

DJIBOUTI v FRANCE*

SELF-JUDGING CLAUSES BEFORE THE INTERNATIONAL COURT OF JUSTICE

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I INTRODUCTION

Self-judging clauses are clauses that allow states to reserve to themselves a right of non-compliance with international legal obligations in certain circumstances. These circumstances arise predominantly where the state in question considers that compliance will harm its sovereignty, security, public policy, or more generally, its essential interests.¹ Self-judging clauses can usually be identified by the inclusion of language such as 'if the state considers',² which confers discretion on a state to determine that, in particular circumstances, the state is not obliged to comply with certain obligations it has accepted under a particular international agreement.³

A good example of a self-judging clause can be found in art 2(c) of the *Convention concerning Judicial Assistance in Criminal Matters*,⁴ which provides that assistance in proceedings relating to criminal offences

* *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* [2008] ICJ <<http://www.icj-cij.org>>.

¹ See Susan Rose-Ackerman and Benjamin Billa, 'Treaties and National Security' (2008) 40 *New York University Journal of International Law and Politics* 437.

² Alternate language may include 'in the state's opinion' or 'if the state determines'.

³ The term 'self-judging clauses' is used as a shorthand term for the types of clauses under consideration in this case note. 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 case note.

⁴ Signed 27 September 1986, 1695 UNTS 297 (entered into force 1 August 1992) ('*Mutual Assistance Convention*'). However, it should be noted for the sake of completeness that the text and title of this UNTS treaty differ slightly from those annexed to the *Application Instituting Proceedings: Djibouti v France (Application Instituting Proceedings)* (9 August 2006) ICJ <<http://www.icj-cij.org>>. These discrepancies are likely the result of different translations from the original treaty in French and do not result in substantive differences.

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.

As well as appearing in international treaties, self-judging clauses can be found in other types of international instruments including in optional declarations under art 36(2) of the *Statute of the International Court of Justice* ('*ICJ Statute*') — unilateral declarations whereby states accept the jurisdiction of the International Court of Justice vis-à-vis any other state accepting the same obligation⁵ — and in reservations to international treaties.⁶ They appear, however, most frequently in various types of international treaties,⁷ including treaties on mutual assistance and extradition, trade and investment, or private international law and arbitration. It is this latter type of self-judging clause that is the focus of this case note.⁸

⁵ Under optional declarations, states have occasionally excluded 'disputes with regard to matters which are essentially within the domestic jurisdiction of [state X] as determined by the Government of [state X]' from the ICJ's jurisdiction: see, eg, ICJ, *Declarations Recognizing the Jurisdiction of Court as Compulsory*, available from <<http://www.icj-cij.org/jurisdiction/index.php?p1=5>>, of Malawi (12 December 1966), Mexico (28 October 1947), Liberia (20 March 1952), Philippines (18 January 1972), and Sudan (2 January 1958). Self-judging optional declarations were first introduced by the United States in 1946 by the Connally Amendment: see Arthur Larson, 'The Facts, the Law, and the Connally Amendment' [1961] *Duke Law Journal* 74; Hubert Humphrey, 'The United States, the World Court and the Connally Amendment' (1971) 11 *Virginia Journal of International Law* 310.

⁶ An example of a partly self-judging reservation is the reservation that the US attached to its ratification of the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 December 1951), in which the US 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': see Committee on Foreign Relations, US Senate, *Report on the International Convention on the Prevention and Punishment of the Crime of Genocide* (1989) 28 ILM 760, 774 (emphasis added).

⁷ See, eg, *Convention on Cybercrime*, opened for signature 23 November 2001, 2296 UNTS 167 (entered into force 1 July 2004); *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1582 UNTS 164 (entered into force 11 November 1990); *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003); *United Nations Convention against Corruption*, opened for signature 31 October 2003, 2349 UNTS 41 (entered into force 14 December 2005); *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002); *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, 2149 UNTS 256 (entered into force 23 May 2001); *European Convention on Mutual Assistance in Criminal Matters*, opened for signature 20 April 1959, 472 UNTS 185 (entered into force 12 June 1962); *Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union*, [2000] OJ C 197/1; *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, opened for signature 8 November 1990, 1862 UNTS 69 (entered into force 1 September 1993).

⁸ Self-judging clauses in optional declarations and reservations give rise to different issues as compared to self-judging clauses in international treaties, primarily due to their unilateral nature, leading to questions being raised about their validity. For example, it has been suggested that self-judging limitations to optional declarations are 'not a legal instrument' at all because each state party has only 'undertaken an obligation to the extent to which it, and it alone, considers that it has done so': *Certain Norwegian Loans (France v Norway) (Judgment)* [1957] ICJ Rep 34, 48 (Separate Opinion of Judge Lauterpacht).

Despite their pervasiveness, until the recent decision of the ICJ in *Djibouti v France*,⁹ self-judging clauses in international treaties had not received more than passing reference in international dispute resolution.¹⁰ The question of the appropriate role of international dispute settlement bodies when asked to resolve disputes regarding allegations of abuse or breach of a self-judging clause is, however, of growing importance. As the range of human activity regulated by international agreements proliferates, self-judging clauses constitute one mechanism that allows states to actively engage in the expanding international legal order, while retaining a right to relieve themselves of international obligations in circumstances where the state determines that its essential interests are at risk. The presence of such exit-valves arguably enhances international cooperation, in that states are prepared to cooperate more deeply than would have been possible in the absence of such an ability to side-step international obligations under specific circumstances. At the same time, the large potential for abuse of such clauses could also have a chilling effect on international cooperation because each state party retains, to a certain extent, the right to determine the scope of the international obligations it has assumed. In adjudicating on disputes concerning the application of self-judging clauses, international dispute settlement bodies must therefore balance the need to apply a sufficiently robust standard of review to prevent abuse of such clauses against the need to respect the discretion that such clauses confer upon the state relying on them.

This case note outlines the ICJ's interpretation of the role and operation of self-judging clauses in the context of a dispute between Djibouti and France relating to France's compliance with the *Mutual Assistance Convention*. It also analyses how effective the Court has been in achieving the necessary balance between enforcement of an obligation and a state's discretion to limit this obligation. The case note focuses in particular on Judge Keith's declaration in *Djibouti v France*, which draws on principles of domestic administrative law in determining the appropriate standard of review to apply in cases where a breach of a treaty provision of a self-judging nature is alleged. This case note also

⁹ *Djibouti v France (Judgment)* [2008] ICJ.

¹⁰ Self-judging clauses have previously received passing reference in obiter dicta in cases that concerned the interpretation of a non-self-judging clause. See, eg, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14 [221]–[222] ('*Nicaragua*'); *Oil Platforms (Islamic Republic of Iran v US)* [2003] ICJ Rep 161 [43] ('*Oil Platforms*'). For examples in International Centre for Settlement of Investment Disputes ('ICSID') tribunal decisions relating to the Argentinean economic crisis, see *CMS Gas Transmission Co v Argentine Republic (Award)* ICSID Case No ARB/01/8 (12 May 2005) [366]; *LG & E Energy Corp v Argentine Republic (Decision on Liability)* ICSID Case No ARB/02/1 (3 October 2006) [212]; *Sempra Energy International v Argentine Republic (Award)* ICSID Case No ARB/02/16 (28 September 2007) [379]–[385]; *Enron Corp v Argentine Republic (Award)* ICSID Case No ARB/01/3 (22 May 2007) [335]–[339]; *Continental Casualty Co v Argentine Republic (Award)* ICSID Case No ARB/03/09 (5 September 2008) [182]. The arbitral awards cited in this case note can be found at either <<http://www.investmentclaims.com>> or <<http://ita.law.uvic.ca>>. Self-judging clauses have also been discussed by a panel established under the *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948) ('*GATT*'), where the invocation of the self-judging clause was the subject of the dispute but the panel's limited mandate prevented it from judging or examining the validity or motivation for its invocation: see *US — Trade Measures Affecting Nicaragua*, GATT Doc L/6053 (13 October 1986) (Report of the Panel).

briefly outlines the other legal issues raised in *Djibouti v France* and the Court's decision in respect of these issues.

II FACTS AND ISSUES IN THE CASE

A *The Facts*

The individual stories behind this dispute could of themselves form the basis of a novel.¹¹ A simplified summary of the facts follows. A French judge, Bernard Borrel, died in suspicious circumstances in Djibouti in 1995 while seconded as a Technical Advisor to the Djiboutian Ministry of Justice. Judge Borrel's charred body was found at the bottom of a cliff some 80 kilometres from the city of Djibouti. The Djiboutian judicial investigation into Judge Borrel's death upheld a theory of suicide.

A judicial investigation was also commenced in France in 1995. In 1997, the investigation became an investigation into the murder of Judge Borrel on the basis of evidence casting doubt on the hypothesis of suicide. His wife and children were civil parties to these investigations. Indeed, Mrs Borrel has dedicated a significant portion of her life since the death of her husband to ensuring that his murderer is found and has been heavily involved in all of the judicial investigations and related proceedings. The French Government even sought to have her appear as a witness in the ICJ proceedings. The request was refused by the Court on the basis that 'the evidence to be obtained from Mrs Borrel did not appear to be that of a witness called to establish facts within her personal knowledge which might help the Court to settle the dispute brought before it'.¹²

During the course of the inquiry, various French investigating judges made use of mechanisms under the *Mutual Assistance Convention* on a number of occasions to obtain various documents and statements, to reconstruct the events and to visit the scene of Judge Borrel's death. This included the issuing of three international letters rogatory to Djibouti. Djibouti responded positively to the letters rogatory in each instance.

In the course of the investigation, a number of Djiboutian Government officials were implicated in the murder of Judge Borrel, including the President of Djibouti (who at the time of the murder was the Chief of Staff of the former President). The French media also adopted this theory of the murder, with the motive said to be that Judge Borrel had uncovered evidence linking high-level Djiboutian officials with a drug- and gun-running ring.¹³ This led to a complaint in 2003 by the Djiboutian Minister for Foreign Affairs to the French Minister for Foreign Affairs who noted his disappointment that France had taken no action to counteract the false allegations being made about the Djiboutian President in the French press and requested that the French Government expedite the conclusion of the judicial investigation.¹⁴

¹¹ For a full account of the facts, see *Djibouti v France (Judgment)* [2008] ICJ [19]–[38].

¹² *Ibid* [12].

¹³ See, eg, Brigitte Vital-Durand, 'Affaire Borrel: la révélation des militaires français', *Libération* (Paris, France) 12 July 2007, 10; Jon Swain, 'Widow's Hunt for Killer Angers Key French Ally', *The Sunday Times* (London, United Kingdom) 28 October 2007.

¹⁴ See *Djibouti v France (Judgment)* [2008] ICJ [23].

In parallel to the judicial investigations, judicial proceedings were opened in respect of subornation of perjury in France against the *Procureur de la République* of Djibouti and the Djiboutian Head of National Security. Both were accused of having exerted pressure on witnesses who had given evidence in the judicial investigation (one implicating the President of Djibouti, and the other discrediting such evidence). In early 2004, these two Djiboutian officials were summoned to appear before the French court conducting the proceedings.¹⁵

In 2004, the Djiboutian Government decided to reopen the judicial investigation into Judge Borrel's death in Djibouti and requested, by way of international letter rogatory, the transmission of the record of the French investigation. Despite initial positive assurances from the French Ministries for Justice and Foreign Affairs that the request would be satisfied, the French investigating judge with responsibility for responding to the international letter rogatory decided on 8 February 2005 not to transmit the requested files. She noted that, since no new element had come to light since the closing in December 2003 of the first Djiboutian judicial investigation, and given the absence of any reason connected with the opening of the new Djiboutian investigation, the new investigation

appear[ed] to be an abuse of process aimed solely at ascertaining the contents of a file which includes, amongst other things, documents implicating the *procureur de la République* of Djibouti in another [judicial] investigation being conducted at Versailles ... where his personal appearance had been requested.¹⁶

She further noted that:

Article 2(c) of the [Mutual Assistance] Convention ... provides that the requested State may refuse a request for mutual assistance if it considers that execution of the request is likely to prejudice [the] sovereignty, ... security, ... *ordre public* or other ... essential interests [of France].¹⁷

She concluded that in the presence of 25 declassified 'defence secret' documents on the file from two French intelligence services:

[t]o accede to the Djiboutian judge's request would amount to an abuse of French law by permitting the handing over of documents that are accessible only to the French judge. Handing over our record would entail indirectly delivering French intelligence service documents to a foreign political authority. Without contributing in any way to the discovery of the truth, such transmission would seriously compromise the fundamental interests of the country and the security of its agents.¹⁸

¹⁵ When the two officials failed to appear, European arrest warrants were issued in 2006. Furthermore, subsequent to the oral hearings in *Djibouti v France*, on 27 March 2008, the *Procureur de la République* of Djibouti and the Djiboutian Head of National Security were found guilty, in absentia, of subornation of perjury and sentenced to 18 months and one year of imprisonment respectively: see *ibid* [36]. On 28 May 2009, these judgments, however, were reversed and the two officials acquitted. Further, the European arrest warrants were cancelled: see 'France Acquits Djibouti Officials', *BBC News Online* (London, UK) 29 May 2009 <<http://news.bbc.co.uk/2/hi/europe/8073407.stm>>.

¹⁶ Quoted in *Djibouti v France (Judgment)* [2008] ICJ [28].

¹⁷ *Ibid*.

¹⁸ *Ibid*.

There was some dispute between the parties about when this decision was in fact notified to Djibouti and whether adequate reasons were given. France claimed to have notified the Ambassador of Djibouti in Paris by letter from the Ministry of Justice dated 31 May 2005, which referred to France's reliance on art 2(c) of the *Mutual Assistance Convention*. Djibouti claimed never to have received this letter and to have received notification of the decision only in a letter dated 6 June 2005 from the French Ambassador in Djibouti to the Djiboutian Minister of Foreign Affairs. This letter simply stated that France was not in a position to comply with the request for the execution of the international letter rogatory.

Meanwhile, the judicial investigation into the murder of Judge Borrel was continuing in France. On 18 May 2005 and then again on 14 February 2007, the investigating judge invited the President of Djibouti, who was on official visits in France, to appear as a witness in the judicial investigation. In each case, the fact that such a request had been made was reported in the French press on the same day.¹⁹ France accepted that the first request was not made in accordance with French law, but submitted that the second request was validly made. In each case, the President of Djibouti declined to appear.

B The Issues

France has no declaration in force accepting the compulsory jurisdiction of the Court under art 36(2) of the *Statute of the International Court of Justice*,²⁰ and there is no compromissory clause contained in any treaty between France and Djibouti applicable to the dispute. Djibouti, therefore, sought to found the Court's jurisdiction on art 36(1) of the *ICJ Statute* and art 38(5) of the *ICJ Rules of Court*; that is, on France's consent to the Court's jurisdiction in the specific context of the dispute (*forum prorogatum*).²¹ France consented to the Court's

¹⁹ See 'French Courts Summon Djibouti President over Judge's Death', *Agence France Presse Newsfeed*, 18 May 2005; 'Le président djiboutien convoqué dans l'affaire Borrel', *Le Figaro* (Paris, France) 15 October 2007.

²⁰ Article 36(2) of the *ICJ Statute* provides:

The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

²¹ Article 36(1) of the *ICJ Statute* provides:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force.

ICJ, Rules of Court art 38(5) (adopted 14 April 1978), provides:

When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which the application is made, the application shall be transmitted to that State. It shall not however be entered on the General List, nor any action be taken in the proceedings, unless and until the State against which such an application is made consents to the Court's jurisdiction for the purposes of the case.

jurisdiction over the dispute on 25 July 2006.²² The precise scope of this consent, however, was one of the issues that the Court had to decide in the context of the dispute. France submitted that Djibouti had broadened its case in its written and oral arguments from that over which it had accepted jurisdiction in the application and, therefore, that the Court lacked jurisdiction to decide certain of Djibouti's claims.

Without analysing the detail of the Court's decision in this respect,²³ the Court found that it had jurisdiction in respect of the following issues:

- 1 whether France had violated its obligations under the *Mutual Assistance Convention* by failing to execute the letter rogatory addressed to it by Djibouti and/or failing to give reasons for the failure to execute the letter rogatory, and, if so, what reparations should be made;
- 2 whether France had violated the general obligation of cooperation provided for by the *Treaty of Friendship and Co-operation between France and Djibouti of 27 June 1977*²⁴ by 'not co-operating with it in the context of the judicial investigation into the Borrel case; attacking the dignity and honour of the Djiboutian Head of State and other Djiboutian authorities; and acting in disregard of the principles of equality, mutual respect and peace set out in Article 1 of the Treaty';²⁵
- 3 whether France had violated the obligation deriving from established principles of customary and general international law to prevent attacks on the person, freedom or dignity of an internationally protected person by sending witness summonses to the Head of State of Djibouti;²⁶ and
- 4 whether the *Procureur de la République* and the Head of National Security benefited from functional immunity from prosecution in light of the fact that the conduct, which was the subject of criminal prosecution, was undertaken while they were acting as an organ of the state, and whether in light of this French courts should be declared to have no jurisdiction to continue with the proceedings or to have issued the summonses.²⁷

The remainder of this case note will focus on the first of these four issues relating to the *Mutual Assistance Convention*, and in particular, the Court's approach to interpreting the self-judging provision in art 2(c) of the *Mutual Assistance Convention*. This first issue was discussed in both the majority judgment and in a declaration by Judge Keith.

However, for completeness, it is noted that Djibouti was unsuccessful on all of its other arguments. In respect of the argument relating to the *Co-operation*

²² See generally ICJ, '*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*' (Press Release, 4 June 2008) <<http://www.icj-cij.org/docket/files/136/14570.pdf>>.

²³ For this aspect of the Court's decision, see *Djibouti v France (Judgment)* [2008] ICJ [45]–[95].

²⁴ Signed 27 June 1977, 1482 UNTS 195 (entered into force 31 October 1982) ('*Co-operation Treaty*').

²⁵ *Djibouti v France (Judgment)* [2008] ICJ [96].

²⁶ *Ibid* [157].

²⁷ *Ibid* [185].

Treaty, the Court held that the general obligation to cooperate enshrined in arts 1 and 2 of the *Co-operation Treaty* did not create a self-standing legal obligation. Rather, it informed the interpretation of the obligations set out in the remainder of the *Co-operation Treaty*. While this general obligation could also be relevant to interpreting the *Mutual Assistance Convention*, in light of the fact that the *Co-operation Treaty* did not deal specifically with mutual assistance in criminal matters, it could not ‘possibly stand in the way of a party to the [Mutual Assistance] Convention relying on a clause contained in it which allows for non-performance of a conventional obligation under certain circumstances’.²⁸

In respect of the witness summonses issued to the President of Djibouti, Djibouti’s failure to establish its case resulted from the fact that the summonses were actually ‘merely an invitation to testify which the Head of State could freely accept or refuse’.²⁹ There was, consequently, no attack on the Head of State’s immunity from criminal jurisdiction.³⁰ The Court did note, however, that in respect of the first witness summons, which was issued in contravention of the process required under French law for summonses issued to foreign Heads of State, an apology would have been due from France.³¹ The Court further noted that had it been established that the French judiciary had transmitted the information about the summonses to the French media, as alleged by Djibouti, this could have constituted a violation of France’s international obligations. However, the Court considered that no probative evidence to this effect had been provided.³²

In respect of the last argument, Djibouti’s failure to establish its case was based not on the substance of the claim. Rather, it was based on the lack of evidence put forward by Djibouti to prove that the two officials were in fact acting in an official capacity when undertaking the actions that were the subject of the criminal proceedings (the alleged attempts to influence the evidence given by certain witnesses), and the failure of Djibouti to have raised this claim of immunity in the French domestic courts.³³

III THE *MUTUAL ASSISTANCE CONVENTION* AND ART 2(C)

Djibouti put four main arguments to the Court relating to France’s breach of the *Mutual Assistance Convention*. First, it argued that art 1 of the *Mutual Assistance Convention*³⁴ placed France under an obligation to execute the international letter rogatory, and, in particular, that the article imposed an obligation of reciprocity. As the French judicial authorities benefited considerably from assistance provided by Djibouti under the auspices of the

²⁸ Ibid [107]–[114].

²⁹ Ibid [171].

³⁰ Ibid [171], [179].

³¹ Ibid [173].

³² Ibid [175], [180].

³³ Ibid [191], [195]–[196].

³⁴ Article 1 of the *Mutual Assistance Convention*, above n 4, provides:

The two States undertake to extend to each other, in accordance with the provisions of this Convention, the broadest possible judicial assistance in any proceeding relating to offences the punishment of which is, at the time when assistance is requested, within the competence of the judicial authorities of the requesting State.

Mutual Assistance Convention in respect of the French investigation into the death of Judge Borrel, Djibouti argued that France was under an obligation to provide the same measure of assistance to Djibouti.³⁵ Second, Djibouti submitted that France, through its Ministries of Justice and Foreign Affairs, had undertaken to transmit the requested files and was bound by that undertaking.³⁶ Third, Djibouti submitted that France could not validly rely on art 2(c) to justify its refusal to execute the letter rogatory.³⁷ Finally, it submitted that France had breached its obligations to give reasons under art 17 of the *Mutual Assistance Convention*, and that this invalidated France's reliance on art 2(c).³⁸

The Court disposed of Djibouti's first two arguments in short form. In respect of the argument that art 1 required reciprocity of conduct, the Court held

that, so far as the 1986 Convention is concerned, each request for legal assistance is to be assessed on its own terms by each Party. Moreover, the way in which the concept of reciprocity is advanced by Djibouti would render without effect the exceptions listed in Article 2. The Court observes that the Convention nowhere provides that the granting of assistance by one State in respect of one matter imposes on the other State the obligation to do likewise when assistance is requested of it in turn.³⁹

In respect of the argument that France was bound by its undertaking to execute the letter rogatory, the Court considered that the correspondence relied upon to establish this undertaking — a letter from the Principal Private Secretary to the French Minister of Justice — merely informed the Ambassador of Djibouti in France that the steps necessary to set in motion the legal process of considering the request had been undertaken and did not constitute a formal undertaking to transfer the file giving rise to obligations at international law.⁴⁰

The Court gave more attention to the last two of Djibouti's arguments.

A *France's Reliance on Art 2(c) — Majority Judgment*

France relied on the reasons provided by the investigating judge to support its reliance on the exception in art 2(c) of the *Mutual Assistance Convention*, which allows 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'.⁴¹ As set out above, in her decision refusing to execute the letter rogatory, the investigating judge stated that she considered transmission of the French file to be 'contrary to the essential interests of France', in that the file contained declassified 'defence secret' documents, together with information and witness statements in respect of another case in progress.⁴² In written and oral argument, France explained that the documents were declassified only to the extent required to make them

³⁵ *Djibouti v France (Judgment)* [2008] ICJ [116]–[117].

³⁶ *Ibid* [125]–[126].

³⁷ *Ibid* [132].

³⁸ *Ibid* [133]–[134].

³⁹ *Ibid* [119].

⁴⁰ *Ibid* [128]–[130].

⁴¹ *Mutual Assistance Convention*, above n 4, art 2(c).

⁴² See *soit-transmis* of 8 February 2005, as cited in *Djibouti v France (Judgment)* [2008] ICJ [147].

available to the French judiciary. It further 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.⁴³

France further argued that in light of the sensitive nature of penal affairs and their tight link to state sovereignty, art 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.⁴⁴

Djibouti contested the French position in this regard, arguing that the Court must at least review the invocation of art 2(c) for good faith.⁴⁵ Djibouti further submitted that no prejudice to the sovereignty, security, *ordre public* or any other of France’s essential interests could result from the transmission of the file, including the ‘defence secret’ documents. In making this argument, Djibouti placed weight on the fact that the documents had been declassified to the extent necessary to be made available to the investigating judge and parties to the judicial investigation in France, such as Mrs Borrel. Djibouti also questioned France’s rationale for refusing to transfer any part of the file.⁴⁶

The Court accepted that art 2(c) conferred a wide discretion on a state in deciding to refuse mutual assistance, but held that the exercise of discretion under art 2(c) remained subject to the obligation of good faith codified in art 26 of the *Vienna Convention on the Law of Treaties*.⁴⁷ In reaching this conclusion, the Court made no reference to its earlier obiter dicta discussion of self-judging clauses in the *Nicaragua*, which appeared to favour the position put forward by

⁴³ Ibid [137], [148].

⁴⁴ *Djibouti v France (Oral Proceedings of France — Translation)* (25 January 2008) [2008] ICJ [12].

⁴⁵ *Djibouti v France (Oral Proceedings of Djibouti — Translation)* (28 January 2008) [2008] ICJ [15]. See also *Djibouti v France (Judgment)* [2008] ICJ [135].

⁴⁶ *Djibouti v France (Judgment)* [2008] ICJ [132].

⁴⁷ Opened for signature on 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*VCLT*). The requirement of good faith derives from the customary law principle of *pacta sunt servanda* and is reflected not only in art 26 of the *VCLT*, but also in art 31(1) of the *VCLT*. It finds further reflection in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UN GAOR, 25th sess, 1883rd plen mtg, Supp 18, UN Doc A/RES/25/2625 (24 October 1970). In *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253, 268, and *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457, 473, the ICJ recognised that good faith is one of the basic principles governing the creation and performance of legal obligations, whatever their source. In *Border and Transborder Armed Action (Nicaragua v Honduras) (Judgment)* [1988] ICJ Rep 69, 105, however, the Court emphasised that good faith is not in itself a source of obligation where none would otherwise exist. See also Jan Klabbbers, *The Concept of Treaty in International Law* (1996) 94. Consistent with the Court’s jurisprudence, in *Djibouti v France* the concept of good faith is not used as the source of a legal obligation. Rather, good faith is used to limit the exercise by a state of discretion within the context of legal obligations to which it is subject.

France on self-judging clauses, namely that the Court would have no jurisdiction to review a state's exercise of discretion under a self-judging clause.⁴⁸

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 art 2.⁴⁹ The Court then outlined one of the reasons provided by the instructing judge for refusing to execute the letter rogatory (that relating to the file containing declassified 'defence secret' documents) and held that it fell within the scope of art 2(c) of the *Mutual Assistance Convention*. On this basis, the Court found that France had relied on art 2(c) in good faith.⁵⁰ It can be seen from this reasoning that the Court interpreted good faith to permit only a very limited review. All that needed to be established was that one of the reasons provided by the instructing judge for refusing to transmit the file fell within the ambit of art 2(c).

B *France's Failure to Give Reasons under Art 17 — Majority Judgment*

In light of Djibouti's assertion that its Ambassador to France did not receive the letter of 31 May 2005 and France's inability to conclusively prove that the letter was received, the Court held that it could not take this document into consideration in ascertaining whether France had complied with the obligation to give reasons under art 17 of the *Mutual Assistance Convention*.⁵¹

The Court therefore focused on the letter of 6 June 2005 in which the French Ambassador to Djibouti informed the Djiboutian Minister of Foreign Affairs that France was not in a position to comply with the Djiboutian request but provided no explanation as to why. The Court found that France had failed to comply with its duty to give reasons, noting that the fact that Djibouti may have become aware of France's reasons through the media, and was informed of France's

⁴⁸ *Nicaragua (Merits)* [1986] ICJ Rep 14 — referring to art XXI of the *Treaty of Friendship, Commerce and Navigation (with Protocol)*, signed 21 January 1956, Nicaragua-US, 367 UNTS 3 (entered into force 24 May 1958), which provided that the Treaty did not preclude the application of measures 'necessary to protect [a state's] essential security interests' — the Court stated that:

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: [222].

See also at [282]; *Oil Platforms (Judgment)* [2003] ICJ Rep 161, [43].

⁴⁹ See *Djibouti v France (Judgment)* [2008] ICJ [135], [145]:

The Court begins its examination of Article 2 of the 1986 Convention by observing that, while it is correct, as France claims, that the terms of Article 2 provide a State to which a request for assistance has been made with a very considerable discretion, this exercise of discretion is still subject to the obligation of good faith codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties. ... This requires it to be shown that the reasons for refusal to execute the letter rogatory fell within those allowed for in Article 2.

⁵⁰ *Ibid* [147]–[148], [202].

⁵¹ *Ibid* [143].

reasons in its counter-memorial filed in the case on 13 July 2007, did not remedy this breach.⁵²

The Court further held that even if the letter of 31 May 2005 had been found to exist, the mere statement that France was relying on art 2(c) would not have satisfied the obligation to give reasons. In so doing, the Court recognised the importance of the obligation in art 17 in preventing the abuse of self-judging clauses by allowing the requesting state to ascertain whether the requested state's refusal remained within the possible limits of the self-judging determination in question. In this respect, the Court stated that art 17 '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'.⁵³

While the Court found a violation of art 17, it did not, however, as a matter of treaty interpretation, support Djibouti's argument that this breach prevented France's reliance on art 2(c). Further, in circumstances where the reasons had passed into the public domain, the Court considered that its finding that France had violated its obligation to Djibouti under art 17 constituted appropriate satisfaction.⁵⁴

C *France's Reliance on Art 2(c) — Declaration of Judge Keith*

In a separate declaration, Judge Keith analysed the standard of review applicable to self-judging clauses in greater detail. He considered that the decision not to grant mutual assistance should be reviewed against the closely related principles of good faith, abuse of rights and misuse of power. He held 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.⁵⁵ In this context, he cited the Court's statement in *Gabčíkovo-Nagymaros Project*⁵⁶ that the good faith obligation in art 26 of the *VCLT* 'obliges the parties [to a treaty] to apply it in a reasonable way and in such a manner that its purpose can be realized'.⁵⁷

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 (per art 1), Judge Keith considered whether the reasons given by the instructing judge satisfied the requirements of good faith. In his view, 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 art 2(c), namely that the letter rogatory was an abuse of process — because the request failed to indicate the object of, and the reason for, the request as required by art 13(b) and appeared to be a means of obtaining copies of documents implicating the *Procureur de la République* of Djibouti in

⁵² Ibid [150]–[152].

⁵³ Ibid [152]. See also *Djibouti v France (Judgment)* [2008] ICJ [10] (Declaration of Judge Keith).

⁵⁴ *Djibouti v France (Judgment)* [2008] ICJ [156], [204].

⁵⁵ *Djibouti v France (Judgment)* [2008] ICJ [6] (Declaration of Judge Keith).

⁵⁶ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 79.

⁵⁷ Ibid [142].

the related subornation of perjury proceedings in which he had refused to appear.⁵⁸

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 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. This was despite the fact that the evidence showed that the French Minister for Defence had indicated prior to her taking the decision that he was not opposed to the partial handing over of the file. Judge Keith considered that the judge’s failure to consider transferring part of the file, or requesting that Djibouti particularise its request, amounted to a failure to have proper regard to the purpose of the *Mutual Assistance Convention*.⁵⁹ This failure could not be cured by the post-hoc reasons for this approach put forward by France in its written and oral pleadings.

On this basis, Judge Keith concluded that the French judge had not complied with the *Mutual Assistance Convention* in making her decision under art 2(c) and was yet to make a decision in accordance with law in response to the letter rogatory. In the event, however, Judge Keith found that Djibouti’s failure to seek clarification about the reasons for the refusal, or to seek a reversal of the refusal, until it lodged its application before the Court, precluded any positive remedy. Judge Keith, therefore, voted with the majority in declining to uphold Djibouti’s final submissions in respect of art 2(c) of the *Mutual Assistance Convention*.⁶⁰

IV AVOIDING ABUSE OF SELF-JUDGING CLAUSES

As can be seen in *Djibouti v France*, treaties containing self-judging clauses will often include mechanisms aimed at limiting instances of abuse by providing a means for states parties to monitor the use of discretion by other states parties reserved in such clauses. In the case of the *Mutual Assistance Convention*, this mechanism was a duty to give reasons where assistance was refused. As noted by both the majority judgment and Judge Keith, the duty to provide reasons is an important tool allowing the affected state to assess whether the acting state’s exercise of discretion is within the limits of the self-judging clause in question.⁶¹

Many other treaty regimes containing self-judging clauses also include procedural and institutional safeguards, which aim to prevent states from availing themselves of such clauses in a way that is arbitrary, defeats the object and purpose of the treaty regime or, more generally, unwarrantedly obstructs international cooperation.⁶² Such safeguards play an important role in bringing to light potential misuse of a self-judging clause, and hence provide a basis for states parties to apply political pressure on states that are viewed as abusing their

⁵⁸ *Djibouti v France (Judgment)* [2008] ICJ [7]–[9] (Declaration of Judge Keith).

⁵⁹ *Ibid* [8]–[9].

⁶⁰ *Ibid* [11].

⁶¹ *Djibouti v France (Judgment)* [2008] ICJ [152]. See also *ibid* [10].

⁶² See, eg, *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 72, which sets out a detailed process through which a state must go, including negotiation and the provision of reasons, when it refuses to provide information to the Court on the basis that it is of the opinion that its national security interests would be prejudiced.

discretion. In circumstances where resort to an international dispute settlement body is not available, these systems constitute the primary means of preventing abuse of self-judging clauses.

However, as recourse to international dispute settlement bodies is increasing,⁶³ the role of these bodies in monitoring the use of self-judging clauses is also likely to increase. Given the important and politically sensitive role that self-judging clauses play in international cooperation, it is particularly important for international dispute settlement bodies reviewing the invocation of such clauses to properly balance the need to avoid the abuse of self-judging clauses against the need to respect a state's sovereign exercise of discretion.

As *Djibouti v France* is the first case in which the invocation of a self-judging clause has been directly considered by an international dispute settlement body, it is useful to analyse how successful the Court has been in reaching an appropriate balance in this instance.

The majority judgment found that the appropriate standard of review to apply to self-judging clauses was that of good faith.⁶⁴ Similarly, in his declaration, Judge Keith found the appropriate standard of review to be based on the related concepts of good faith, abuse of rights and misuse of power. The requirement of good faith, the common element in both the majority judgment and Judge Keith's declaration, has also been considered to be the appropriate standard of review to apply to self-judging clauses by a number of investment arbitration tribunals in obiter⁶⁵ and by numerous academic commentators.⁶⁶ The question remains, however, what is meant by good faith review (or indeed review on the basis of abuse of rights or misuse of power) and how does such review differ

⁶³ See the symposium held at New York University School of Law in October 1998, 'Symposium Issue: The Proliferation of International Tribunals: Piecing Together the Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 679–935. See especially Benedict Kingsbury, 'Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?' (1999) 31 *New York University Journal of International Law and Politics* 679; Jonathan Charney, 'The Impact on the International Legal System of the Growth of International Courts and Tribunals' (1999) 31 *New York University Journal of International Law and Politics* 697; Cesare Romano, 'The Proliferation of International Judicial Bodies: The Piece of the Puzzle' (1999) 31 *New York University Journal of International Law and Politics* 709.

⁶⁴ The conclusion reached by the majority judgment in this respect was supported by 15 votes to one: see *Djibouti v France (Judgment)* [2008] ICJ [205].

⁶⁵ See *LG & E Energy Corp v Argentine Republic (Decision on Liability)* ICSID Case No ARB/02/1 (3 October 2006) [214]; *Sempra Energy International v Argentine Republic (Award)* ICSID Case No ARB/02/16 (28 September 2007) [388]; *Enron Corp v Argentine Republic (Award)* ICSID Case No ARB/01/3 (22 May 2007) [339].

⁶⁶ In the World Trade Organization context, see Michael Hahn, 'Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception' (1991) 12 *Michigan Journal of International Law* 558, 599–601; Hannes Schloemann and Stefan Ohlhoff, "'Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence' (1999) 93 *American Journal of International Law* 424, 444; Dapo Akande and Sope Williams, 'International Adjudication on National Security Issues: What Role for the WTO?' (2003) 43 *Virginia Journal of International Law* 365, 389–92. In the ICSID context (concerning self-judging clauses in investment treaties), see William Burke-White and Andreas von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 *Virginia Journal of International Law* 307, 376–81; cf. also concerning self-judging reservations in optional declarations under the *ICJ Statute*, Donald Greig, 'Nicaragua and the United States, Confrontation over the Jurisdiction of the International Court' (1991) 62 *The British Year Book of International Law* 119, 181–213.

from the review undertaken by international dispute settlement bodies in relation to non-self-judging clauses?

Kolb 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 (eg, the principle of consent, no obligation without consent) may have in the international society, in ever-increasing need of cooperation’.⁶⁷ In the context of treaties, the principle of good faith protects the object and purpose of the treaty against acts intending or having the effect of depriving it of its use. Described as such, it is clear that good faith is a very general legal concept. For this reason it can be useful to concretise the principle of good faith in order to apply it to specific cases.⁶⁸ Similarly, it can be useful to concretise general principles such as the abuse of rights or misuse of power. At least in the context of good faith, previous jurisprudence of the ICJ has not undertaken such concretisation in any detail. The question remains: how can these principles be concretised in the context of reviewing the invocation of self-judging clauses?

Djibouti v France presents us with two possible approaches: that adopted in the majority judgment or that adopted by Judge Keith in his declaration.

A *The Standard of Review Applied in the Majority Judgment*

The majority judgment does not elaborate in any detail on what is meant by good faith review. In this sense, the test applied resembles a ‘touch and feel’ type test. Furthermore, the Court held that, in applying the test, France needed to show that the reasons for its refusal to execute the letter rogatory fell within those allowed for in art 2(c). However, the Court then proceeded to consider only one of the several reasons provided by France, and, on that basis, decided that the requirement of good faith was satisfied.⁶⁹ The Court chose the reason most closely tied to the self-judging exception in question from a range of reasons supplied by the state invoking the self-judging clause. The Court then relied on that reason in order to find that the state had exercised its discretion in good faith.

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.

In addition, while such a ‘touch and feel’ type test may have advantages due to its flexibility in application, there is also a risk that it will not be robust enough to give states sufficient confidence that self-judging clauses will not be abused, or conversely that the state’s legitimate discretion will be respected by a reviewing court or tribunal. Such a test, without further concretisation, thus entails 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.

⁶⁷ Robert Kolb, ‘Principles as Sources of International Law (with Special Reference to Good Faith)’ (2006) 53 *Netherlands International Law Review* 1, 18.

⁶⁸ *Ibid* 19–20 (stating that ‘the key to the life of the great principles is the concept of “concretization”, which has not received yet the attention it deserves’).

⁶⁹ See *Djibouti v France (Judgment)* [2008] ICJ [4] (Declaration of Judge Keith).

B *The Standard of Review Applied by Judge Keith*

In contrast to the majority judgment, Judge Keith suggests a number of concrete questions that may be asked in order to assess a breach of the good faith requirement, an abuse of rights or a misuse of power. These questions bear a close resemblance to the questions applied in judicial review of administrative decision-making in many domestic administrative law systems, particularly to those grounds of review relating to the improper exercise of a power.⁷⁰

In the Australian context, the codification of these grounds of judicial review is set out in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*').⁷¹ Indeed, the requirements cited by Judge Keith reflect s 5(2)(a) (taking an irrelevant consideration into account in the exercise of a power); s 5(2)(b) (failing to take a relevant consideration into account in the exercise of a power); and s 5(2)(c) (an exercise of a power for a purpose other than a purpose for which the power is conferred) of that Act.

Many of the other grounds of review listed in s 5(2) of the *ADJR Act*⁷² would also seem to fall neatly within the concept of good faith decision-making or the concept of abuse of rights or misuse of power in the context of reviewing a discretionary self-judging clause in an international treaty. Indeed, some of these grounds simply restate these principles, while others list actions indicative of a breach of such principles and thus assist in concretising how they may be applied.

Judge Keith's focus on this approach to reviewing a discretionary decision probably owes much to his background, and in particular to his judicial career in New Zealand.⁷³ However, Judge Keith's declaration also demonstrates the important influence that domestic legal principles of administrative law can have on the development of international law.⁷⁴

Indeed, there seems no reason in principle why review of a discretionary power at the international level should be different from review of a discretionary power in domestic judicial systems. Certainly, the respective contexts and relevant circumstances may differ, but the rationale for the

⁷⁰ Also described as grounds of judicial review available for abuse of discretionary power and/or irrationality: see, eg, Philip Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, 2007) 870, 885, 931. Note that Judge Keith's approach to remedies, and in particular his decision to refuse a remedy in the face of Djibouti's delay in contesting the validity of France's decision is also analogous to the recognised discretion to refuse a remedy in domestic administrative law systems: see, eg, Peter Cane and Leighton McDonald, *Principles of Administrative Law* (2008) 115–16; Sir William Wade and Christopher Forsyth, *Administrative Law* (9th ed, 2004) 700–3.

⁷¹ For a foundational case on these grounds of review at common law, see *Associated Provincial Picture Houses Ltd v Wednesbury Co* [1947] 2 All ER 680.

⁷² Such grounds include 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.

⁷³ Judge Keith was Judge of the New Zealand Court of Appeal from 1996–2003, and then of the newly established Supreme Court of New Zealand from 2004–05, as well as a member of the Public and Administrative Law Reform Committee from 1972–86, and then of the New Zealand Law Commission from 1986–96 (including five years as President from 1991–96).

⁷⁴ See generally Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15.

existence of such discretion in both systems is quite comparable: avoiding the 'over-inclusive and under-inclusive' effect of absolute rules,⁷⁵ which can hamper effective policy implementation. Further, the rationale for reviewing the exercise of discretion by domestic public authorities for reasonableness and good faith — that the power is conferred for public purposes and on trust⁷⁶ — has parallels at the international level. 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. The states parties are committing to obligations, subject to exceptions on the basis of trust, as informed by the principle of *pacta sunt servanda*. Treaties may impose limits on the exercise of state sovereign powers, and where such limits are subject to discretionary exceptions, the discretion can be expected to be exercised reasonably and in good faith in accordance with the treaty's overall purpose to further international cooperation.⁷⁷

However, even if it is accepted that domestic administrative law may usefully inform 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 as currently formulated 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.

Setting aside for one moment the unreasonableness ground of review, the grounds of review for improper purpose applicable to discretionary decision-making in Australia are targeted not at the substantive assessment made by the decision-maker, but at the process by which the decision is arrived at in

⁷⁵ For the international perspective, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (revised ed, 2006) 591–2:

Indeterminacy is an absolutely central aspect of international law's acceptability. It does not emerge out of carelessness or bad faith of legal actors (States, diplomats, lawyers) but from their deliberate and justified wish to ensure that legal rules will fulfil the purposes for which they were adopted. Because those purposes, however, are both conflicting as between different legal actors and unstable in time even in regard to single actors, there is always the risk that rules — above all 'absolute rules' — will turn out to be over-inclusive and under-inclusive. The rules will include future cases we would not like to include and exclude cases that we would have wanted to include had we known of them when the rules were drafted. This fundamentally — and not just marginally — undermines their force. It compels the move to 'discretion' which it was the very purpose to avoid by adopting the rule-format in the first place.

For a domestic perspective, see Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (1990) 69–78, commenting 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'.

⁷⁶ See Wade and Forsyth, above n 70, 354–6.

⁷⁷ In focusing in this case note on the analogy that can be drawn between review of the use of self-judging clauses by international dispute settlement bodies and judicial review of administrative decisions in domestic legal systems, the authors are not suggesting that other analogies, for example with contract law, could not also assist in concretising the concept of good faith. Indeed, the abuse of rights doctrine and prohibitions on arbitrary behaviour are just two examples of contract law principles that could assist in this regard. However, the authors consider that the administrative law analogy suggested by Judge Keith's separate opinion is a 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 discretionary decisions.

light of the purpose of the law under which the power is exercised. Applied to self-judging clauses in international treaties, these grounds, therefore, respect the subjective aspect of the phrase ‘if the state considers’ while providing concrete questions by which to assess good faith. The questions themselves are determined by reference to an identification of the object and purpose of the relevant treaty, objects and purposes which states parties have undertaken to pursue by ratifying the treaty.⁷⁸

As a review of the legality of the decision and not of the merits, this form of review would not authorise an international dispute settlement body to ‘step into the shoes’ of the state and remake the decision. Indeed, in the case of the procedural grounds of review, a finding that a state has exercised its power improperly and has yet to make a decision according to law does not prevent the state from making the same substantive decision on review, if that same decision can be reached when the power is exercised for a proper purpose, taking into account all and only relevant considerations, and having regard to the specific circumstances of the case. It is possible that in *Djibouti v France*, this would have been the outcome if the Court had ordered France to remake its decision given the further reasons for its refusal that France provided during the course of the proceedings.

This form of review can also be said not to trespass into areas of which the state is the ‘sole trustee’.⁷⁹ Instead, such a standard of review upholds a state’s sovereign discretion to determine its own essential interests and the circumstances in which they may be prejudiced or require protection, as envisaged by a self-judging clause. At the same time, such a standard of review ensures that state discretion is not misused by imposing concrete procedural controls through an independent international dispute settlement body.

The unreasonableness ground of review is the one ground of review that, if rigorously applied, has the greatest potential to trespass into a review of the merits of the decision.⁸⁰ However, so long as the unreasonableness test is limited in its application to situations where the decision to rely on the self-judging clause is ‘wholly unreasonable and disproportionate’ or ‘clearly unsuitable and manifestly inappropriate’,⁸¹ an international court or tribunal would still

⁷⁸ 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.

⁷⁹ See Robert Jennings, ‘Recent Cases on “Automatic” Reservations to the Optional Clause’ (1958) 7 *International and Comparative Law Quarterly* 349, 362, where he argues that national security is such a matter and is a category not capable of any kind of judicial assessment. For an analysis of how review of an improper exercise of administrative decision-making power relating to national security can legitimately be undertaken at the domestic level, see Chris Finn, ‘The Justiciability of Administrative Decisions: A Redundant Concept?’ (2002) 30 *Federal Law Review* 239, 255–6.

⁸⁰ See the discussions of unreasonableness and proportionality in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 367–83; Joseph, above n 70, 931–46; Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith’s Judicial Review* (6th ed, 2007) 551–90.

⁸¹ See Martin Trybus, ‘The EC Treaty as an Instrument of European Defence Integration: Judicial Scrutiny of Defence and Security Exceptions’ (2002) 39 *Common Market Law Review* 1347, 1358–9. See also Woolf, Jowell and Le Sueur, above n 80, 544 discussing the concept of ensuring that the principles of ‘just administrative action’ have been met under the unreasonableness head of review rather than reviewing the merits.

sufficiently respect the discretion conferred by self-judging clauses while taking into account the legitimate expectation of the other contracting state party that this discretion will be exercised in good faith, and without abuse of rights or misuse of power.

Indeed, when such a restrictive approach to the unreasonableness test is adopted, it is rare in domestic administrative law for a court to find a decision unlawful on the ground of unreasonableness alone. A failure to take into account a relevant consideration, a failure to have regard to the purpose of the power conferred or some such other concrete misuse of discretion is almost always present in such cases.⁸²

V CONCLUSION

Self-judging clauses have sometimes been perceived as a threat to international cooperation because they allow states to invoke domestic interests in order to escape an international obligation and to put its national interest centre stage. It is also arguable, however, 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.⁸³

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 a test that provides an appropriate and acceptable balance between the recognised needs for self-determination on the one hand, and international cooperation on the other, that will allow both to flourish.

Djibouti v France, while raising numerous interesting issues of international law, is notable particularly for being the first case in which an international dispute settlement body has been directly called upon to develop such a test. The consensus emerging from this decision is that the appropriate standard of review to apply to self-judging clauses is that of good faith (and potentially also the related concepts of abuse of rights and misuse of power). Unfortunately, the majority judgment does little to clarify or elaborate what is required by such a standard. Judge Keith, on the other hand, sets out a possible concretisation of good faith, abuse of rights and misuse of power in his declaration that appears to draw on certain of the grounds of review applied by courts in domestic legal systems in relation to discretionary decisions taken by administrative agencies. Indeed, Judge Keith's reasoning resembles the tests applied by Australian courts

⁸² See, eg, Aronson, Dyer and Groves, above n 80, 369–70 (fn 250).

⁸³ See Andrew Emmerson, 'Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?' (2008) 11 *Journal of International Economic Law* 135, 137 arguing that self-judging 'security exceptions are the necessary legal linchpins to WTO Agreements, mediating political exigencies, while simultaneously orchestrating international economic integration'. See also Wesley 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' (2001) 26 *Yale Journal of International Law* 413, 417.

when reviewing administrative decisions for ‘improper purpose’ as it has been codified in the *ADJR Act*.

Arguably, drawing analogies between the standard of review applied by domestic courts in reviewing discretionary acts by domestic administrations and the standard of review applied by international courts and tribunals in reviewing whether a state has relied on a self-judging clause in an international treaty in good faith 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. While not discounting the value of exploring alternative approaches that focus, for example, more strictly on issues of treaty interpretation or seek parallels in domestic contract law, analogies to domestic administrative law seem 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.

Australian law, in this context, cannot be more than an example of how domestic law analogies can be used to ‘concretise’ the good faith review applied by international courts and tribunals to a state’s decision not to cooperate internationally under a self-judging clause. It is, however, a useful example in fleshing out how to approach and conceptualise the issue at hand. Thus, Australian law illustrates how judicial review of discretionary decisions under good faith can be fuelled with concrete sub-elements. In particular, the emphasis on the primarily procedural review of discretionary decisions of administrative agencies appears a crucial factor in this context. This affords the state invoking the clause sufficient leeway to give primacy to its national interest, while imposing a range of principally procedural limitations that can help to avoid the abuse of the state’s discretion.

In order to arrive at a generally accepted standard of review based on domestic administrative law analogies, however, it will be necessary to draw from a wider comparative law base that takes into account how other domestic legal systems — both common law⁸⁴ and civil law⁸⁵ — implement judicial review of discretionary decisions of administrative agencies.⁸⁶ This will likely

⁸⁴ See, eg, Woolf, Jowell and Le Sueur, above n 80, 551–608, discussing cases from the UK, Canada, Australia, NZ and South Africa, and comparing approaches to judicial review of administrative discretion in these countries.

⁸⁵ See Stefan Oeter, ‘Die Kontrolldichte hinsichtlich unbestimmter Begriffe und des Ermessens’ in Jochen Frowein (ed), *Die Kontrolldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung* (1993) 266 and Georg Nolte, ‘Der Wert formeller Kontrolldichtemaßstäbe’ in Jochen Frowein (ed), *Die Kontrolldichte bei der gerichtlichen Überprüfung von Handlungen der Verwaltung* (1993) 278, for a synthesis of country reports on the standard of judicial review of discretionary decision-making in civil and common law jurisdictions, including France, Italy, Spain, Austria and Switzerland. See also René Chapus, *Droit administratif général* (15th ed, 2001) vol I, 1055–85, for an analysis of the situation in French administrative law; Friedhelm Hufen, *Verwaltungsprozeßrecht* (3rd ed, 1998) 466–74, for an analysis of the situation in Germany; Mahendra Singh, *German Administrative Law in Common Law Perspective* (1985) 85–96.

⁸⁶ See, eg, Wade and Forsyth, above n 70, 366–71, where the similarities between the common law *Wednesbury* unreasonableness test, and the European proportionality test applied together with a margin of appreciation are discussed.

generate not only a more extensive range of possible approaches to judicial review, but may allow the development of a common denominator, from which international dispute settlement bodies can draw, and which is capable of reconciling the state's interest in safeguarding its essential national interests with the interest of its counterpart in enforcing compliance with international obligations. At the same time, this will produce standards that prevent international courts and tribunals from replacing a state's decision to avail itself of a self-judging exception with the dispute settler's own determination of how the state's discretion should have been exercised in substance.

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