the essential interests of France,” as the file contained certain declassified “defence secret” documents. The French judge also placed weight on the fact that no new element had come to light since the closing in December 2003 of the first Djiboutian judicial investigation, and no reason had been given for the opening of the new judicial investigation. In light of this, she formed the view that the new investigation appeared to be an abuse of process aimed solely at gathering information and witness statements in respect of another case in progress in France, in which the *Procureur de la République* of Djibouti and its head of security were accused of subornation of perjury.¹⁴⁵

In the proceedings before the Court, 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.¹⁴⁶ Djibouti contested this, arguing that the Court must at least review the invocation of article 2 (c) for good faith.¹⁴⁷

The Court, in response, 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 2 (c) remained subject to the obligation of good faith codified in article 26 of the Vienna Convention on the Law of Treaties.¹⁴⁸ In doing so, the Court drew a parallel be-

ceeds from Crime, opened for signature 8 November 1990, UNTS Vol. 1862 No. 69 (entered into force 1 September 1993).

¹⁴⁵ See *soit-transmis* of 8 February 2005 as described in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9, para. 28 and 147.

¹⁴⁶ *Djibouti v. France (Oral Proceedings of France-Translation)* (25 January 2008), para. 12, available via <<http://www.icj-cij.org>>.

¹⁴⁷ *Djibouti v. France (Oral Proceedings of Djibouti – Translation)* (28 January 2008), para. 15, available via <<http://www.icj-cij.org>>. See also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9, para. 135.

¹⁴⁸ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9, para. 145 (citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, see note

tween the concept of good faith and the concept of abuse of rights discussed in earlier decisions of the Permanent Court of International Justice (PCIJ). In order to satisfy the good faith test, the Court held that France was required to show that the reasons for its refusal to execute the letter rogatory fell within those allowed for in article 2.¹⁴⁹ The Court then outlined one of the reasons provided by the instructing judge for refusing to execute the letter rogatory namely, that relating to the presence of declassified “defence secret” documents, and held that it fell within the scope 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.¹⁵⁰ It can be seen from this reasoning, that the Court interpreted good faith to permit only a very limited review. All that France needed to establish 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).¹⁵¹

The Court, therefore, did not find that the self-judging clause in question ousted its jurisdiction. At the same time, it recognized that self-judging clauses granted the state discretion that could be reviewed by the Court in order to determine whether the state invoking the clause had done so in good faith. What precisely this standard entailed, remained, however, largely unresolved in *Djibouti v. France*. Notably, the Court left open how to operationalize good faith review and what the limits of it were.

In contrast, Judge Keith, in a separate Declaration, analyzed the standard of review applicable to self-judging clauses in greater detail. Like the majority, he considered that the decision not to grant mutual assistance should be reviewed against the closely related principles of

22, 116, para. 222, and *Oil Platforms (Islamic Republic of Iran v. United States of America)*, see note 41, 183, para. 43 and 135).

¹⁴⁹ See *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9, para. 145 (citing *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, PCIJ, Series A*, p. 30, and *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, PCIJ, Series A/B, No. 46*, p. 167).

¹⁵⁰ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9, para. 147-148, 202.

¹⁵¹ Note that this approach runs the risk that the selected reason may actually not have been determinative in the state’s decision-making process. A state’s decision to rely on a self-judging clause could thus be upheld on the basis of a reason that, although legitimate by itself, was not in fact the primary motivator behind the state’s actions.

good faith, abuse of rights and misuse of power. However, he went further than the majority in holding that those principles required the responsible state agency to exercise the power for the purpose for which it was conferred, in a manner that did not frustrate the object and purpose of the treaty, and without regard to improper purposes or irrelevant factors.¹⁵² In this context, he cited the Court's statement in the *Gabčíkovo-Nagymaros Project* case that the good faith obligation in article 26 of the Vienna Convention "obliges the Parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized."¹⁵³

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, Judge Keith considered whether the reasons given by the instructing judge satisfied the requirements of good faith.¹⁵⁴ In his view, however, they did not in two respects. First, in taking her decision to refuse cooperation, the French judge appeared to have had regard to factors that did not fall within the scope of article 2 (c), namely that the letter rogatory was an abuse of process because it failed to indicate the object of and the reason for the request as required by article 13 (b) of the Convention and appeared to be a means of obtaining copies of documents implicating the *Procureur de la République* of Djibouti in the related proceedings for subornation of perjury in which he had refused to appear.¹⁵⁵

Second, in determining that the file could not be transferred in its entirety due to the presence of certain declassified "defence secret" documents, the French judge made no assessment of the likely prejudice that the release of these documents would present to France's national security, nor did she provide reasons why it would not be sufficient to withhold only the declassified documents and thereby protect the national security interest allegedly at stake. The lack of such a consideration was particularly striking as the French Ministry for Defense had indicated, prior to the judge's decision, that it was not opposed to a partial transmission of the file.

¹⁵² *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Declaration of Judge Keith, see note 9, para. 6.

¹⁵³ *Ibid.* See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, see note 39, 78, para. 142.

¹⁵⁴ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Declaration of Judge Keith, see note 9, para. 6.

¹⁵⁵ *Ibid.*, para. 7-9.

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.¹⁵⁶ Implicitly, it appears from Judge Keith's Declaration that this failure could not be cured by the *post hoc* reasons for this approach put forward by France in her written and oral pleadings where it was submitted that the "defence secret" documents had been used in such a way by the investigating judge so as to permeate the whole file, and it was therefore not possible to even transmit part of the file with the declassified documents removed.¹⁵⁷ Indeed, Judge Keith concluded that the French judge had not complied with the *Mutual Assistance 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.¹⁵⁸

In summary, the *Djibouti v. France* case establishes that the ICJ, similarly to the ICSID Tribunals in the investment treaty context and in line with many commentators on article XXI GATT, considers that self-judging clauses do not oust the jurisdiction of an international Court or Tribunal. Instead, they modify the standard of review to be applied in view of the discretion the clauses grant. This standard is generally accepted, as exemplified in the judgment in *Djibouti v. France*, to be one of good faith. However, the precise criteria for ascertaining whether the good faith standard is met, are largely left open in the majority judgment in *Djibouti v. France*, where 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 common and civil law countries.

¹⁵⁶ Ibid., para. 8-9.

¹⁵⁷ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9, para. 137, 148.

¹⁵⁸ At the same time, 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 Djibouti's final submissions in respect of article 2 (c) of the Mutual Assistance Convention.

3. Summary

While some countries, above all the United States, almost consistently, adopt the view that self-judging clauses in international treaties are completely unreviewable and constitute a bar to the jurisdiction of international dispute settlement bodies,¹⁵⁹ numerous other states, and virtually all dispute settlement bodies that have been called upon to decide on the effect of self-judging treaty clauses in international dispute resolution, have rejected the view that such clauses remove their jurisdiction and instead have taken the position that such clauses merely affect the applicable standard of review. This latter position is justified, unless the self-judging clause is clearly framed as a bar to jurisdiction,¹⁶⁰ for a number of reasons.¹⁶¹ Implying limitations to the jurisdiction of an international Court or Tribunal to review the invocation of a self-judging clause unnecessarily broadens the potential for misuse of such clauses and allows unilateral considerations to take precedence over the legitimate expectation of other Contracting Parties to an international treaty. The principle of primacy of international law over national law therefore militates against implying a bar to the jurisdiction of an international Court or Tribunal where states did not clearly express such an intention.¹⁶²

Furthermore, implying limitations to jurisdiction runs counter to the functions Courts and Tribunals play in the peaceful settlement of disputes, the principle that Courts, unless stated otherwise, have the competence to determine their competence (*Kompetenz-Kompetenz*),¹⁶³ and the general principle of law that no one may be a judge in his own cause (*nemo iudex in sua causa*).¹⁶⁴ Equally, upholding jurisdiction and reviewing whether a state's invocation of a self-judging clause remained

¹⁵⁹ See also Greig, see note 69, 181-213.

¹⁶⁰ This is the case, for example, in the 2006 Peru-United States Free Trade Agreement or the India-Singapore Agreement, see notes 71 and 72.

¹⁶¹ See on this and the following Alvarez/ Khamisi, see note 16, 418-420, 424 footnote 269.

¹⁶² See also Greig, see note 69, 193.

¹⁶³ See only Article 36 (6) ICJ Statute, article 41 (1) ICSID Convention. Cf. also *Certain Norwegian Loans (France v. Norway)*, see note 69, 43-44 (discussing the concept of *Kompetenz-Kompetenz* in the context of Connally clause type Optional Declarations). Cf. also Greig, see note 69, 181-213.

¹⁶⁴ See H. Lauterpacht, *The Development of International Law by the International Court*, 1958, 158-164; Bin Cheng, *General Principles of Law as Applied by the International Court and Tribunals*, 1953, 279-289.

within the limits on which states agreed in a treaty furthers the general principle of *pacta sunt servanda*.¹⁶⁵ Limitations on the jurisdiction of an international Court or Tribunal, therefore, should not be implied, just as in the domestic context, limitations on the review by an independent and impartial Court or Tribunal are not read into a piece of legislation.¹⁶⁶

IV. Towards a General Standard of Review for Self-Judging Clauses

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 a Court or Tribunal has to apply. The standard of review that is generally accepted by international dispute settlement bodies, and championed by legal scholars, is review for good faith.¹⁶⁷ This standard, above all, finds its justification in the general principle that states are required to act, in their relations with other states, in good faith, in particular when implementing international treaties.¹⁶⁸

The question remains, however, what is meant by good faith review and how can it be implemented in practice without conceding too much power to international Courts and Tribunals *vis-à-vis* the state invoking a self-judging clause or bringing about the danger of arbitrary decisions by the dispute settlement bodies themselves. This Part, therefore, considers how good faith can be concretized and suggests, as a useful approach, the drawing of an analogy between the standard of review an international Court or Tribunal should apply when faced with the invocation of a self-judging treaty exception and the standard of review ap-

¹⁶⁵ See article 26 Vienna Convention on the Law of Treaties, see note 13.

¹⁶⁶ See e.g. Aronson/ Dyer/ Groves, see note 90, 91-94, 832-833.

¹⁶⁷ See the discussion above under Part III. 2. On the standard of review in the WTO context see Hahn, see note 70, 599-601; Schloemann/ Ohlloff, see note 6, 444; Akande/ Williams, see note 84, 389-392; on the standard of review in the ICSID context see Burke-White/ von Staden, see note 16, 376-381 (concerning self-judging clauses in investment treaties); cf. also concerning self-judging reservations in Optional Declarations under the ICJ Statute Greig, see note 69, 181-213.

¹⁶⁸ See article 26 Vienna Convention on the Law of Treaties. See also R. Kolb, "Principles as Sources of International Law (with Special Reference to Good Faith)", *NILR* 53 (2006), 1 et seq. (18).

plied by domestic Courts when faced with discretionary decision-making by administrative bodies. This analogy, it is argued, could provide a solution to developing a general standard of review for self-judging clauses that reconciles both the state's right to rely on such a clause and the interest of the other Contracting State in international cooperation, thus ensuring respect for the rule of law, as well as finding an appropriate balance in the relationship between states and dispute settlement bodies.

1. Possible Concretizations of Good Faith Review

Good faith as a standard of review is perhaps one of the broadest and least concretized principles. Kolb, for example, describes good faith as a general principle of international law that has as its aim “to blunt the excessively sharp consequences sovereignty and its surrogates (e.g., the principle of consent, no obligation without consent) may have on the international society, in ever-increasing need of cooperation.”¹⁶⁹ In the context of treaties, the principle of good faith, *inter alia*, protects the object and purpose of the treaty against acts intending or having the effect of depriving it of its use.¹⁷⁰ Good faith is closely connected to the customary law principle of *pacta sunt servanda*¹⁷¹ and is mentioned not only in article 26 of the Vienna Convention on the Law of Treaties, but equally in article 31 (1) of that Convention as a principle guiding the interpretation of treaties.¹⁷² Moreover, in the *Nuclear Tests* cases, the ICJ recognized that good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source.”¹⁷³ In *Border and Transborder Armed Action*, however, the

¹⁶⁹ Kolb, see note 168.

¹⁷⁰ *Ibid.*, 19-20.

¹⁷¹ See *Nuclear Tests (Australia v. France)*, ICJ Reports 1974, 253 et seq. (268, para. 46); *Nuclear Tests (New Zealand v. France)*, ICJ Reports 1974, 457 et seq. (473, para. 49).

¹⁷² The good faith principle 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, A/RES/2625 (XXV) of 24 October 1970.

¹⁷³ See note 171.

Court clarified that good faith “is not in itself a source of obligation where none would otherwise exist.”¹⁷⁴

In light of its background, it is clear that good faith is a very general legal concept. For this reason it is necessary to “concretize” the principle of good faith in order to apply it to specific situations, including the standard of review to be applied under a self-judging clause.¹⁷⁵ While some dispute settlement bodies and commentators appear to prefer not to over-theorize the principle of good faith,¹⁷⁶ such an approach may carry the risk of judicial overreaching into the legitimate realm of a state’s discretion under such clauses. In consequence, some dispute settlement bodies, as well as commentators, have suggested more concrete approaches to the content of good faith review in their application to limiting the invocation of self-judging clauses.

One 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.¹⁷⁷ Generally speaking, if a state alleges a breach of a treaty obligation and the other Contracting State relies on an exception or justification precluding wrongfulness, it is for the state alleging the breach to establish the breach and the state invoking the exception to establish the exception.¹⁷⁸ However, in public

¹⁷⁴ *Border and Transborder Armed Action (Nicaragua v. Honduras)*, ICJ Reports 1988, 69 et seq. (105, para. 94). Cf. also J. Klabbers, *The Concept of Treaty in International Law*, 1996, 94.

¹⁷⁵ Kolb, see note 168, 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”).

¹⁷⁶ See, for example, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, see note 9, para. 147-148, 202 (in which the ICJ adopted a “touch and feel”- type test discussed above under Part III. 2. c.); Akande/ Williams, see note 84, 365 (limiting good faith review to establishing the genuineness of the reasons a state stated for the measures taken. Note that while such tests may have advantages due to their flexibility in application, there is arguably a risk that they will not be robust enough to give states sufficient confidence that self-judging clauses will not be abused. Such tests, without further concretization, also entail the risk that decisions of international Courts or Tribunals supervising whether a state has invoked a self-judging clause in good faith are unpredictable and confer too wide a discretion on the Courts and Tribunals themselves.

¹⁷⁷ See Trybus, see note 31, 1361-1362.

¹⁷⁸ On the burden of proof see Bin Cheng, see note 164, 326-335; see generally M. Kazazi, *Burden of Proof and Related Issues*, 1996.

international law states are generally presumed to act in good faith.¹⁷⁹ 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 for good faith, the state alleging the breach must also bear the burden of establishing a lack of good faith on the part of the invoking state, rather than the state invoking the exception having to establish the existence of good faith.

Such a reversal of the burden of proof in relation to the invocation of a self-judging exception would confer significant flexibility on the state invoking it.¹⁸⁰ Such an approach, however, has not been applied by any international dispute settlement body. Indeed, particularly in situations 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 *vis-à-vis* an international Court or Tribunal and the other Contracting State Party, because it will regularly be difficult, if not impossible, for the state seeking redress for the breach of an international obligation to obtain the information necessary to show a violation of good faith in such a sensitive area.¹⁸¹

Alternatively, good faith review can be concretized by requiring the application of a proportionality test, possibly in connection with grant-

¹⁷⁹ See e.g. R. Yakemtchouk, *La Bonne Foi dans la conduite internationale des Etats*, 2002, 67 et seq.; G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, 1986, 615.

¹⁸⁰ See Trybus, see note 31, 1361-1362 (stating in discussing this approach in the context of the EC Treaty that “[p]lacing 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.”).

¹⁸¹ Similarly, Schloemann/ Ohlhoff, see note 6, 448 (stating that “[t]he general obligation to exercise good faith also has a procedural dimension. It demands that a member relying on Article XXI not only participates in Panel proceedings, but also provides the information necessary for the Panel to make the findings within its competence.”); Cann, see note 125, 478-479; Hahn, see note 70, 616.

ing the state invoking a self-judging clause a margin of appreciation.¹⁸² Indeed, the statement by the Tribunal in *LG&E*,¹⁸³ 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 or margin of appreciation. The presence of a self-judging clause and the scope of discretion it ensures, on this view, would merely make explicit and compulsory the granting of a margin of appreciation that would otherwise only be a question of judicial self-restraint and deference.¹⁸⁴ Equating good faith review concerning self-judging clauses with the principle of deference, however, could mitigate differences between self-judging clauses and non-self-judging clauses, as international Courts and Tribunals regularly grant a margin of appreciation or pay deference to states in the context of matters that pertain to particularly sensitive areas, even when they are not protected by the inclusion of a self-judging clause.¹⁸⁵ Furthermore, it does not adequately address the characteristics of the discretion Contracting States intended to retain for themselves under a self-judging clause.

A third approach to concretizing good faith review concerning self-judging clauses is the one suggested by Judge Keith in his Declaration in *Djibouti v. France*, which suggests asking a number of concrete questions in order to identify a failure on behalf of a state invoking a self-judging clause to meet the requirement to act in good faith, or to not engage in an abuse of rights or a misuse of power.¹⁸⁶ These questions

¹⁸² Cf. Burke-White/ von Staden, see note 16, 368-386; Schloemann/ Ohlhoff, see note 6, 446.

¹⁸³ *LG&E v. Argentine Republic*, see note 24, para. 214.

¹⁸⁴ See J. Elkind, *Non-appearance before the International Court of Justice – Functional and Comparative Analysis*, 1984, 122 (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, such as essential [security] interests).

¹⁸⁵ See above Part II. 3. See also Shany, see note 31, 916 (arguing 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).

¹⁸⁶ See above notes 152-158 and accompanying text.

bear a close resemblance to the grounds of review relating to the improper exercise of a discretionary power by administrative agencies as applied by Courts in many domestic administrative law systems.¹⁸⁷ Such an approach to concretizing the content of good faith review has the advantage that it focuses on an element that is common to both self-judging clauses and discretionary powers conferred upon administrative agencies, namely the element of discretion. Such an approach, therefore, addresses the characteristic element of self-judging clauses much better than other concretizations suggested for good faith review in this context.

2. Exploring the Domestic Administrative Law Analogy

In fact, there seems no principled reason why grounds of judicial review as regards the exercise of a discretionary power at the international level should be fundamentally different from the grounds of judicial review applied in this context in the domestic realm. This is particularly so, as state action on the international level, in many contexts, increasingly resembles administrative action in the domestic context, or, at least, can be usefully analogized with the function of administrative agencies on the domestic level.¹⁸⁸ Certainly, the respective contexts and relevant circumstances may differ, but the rationale for the existence of such discretion in both systems is quite comparable. In both cases, discretion is granted in order to avoid the over-inclusive and under-inclusive effect of absolute rules¹⁸⁹ that could hamper the effective implementation of

¹⁸⁷ Also described as grounds of judicial review available for abuse of discretionary power and/or irrationality, see, e.g., P. Joseph, *Constitutional and Administrative Law in New Zealand*, 3rd edition 2007, 870, 885, 931. Note that Judge Keith's focus on this approach to reviewing a discretionary decision probably owes much to his background, and in particular to the time he spent as a Judge of the New Zealand Court of Appeal from 1996-2003 and then of the newly established Supreme Court of New Zealand from 2004-2005, as well as his membership of the Public and Administrative Law Reform Committee from 1972-1986, and later of the New Zealand Law Commission from 1986-1996 (including five years as President from 1991-1996).

¹⁸⁸ In respect of the value of such an approach see generally Kingsbury/Krisch/Stewart, see note 11.

¹⁸⁹ For the international perspective see M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, revised edition

regulatory policies. In fact, one of the reasons why discretion is granted to administrative agencies on the domestic level is the functional necessity for such discretion in modern administrations in order to effectively implement public policies.

Thus, administrative agencies are granted, in many areas of law, a “genuine domain” within which they can exercise regulatory or case-specific discretion.¹⁹⁰ This “genuine domain” has developed from an attempt to balance the need for a certain normative flexibility when administering complex programs, and the competing principle of restricting administrative action through the concept of the rule of law and the principle of legality. This principle aims to ensure both democratic control, and to increase the predictability of administrative decision-making so that individuals can plan and adapt their behavior prospectively to agency conduct. Similarly, self-judging clauses in international law aim at reserving a “genuine domain” to states in order to safeguard specific domestic interests against the interests of other states and to facilitate the implementation of complex cooperative arrangements at the international level.

Furthermore, the rationale for reviewing the exercise of discretion by domestic public authorities has parallels to the good faith review ap-

2005, 591-592 (“[I]ndeterminacy 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.”). For a domestic perspective, see D. Galligan, *Discretionary Powers: A Legal Study of Official Discretion*, 1990, 69-78 (stating that rules restrict the consideration of wider factors, and may prevent the making of decisions in a manner which provides the best accommodation of values and purposes, and which achieves the best result in the particular case).

¹⁹⁰ See on this and the following S. Oeter, “Die Kontrolldichte hinsichtlich unbestimmter Begriffe und des Ermessens”, in: J. Frowein (ed.), *Die Kontrolldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung*, 1993, 266-267.

plicable to self-judging clauses at the international level. In both cases, states in international law, as well as administrations on the domestic level, exercise power for a public purpose and on trust.¹⁹¹ Thus, treaties are entered into in order to further the interests of two or more sovereign states, acting, at least nominally, for the benefit of their respective publics. When states enter into international treaties, they limit, on the basis of mutual trust, the exercise of a state's sovereign powers by promising certain conduct to the other Contracting Party. Conversely, where such limits are subject to discretionary exceptions, states can expect that such discretion will be exercised reasonably and in good faith in accordance with the treaty's overall purpose to further international cooperation in a specific field.¹⁹²

However, even if it is accepted that domestic administrative law analogies may usefully concretize the standard of review to be applied by international Courts and Tribunals to discretionary decisions at international law, it remains necessary to consider whether domestic administrative law principles adequately balance the need to prevent abuse of self-judging clauses against the need to respect the discretion such clauses confer on the state relying on them. For this purpose, the remainder of this section sets out a brief analysis of judicial review of discretionary decisions of administrative agencies in a range of common and civil law countries. The aim is to distil from this analysis a range of possible approaches to judicial review, that may allow the development of a common denominator, from which international dispute settlement bodies can draw when reviewing a state's invocation of a self-judging clause.

¹⁹¹ See H. Wade/ C. Forsyth, *Administrative Law*, 9th edition 2004, 354-356.

¹⁹² We note that analogies to alternative areas of domestic law, including for example contract law, may also assist in concretizing the concept of good faith. Indeed, the abuse of rights doctrine and prohibitions on arbitrary behavior are just two examples of contract law principles that could assist in this regard. However, the focus of this article is to review "concretizations" that have previously been considered either by dispute settlement bodies themselves or by academic commentators in the context of self-judging clauses. Exploring the potential of analogies based on other areas of domestic law is thus beyond the scope of this article. Further, we consider that the administrative law analogy is a particularly worthwhile analogy to develop for a number of reasons, notably that it is an area of law where much judicial and academic thought has been given to the management of discretion and to the standard of review that Courts should apply in reviewing such discretionary decisions.

a. Commonwealth Common Law Countries

Common law countries, such as the United Kingdom, Australia, New Zealand and Canada, have traditionally restricted judicial review, beyond scrutinizing whether the agency's action was *ultra vires* and procedurally proper, to an unreasonableness or irrationality test.¹⁹³ Thus, Courts under the so-called Wednesbury test only ask whether a discretionary decision made by an administrative agency was plausible or whether it reached "a conclusion so unreasonable that no reasonable authority could ever come to it."¹⁹⁴ Such unreasonableness could arise if the agency was guided in the exercise of discretion by irrelevant considerations or did not take into account factually and legally relevant considerations. This test is complemented by review for legality and for procedural propriety, involving above all the right to be heard and the absence of bias in the decision-maker.¹⁹⁵ While the Wednesbury test involves considerable judicial deference in relation to administrative decision-making, it nevertheless ensures that discretion is exercised in light of the purpose of the discretionary competence conferred and based on a proper investigation of the facts.¹⁹⁶

A good example of the codification of grounds of judicial review developed from the Wednesbury test can be found in Australia in the Administrative Decisions (Judicial Review) Act 1977.¹⁹⁷ In fact, there are close parallels between the requirements cited by Judge Keith in *Djibouti v. France*,¹⁹⁸ and a number of grounds of judicial review set out in Section 5 (2) of that Act, such as taking an irrelevant consideration into account in the exercise of a power, failing to take a relevant consideration into account in the exercise of a power, and an exercise of a power for a purpose other than a purpose for which the power is conferred. Many of the other grounds of review listed in Section 5 (2) of

¹⁹³ See M. Herdegen, "Landesbericht Grossbritannien", in: Frowein, see note 190, 38 et seq. (44-48).

¹⁹⁴ Court of Appeal, *Associated Provincial Picture House Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 233 at 229-230 (per Lord Greene M. R.).

¹⁹⁵ Herdegen, see note 193, 44-45, 47-48.

¹⁹⁶ Notably, even decisions pertaining to foreign policy are reviewable under that standard in the United Kingdom. See Herdegen, see note 193, 55.

¹⁹⁷ The Act governs the review of administrative decision-making of federal agencies. In addition, each state has its own rules governing administrative decision-making and its review by Courts.

¹⁹⁸ See above Part III. 2. c.

the Act¹⁹⁹ would also neatly fall within the concept of good faith decision-making in the context of reviewing a discretionary self-judging clause in an international treaty.

The unreasonableness test is, however, increasingly being replaced or influenced in the United Kingdom, New Zealand and Canada by the civil law proportionality test,²⁰⁰ in particular in relation to decisions affecting human rights.²⁰¹ However, the difference between the unreasonableness test and the proportionality test is overshadowed by a concurrent move to applying different intensities of review to both tests depending on the subject matter under consideration. In other words, whether applying a reasonableness test or a proportionality test, Courts will apply a wider or narrower margin of appreciation depending on the subject matter of the discretionary decision. Thus, they will overturn a decision only for manifest unreasonableness or manifest disproportionality in cases where the decision-maker has specialized knowledge or the decision involves complex policy considerations. However, more anxious scrutiny will be applied, for example, to decisions where human rights are involved.²⁰²

¹⁹⁹ 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.

²⁰⁰ Proportionality has been defined by the Council of Europe Committee of Ministers (on 11 March 1980) as requiring an administrative authority when exercising a discretionary power to “maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purposes which it pursues” (cited in: H. Woolf/ J. Jowell/ A. Le Sueur, *De Smith’s Judicial Review*, 6th edition 2007, 585).

²⁰¹ See Woolf/ Jowell/ Le Sueur, see note 200, 545-606. Note that the authors emphasize the significant overlap between unreasonableness and proportionality, see *ibid.*, 546. See also the discussions of unreasonableness and proportionality in Aronson/ Dyer/ Groves, see note 90, 367-383; Joseph, see note 187, 931-946. The application of a proportionality test is particularly notable in cases involving the United Kingdom’s Human Rights Act, the Canadian Charter and the New Zealand Bill of Right, see Woolf/ Jowell/ Le Sueur, see note 200, 588-589, 600 and 602.

²⁰² Woolf/ Jowell/ Le Sueur, see note 200, 591-598 in respect of the United Kingdom, 600-603 in respect of Canada and 602-604 in relation to sliding scale intensity of review in New Zealand.

b. The United States

In the United States, judicial review of discretionary decision-making of federal administrative agencies follows a similar pattern.²⁰³ While U.S. Courts apply different types of tests depending on the subject matter and administrative procedure involved, the standard of review most commonly applied is review under Section 706 (2)(A) of the Administrative Procedure Act pursuant to which a discretionary decision must be set aside if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²⁰⁴ According to the Supreme Court:

“[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²⁰⁵

While this standard is narrow and does not allow the Courts to substitute their judgment for the one of the agency,²⁰⁶ U.S. Courts scrutinize the reasoning the administrative agency has provided in order to determine whether it has relied on a proper and complete factual basis in its decision-making and if its policy judgment remains within accept-

²⁰³ As the United States, similar to Australia and Canada, is a federal system, every state also has its rules for administrative procedure and judicial review of discretionary decisions. State rules, however, will not be discussed in the context of this comparative review.

²⁰⁴ Administrative Procedure Act, 5 U.S.C. § 706.

²⁰⁵ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43, 44 (1983).

²⁰⁶ *Citizens to Preserve Overton Park, Inc.*, 401 U.S. 402, 416 (1971); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Instead, the validity of the agency’s action is presumed, and substantial deference is afforded in view of the agency’s expertise in interpreting the underlying facts. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978).

able bounds.²⁰⁷ While the reviewing Court is required to give the agency's action "a thorough, probing, in-depth review,"²⁰⁸ it will uphold that decision as long as a rational connection exists between the facts found and the agency's decision. U.S. law therefore subscribes to implementing a primarily procedural mechanism for limiting discretionary decision-making by administrative agencies without the Courts overreaching by replacing their own views for that of an agency.

c. France

French Courts equally endorse a primarily formal approach to reviewing discretionary agency decisions.²⁰⁹ In particular, they review such decisions for illegality with respect to the reasons (*illégalité relative aux motifs*) and abuse of power or process (*détournement de pouvoir ou de procédure*). While the latter category is difficult to prove and is rarely established in practice, French Courts primarily scrutinize the reasoning of discretionary decisions for errors of fact or law (*erreur de fait/erreur de droit*), manifest error of appreciation (*erreur manifeste d'appréciation*), mistakes in the legal characterization of facts (*qualification juridique des faits*) and proportionality (*proportionnalité*). The

²⁰⁷ G. Nolte, "Landesbericht Vereinigte Staaten von Amerika", in: Frowein, see note 190, 172, 187 (citing the Restatement of 8 February 1986 of the American Bar Association's Section for Administrative Law). See also *American Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (concerning taking into account relevant factors); *Sea Robin Pipeline v. FERC*, 127 F.3d 365, 369 (5th Cir. 1997); *Hells Canyon Alliance v. United States Forest Serv.*, 227 F.3d 1170, 1177 n. 8 (9th Cir. 2000); *Florida Cellular Mobil Commc'ns. Corp. v. FCC*, 28 F.3d 191, 199-200 (D.C. Cir. 1994); *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369-70 (Fed. Cir. 1998); *Pacific Gas Transmission Co. v. FERC*, 998 F.2d 1303 (5th Cir. 1993) (concerning the lack of adequate reasons); *Natural Res. Defense Council v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (concerning the misuse of procedure); *South Valley Health Care Ctr. v. Health Care Fin. Admin.*, 223 F.3d 1221, 1225 (10th Cir. 2000) (concerning the abuse of discretion if the purpose of discretion is not followed); *Lloyd Noland Hosp. & Clinic v. Heckler*, 762 F.2d 1561 (11th Cir. 1985); *Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989) (concerning the lack of necessary fact-finding as an abuse of discretion).

²⁰⁸ *District of Columbia v. Pace*, 320 U.S. 698, 701-703 (1944).

²⁰⁹ See C. Lerche, "Landesbericht Frankreich", in: Frowein, see note 190, 1 et seq. (7-15). See also R. Chapus, *Droit administratif général*, 15th edition 2001, Vol. I, para. 1055-1085.

scope of review, in turn, depends on the subject matter concerned. Thus, review under all four categories (so-called *contrôle maximum*) generally occurs only in cases where the impact on individual rights is particularly extensive, such as cases of expropriation and the exercise of police powers, whereas, at the other end of the spectrum, minimal review, which is limited to review for errors of fact or law and manifest error of appreciation (so-called *contrôle minimum*), is applied in cases involving either specific technical knowledge or cases involving considerations that are “too diverse and too finely balanced to be judicially reviewed.”²¹⁰ Standard review (so-called *contrôle normal*), excludes the more intensive proportionality review, but includes review of the legal characterization of the facts involved.

Despite the attempt to define and distinguish different modes and levels of scrutiny, Courts in France generally scrutinize whether the reasons given by the administration for its decision demonstrate that the decision is based on properly and fully investigated facts, involves a proper application of the legal framework and, as regards discretion, is not manifestly unreasonable, for example in exceeding the scope of discretion or in exercising it in a way contrary to the discretion’s purpose. This is, in principle, consistent with the conceptualization of the relationship between Courts and administrative agencies that prevails in the common law jurisdictions discussed.

d. Germany

In Germany, Court scrutiny of discretionary decisions is considered to be comparably strict relative to the other domestic legal orders discussed. Yet, German Courts, like the Courts in other countries, respect the discretion granted to administrative agencies and do not replace an agency’s exercise of discretion with their own judgment. They merely determine whether an administrative agency has committed mistakes in exercising discretion.²¹¹ Based on Section 114 (1) of the Administrative

²¹⁰ See Conseil d’Etat, Decision of 5 December 1956 – Thibault, D. 1957.21 (“*considerations trop diverses et trop ténues pour être saisies par [les juges]*”).

²¹¹ See F. Hufen, *Verwaltungsprozeßrecht*, 7th edition 2008, 422-430; M. Singh, *German Administrative Law in Common Law Perspective*, 1985, 85-96; J. Oster, “The Scope of Judicial Review in the German and U.S. Administrative Legal System”, *German Law Journal* 9 (2008), 1267 et seq. (1269). Like in the other federal legal systems discussed, the Länder have their own rules on administrative discretion. These, however, follow the federal law discussed here.

Court Procedures Code (Verwaltungsgerichtsordnung), Administrative Courts in Germany can find an exercise of discretion to be “unlawful because the agency exceeds the legal limits of the discretionary power or because the agency did not use its discretion in accordance with the purpose of the empowerment.”²¹² Notably, Courts set aside discretionary decisions in case of partial or full non-use of discretion (*Ermessensnichtgebrauch* and *Ermessensunterschreitung*), of abuse of discretion (*Ermessensfehlgebrauch*) and if an agency exceeds the scope of discretion (*Ermessensüberschreitung*).²¹³

Judicial review for these errors in the exercise of discretionary powers touches upon whether the administrative agency complied with the rules of procedure, whether it correctly investigated the facts, whether it complied with general standards of evaluation and whether it based its decision on relevant factors without being influenced by irrelevant ones. Furthermore, consistency in the administration’s decision-making and equal treatment of like cases play a significant role in judicial review of discretionary powers.²¹⁴

In addition to this primarily formal review, the review applied to administrative decision-making in Germany is heavily influenced by the importance of fundamental rights protection through Court review. This may lead Courts to scrutinize the exercise of discretion also with respect to the substantive choices made by agencies, and thus goes beyond the standard of review of discretionary decision that is customary

²¹² Exercise of Discretion is governed by Section 40 of the German Administrative Procedure Act (Verwaltungsverfahrensgesetz) which states: “Where an authority is empowered to act at its discretion, it shall do so in accordance with the purpose of such empowerment and shall respect the legal limits to such discretionary powers.”

²¹³ See Hufen, see note 211, 425; Oster, see note 211, 1269. A similar test has been developed for reviewing discretionary planning decisions of administrative agencies in the jurisprudence of the Highest Administrative Court (Bundesverwaltungsgericht). This standard of review is limited to determining whether the agency has balanced competing rights and interests in a proper way; BVerwGE 34, 301, 309; 45, 309, 316; 56, 110, 119. Review, in these situations, is limited to four balancing mistakes that result in formal rather than substantive review, namely non-balancing (*Abwägungsausfall*), balancing deficit (*Abwägungsdefizit*), false evaluation of relevant considerations (*Abwägungsfehlschätzung*), or balancing disproportionately (*Abwägungsdisproportionalität*). See Hufen, see note 211, 429-430; Oster, see note 211, 1271.

²¹⁴ Oster, see note 211, 1271.

in other countries. Apart from this specific emphasis on ensuring respect for fundamental rights, however, the approach in Germany is similar in its emphasis to the formal control of discretionary decision-making in other domestic legal orders.

e. Summary

Both civil and common law countries stress similar considerations as relevant for the judicial review of discretionary decision-making by administrations. They all recognize the existence of a “genuine domain” of discretionary administrative decision-making, based on the consideration that administrative agencies dispose of specific expertise and competence and are more immediately accountable than judges to the relevant constituencies.²¹⁵ Despite necessarily existing nuances and variances between the administrative laws of different countries, judicial review of discretionary decision-making is functionally rather similar and primarily of a formal nature.²¹⁶ Thus, Courts, against this background, refrain from judging the substance of the decision itself. In particular, Courts regularly stress that it is not their function and mandate to second-guess or to substitute their judgment for the agency whose discretionary decision is challenged.²¹⁷

Although domestic legal systems endorse different levels of review, ranging from review for arbitrariness, via irrationality to closer scrutiny based on proportionality review in certain circumstances, the domestic legal systems examined above encompass and emphasize formal and procedural control mechanisms that focus on the process and basis of the administration’s discretionary decision-making rather than on the substance of the decision itself.²¹⁸ Thus, in order to avoid the potential misuse of discretionary powers, Courts regularly review whether the factual basis of the administration’s decision was adequate and properly investigated, whether the appreciation of the legal framework was correct, whether the agency abided by the proper procedure and whether it was guided in the exercise of discretion by relevant and pertinent considerations.

In addition, Courts stress the importance of adhering to certain procedural safeguards that are unrelated to the content of the administra-

²¹⁵ See Oeter, see note 190, 266-268.

²¹⁶ Oeter, *ibid.*, 272-276; Nolte, see note 207, 278-287.

²¹⁷ Oeter, *ibid.*, 272.

²¹⁸ Oeter, *ibid.*, 272-273; Nolte, *ibid.*, 278-287.

tion's decision-making, such as the right to be heard, lack of bias, the requirement that the decision is sufficiently reasoned and that those reasons be communicated. Likewise, the question of whether discretionary decision-making is consistent and does not differentiate unreasonably between different subjects and situations, finds an important position in judicial review of discretionary decision-making.²¹⁹ At the same time, proportionality review is gaining momentum in many domestic and international dispute settlement systems, involving tighter Court control and greater Court interference with executive decision-making.²²⁰ This form of analysis, however, is not a specific limit to discretionary powers, but a standard that is applied more generally in order to balance competing rights and interests.²²¹ Consequently, it may not adequately address the specific nature of review of discretionary decision-making, even though disproportionality may be a factor suggesting a lack of good faith.²²²

Given the similarity among the factors applied in court monitoring of discretionary decision-making by administrative agencies, it appears possible to speak of a broad consensus as regards the conceptual framework in this respect, even if differences exist between different domestic legal orders. Overall, such formal control mechanisms have the advantage of enabling judicial review while upholding the discre-

²¹⁹ Oeter, *ibid.*, 274.

²²⁰ See A. Stone Sweet/ J. Mathews, "Proportionality Balancing and Global Constitutionalism", *Colum. J. Transnat'l L.* 47 (2008), 72 et seq.

²²¹ It is, however, regularly also combined with according deference or a margin of appreciation to the conduct of governments. On the connections between proportionality analysis and the margin of appreciation doctrine in the context of the European Convention on Human Rights see, for example, Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, 2002.

²²² Proportionality analysis may particularly have a place as regards objective criteria contained in international treaty provisions requiring that certain measures are necessary to protect a certain interest. In any case, if such an element is subject to a state's self-judging appreciation a full-bodied objective proportionality will not be suitable as it ignores differences between self-judging and non-self-judging clauses. Notwithstanding, clearly unsuitable measures or measures that strike a manifestly unreasonable balance between the rights or interests protected by a self-judging clause and the rights or interests of another Contracting Party may indicate a lack of good faith. Such a finding, however, could be reached on the basis of the exercise of discretion for an improper purpose rather than as necessarily tied to proportionality review. Cf. Schloemann/ Ohlhoff, see note 6, 444-445.

tionary decision-making of administrations without judicial overreaching.²²³

3. Applying the Domestic Administrative Law Analogy to Self-Judging Clauses

Setting aside the highest intensity of review undertaken in situations where respect for human rights is at stake, which would infrequently arise in the context of the self-judging clauses reviewed in this article, the comparative law approach on the scope and grounds of judicial review of discretionary decision-making clarifies that that review is primarily targeted not at the substantive assessment made by the decision-making executive organ, but rather at the process by which the decision is arrived at in light of the purpose of the law under which the power is exercised. This respects the discretion granted to the decision-maker, but equally ensures that there are outer limits which the decision-maker cannot transgress, thus achieving an appropriate balance between freedom of decision-making and restraint under the rule of law. This conceptual approach also appears appropriate for concretizing the standard of good faith as regards self-judging clauses in international treaties, as it respects the discretion accorded to a state, while providing concrete questions that an international dispute settlement body may ask in order to protect the interest of the other Contracting Parties in international cooperation.

In applying the domestic administrative law analogy, international Courts and Tribunals should first isolate the elements of a treaty provision that is self-judging. As regards article XXI (b) GATT, for example, the question of whether an essential security interest is at stake, is not necessarily subject to a state's self-judging determination, as one could understand the self-judging element to be limited to the determination of whether a certain measure is "necessary" to protect an essential security interest. Similar to the decision of the ICJ in the *Gabčíkovo-Nagymaros Project* case,²²⁴ an international Court or Tribunal is therefore not compelled to exercise deference, even though it may choose to do so, as regards a state's determination in regard of the non-self-judging elements of the treaty provision in question.

²²³ Nolte, see note 207, 291.

²²⁴ See above notes 39-43 and accompanying text.

As regards the self-judging element of a treaty clause, by contrast, an international Court or Tribunal should, similar to the review of discretionary decision-making in domestic administrative law, primarily apply procedural grounds of review as regards the invocation of a self-judging clause. While the Court or Tribunal is thus not authorized to “step into the shoes” of the state invoking a self-judging clause and replace the state’s own determination of the self-judging elements in question, it can review whether the state in question misused its discretionary powers, i.e., whether the factual basis of its decision was adequate and properly investigated, whether the appreciation of the governing legal framework was correct, whether the state abided by the proper procedure and whether it was guided in the exercise of discretion by relevant and pertinent considerations in view of the purpose of the treaty in question. For the purpose of such review, it will also be important that the state invoking a self-judging clause provides the reasons for doing so to the other Contracting Parties.

In this context, the purpose of a self-judging clause, as well as the purpose of the international treaty, which the state seeks to exempt itself from, assume particular importance. 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. Under article XXI GATT, for example, the Dispute Settlement Body should be guided in reviewing a state’s reliance on that provision by scrutinizing whether a measure serves non-economic security interests of a state and cannot manifestly be achieved by clearly less restrictive and equally effective measures, or whether it instead serves economic and therefore protectionist purposes, which is inconsistent with the object and purpose of the GATT.²²⁵ Similarly, in other treaty contexts and other dispute settlement mechanisms, international Courts and Tribunals can determine, based on the object and purpose of the treaty as well as the object and purpose of the specific self-judging clause, whether a state has invoked a self-judging clause for a proper or improper purpose and whether it has based its decision on pertinent as compared to irrelevant considerations. In this sense, the domestic administrative law analogy could serve as a

²²⁵ See Hahn, see note 70, 596-597 (protection of a “vital industry”) and Schloemann/ Ohlhoff, see note 6, 444 (security interests that are entirely a function of the economic capacities, activities and effects that are the very substance of WTO law are not covered).

general standard of review that concretizes the good faith invocation of a self-judging treaty exception.

V. Conclusion

Self-judging clauses are often perceived as a threat to international cooperation, because they allow states to invoke domestic interests in order to escape an international obligation and accord primacy to its domestic interests over international ones. 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 by binding states into a growing network of obligations. Yet, as long as states agree to include self-judging clauses in international treaties, whether bilateral or multilateral, such clauses cannot be viewed as invalid as the fundamental basis for the binding nature of international law is consent.²²⁶ Thus, if states agree to allow for unilateral considerations to trump international cooperation, no contradiction or incompatibility arises 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 rather than to concede permanent restrictions on their sovereignty in such domains.²²⁷ Against this background, self-judging clauses may even have positive effects on international cooperation, as long as such

²²⁶ By contrast, self-judging clauses in the context of reservations to treaties and declarations concerning the submission of states to dispute settlement mechanisms may have to be regarded differently. 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.

²²⁷ See Emmerson, see note 84, 137 (arguing that “[self-judging]security exceptions are the necessary legal linchpins to the WTO Agreements, mediating political exigencies, while simultaneously orchestrating international economic integration”). See also Cann, see note 125, 417; B. Rosendorff/ H. Milner, “The Optimal Design of International Trade Institutions: Uncertainty and Escape”, *International Organization* 55 (2001), 829 et seq. (850-851).

clauses are applied as intended within the international framework in question.

However, self-judging clauses carry an obvious potential for abuse unless there are mechanisms in place that ensure that states only make use of them for the reasons and motives initially indicated and agreed. Such mechanisms include, for example, the duty to give reasons, an instrument that not only requires the state invoking the self-judging clause to justify its decision, but also allows the other Contracting Party to verify whether the limits of a self-judging exception are respected. In addition, dispute settlement mechanisms and review by an international Court or Tribunal can have an important monitoring and supervisory function in ensuring that self-judging exceptions are not misused.

In this context, the article has addressed one of the central questions arising in international dispute resolution involving self-judging clauses, namely whether the invocation of a self-judging clause ousts the dispute settlement body's jurisdiction or merely affects the applicable standard of review. It concludes that international practice, in particular the jurisprudence of the ICJ in the recent case in *Djibouti v. France*, supports the conclusion that self-judging treaty exceptions, unless they are clearly framed otherwise, do not constitute a bar to jurisdiction but merely modify the standard of review an international Court or Tribunal should apply. This standard, as widely agreed, is whether the state in question has relied on a self-judging clause in good faith.

In light of the important role that self-judging clauses play in mediating the relationship between international cooperation and unilateralism, as well as the growing role of formal dispute settlement in the international order, it is crucial that international dispute settlement bodies develop, from the rather malleable standard of good faith, a test that provides an appropriate and acceptable balance between the recognized need for self-determination, on the one hand, and international cooperation, on the other, that will allow both to flourish. Furthermore, the standard has to ensure that international Courts and Tribunals do not intrude into the domain of a state's decision-making that it intended to keep immune from external supervision. While a number of concretizations of the standard of review under good faith have been put forward, many are either not sufficiently precise and do not describe a clearly tailored methodology that Courts and Tribunals can use in determining whether a state has stayed within the outer limits established by the good faith requirement, or ignore differences between self-judging and non-self-judging clauses.

Against this background, the present paper has suggested that international Courts and Tribunals should adopt, similar to the position taken by Judge Keith in his Declaration in *Djibouti v. France*, an approach that focuses on the characteristic element of self-judging clauses, namely the discretion accorded to states to favor domestic over international interests, by drawing on the grounds of judicial review for misuse of discretion under domestic administrative law systems. Such an approach to reviewing the invocation by a state of a self-judging clause would not lead an international Court or Tribunal to judge the substance of the decision made by the state. It would, however, allow review of whether the factual basis of the state's decision was adequate and properly investigated, whether the appreciation of the legal framework was correct and whether the prerequisites for the invocation of a self-judging clause were met, for example, whether the protection of an essential security interest was at stake. Furthermore, it would allow review of whether the state abided by the proper procedure and whether it was guided in the exercise of discretion by relevant and pertinent considerations in accordance with the object and purpose of the self-judging clause and its associated treaty.

Drawing such an analogy, it is argued, is an appropriate way of resolving the tension between a state's discretion under a self-judging clause with the other Contracting Parties' interests in international cooperation. Indeed, analogies to domestic administrative law seem particularly apposite because at the heart of such domestic approaches to reviewing discretionary decisions of administrations is, parallel to the situation at the international level, the desire to ensure, under a system that is faithful to the concept of the rule of law, an appropriate balance between the effectiveness of the state's decision-making and the protection of those affected by discretionary decision-making through judicial review. Similarly, focusing on procedural grounds of review would prevent an international Court or Tribunal from overreaching into the domain states intended to guard against external review.