



Max Planck Institute
for Comparative Public Law
and International Law

Self-Judging Clauses in International Dispute Settlement: Overview and Context

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Questions addressed

- I. What is a self-judging clause?
- II. How to identify a self-judging clause?
- III. Are self-judging clauses valid provisions under international law?
- IV. What effect do they have on international dispute settlement? Do they affect jurisdiction or merely the standard of review?
- V. How to determine the applicable standard of review?



What is a self-judging clause?

Definition: “provision in an international legal instrument 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“

- Residue of sovereignty-centered international law in a modern system of inter-State cooperation
- Appear in various contexts (mutual assistance, extradition, trade, investment, private international law)
- Treaty-by-treaty interpretation necessary, but certain general international legal background (both historical and regarding interpretation)



Self-judging v. non-self-judging clauses (non-investment)

- *Article 2(b) Conv. on Mutual Assistance in Criminal Matters (Djibouti and France)*

assistance in proceedings relating to criminal offences may be refused “if the request concerns an **offence which is not punishable** under the law of both the requesting State and the requested State.”

- *Article 2(c) Conv. on Mutual Assistance in Criminal Matters (Djibouti and France)*

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”



Self-judging v. non-self-judging clauses (investment)

- *Article XIV(1) US-Albania BIT (1995)*

“This Treaty shall not preclude a Party from applying **measures 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.”

- *Article XIV(1) US-Mozambique BIT (1998)*

“This Treaty shall not 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.”



What makes a clause self-judging?

- Subject matter (national security, essential security interests)?
- Wording of the clause (...it considers...)?
- ICJ in *Military and Paramilitary Activities (Nicaragua case)*:

Art. XXI GATT “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.”

- Relevant wordings: “it considers”, “it determines”, “in the state’s opinion”, etc.



Are there implicitly self-judging clauses?

- *CMS v. Argentina*, para. 370:

“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”

- *Sempra v. Argentina*, para. 379:

“[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”

- Difficult to assume that international treaty implicitly allows for unilateral considerations to prevail

- Article 31(4) Vienna Convention (“special meaning”)



Which elements are self-judging?

- Whole clause, eg. Article V(2)(b) New York Convention:

“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 ... [t]he recognition and enforcement of the award would be contrary to the public policy of that country.
- Certain elements, eg. Article 2102(1)(b)(i) NAFTA:

“... nothing in this Agreement shall be construed ... to prevent any Party from taking any actions that **it considers necessary** for the protection of its essential security interests 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”



In which context do self-judging clauses appear?

- Derogation from treaty obligations (“partial exit”)
eg. non-precluded-measures clause in investment treaties
- Exit-clause from international regime (“full exit”)
“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.” (Art. X(1) Treaty on the Non-Proliferation of Nuclear Weapons)
- Unilateral instruments containing consent to jurisdiction
Exclusion from Optional Declaration under Art. 36(2) ICJ Statute
“disputes with regard to matters which are essentially within the domestic jurisdiction of [State X] **as determined by** the Government of [State X].”
- Reservations to international treaties



Validity of self-judging clauses

- *Norwegian Loans* case, Sep. Opinion Judge Lauterpacht
“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. ... 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.
- No problem in treaty provisions as states agree to self-judging character



Avoiding abuse

- Narrow scope of application (“necessary”; “essential security interests”)
- Duty to give reasons
- Procedural and institutional framework (eg. Art. 72 ICC Statute)
- Political restrictions
- Supervision of invocation by international courts and tribunals



Effect of self-judging clauses on dispute settlement

- Do self-judging clause affect jurisdiction?
- Art. 6.12(4) Comprehensive Economic Cooperation Agreement (India-Singapore)

“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”
- ICJ in *Military and Paramilitary Activities (Nicaragua case)*:

“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 [GATT].”



More deferential standard of review: good faith review

- Statement of Administrative Action in the United States' NAFTA Implementation Act of 1993

“Article 2102 [NAFTA, ie 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**.”

- *LG&E v. Argentina*, para. 214:

““[w]ere [it] to conclude that the provision is self-judging, Argentina’s determination would be subject to a **good faith review** anyway”

- *Continental Casualty v. Argentina*, para. 182:

“[i]f Article XI [of the US 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.”



Mutual Assistance in Criminal Matters (Djibouti/France)

- Assistance could 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”
- Wide discretion of requested State
- Obligation of good faith in Art. 26 Vienna Convention
- Good faith connected to prohibition of abuse of rights
- No further clarification of the standard of good faith
- Separate Opinion Judge Keith: good faith review similar to judicial review of discretionary decisions by administrative agencies (proper purpose, proper factual basis, no frustration of object and purpose)



Conclusion: Self-judging clauses

- Self-judging character of clauses (or its elements) need to be made explicit
- Clauses generally do not oust tribunal's jurisdiction, but reduce standard of review to "good faith"
- Good faith can be concretized by recourse to comparative analysis of judicial review of discretionary administrative decision-making
- Clauses can shield a State's essential security interests from tribunal review (increase in willingness of cooperation)
- Drawback is that abuse of clauses may go unsanctioned (decrease in effectiveness of investment protection)



Thank you for your attention!