and the Court took this evolution into account.[18] Furthermore, the Court's judgment itself contributes to the ongoing development of customary international law in this field.

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*Self-judgment—national security—investment arbitration—treaty exceptions—jurisdiction—non-justiciability—U.S.-Colombia TPA*

ANGEL SAMUEL SEDA AND OTHERS V. THE REPUBLIC OF COLOMBIA, Case No. ARB/19/6. Award. *At* http://icsid.worldbank.org.
International Centre for the Settlement of Investment Disputes, June 27, 2024.

The *Seda v. Colombia* award stands out as the most significant engagement with the concept of "self-judgment" by an investment tribunal in decades. While ultimately upholding Colombia's reliance on a self-judging essential security exception in the U.S.-Colombia Trade Promotion Agreement[1] (TPA) and dismissing the case entirely, the dispute marks the first time an investment tribunal has reviewed the invocation of a self-judging provision in an investment agreement, reinforced by a footnote aimed at limiting judicial scrutiny. The award contributes to the ongoing debate on the balance between state authority and international judicial oversight by providing an extensive interpretation of the self-judging provision and applying a good faith review despite the "reinforced" version of the clause.

* * * *

In *Seda v. Colombia*,[2] a group of American investors brought a claim against Colombia for confiscating their real estate on the basis of the property's historical association with transactions linked to organized crime. Starting in 2008, Mr. Seda, a U.S. national, made multiple investments in Colombian real estate. One of these ventures, the Meritage project—a planned luxury hotel and residential complex near the city of Medellín—was funded by Mr. Seda and several other legal and natural persons. The investors' corporate vehicle for the Meritage project secured the land intended for its development through a series of agreements with a local firm between 2012 and 2015. Before finalizing the purchase, the investors undertook due diligence, including a title study, and obtained certification from the Colombian Attorney General's Office to confirm that the property was not implicated in any criminal proceedings or investigations.

In 2014, a man named Mr. López, who had previously been convicted of drug trafficking, claimed ownership of the Meritage property, and purportedly demanded payment from Mr. Seda. Mr. López alleged that, in the early 2000s, he had been forced to relinquish the

[18] In this regard, see Tullio Scovazzi, *Malibu, California: una destinazione molto improbabile per l'Atleta vittorioso*, 107 RIVISTA ITALIANA DI DIRITTO INTERNAZIONALE, 1106–11 (2024).

[1] U.S.-Colombia Trade Promotion Agreement, Pub. L. No. 112-42, 125 Stat. 462 (2011) (*signed* Nov. 22, 2006, *entered into force* May 15, 2012).

[2] Angel Samuel Seda and Others v. The Republic of Colombia, ICSID Case No. ARB/19/6, Final Award (June 27, 2024).

property under duress. After negotiations between Mr. López and Mr. Seda broke down, Mr. López filed criminal proceedings in Colombia with the Organized Crime Unit of the Attorney General's Office in Bogotá, claiming that he was the rightful owner of the property. Simultaneously, unrelated investigations into a cartel prompted Colombian authorities to investigate the property's history (para. 218).

In the area surrounding Medellín, drug cartels have historically engaged in money laundering through real estate transactions (paras. 183, 185). To provide authorities with an effective tool against such transactions, Colombian law permits courts to order the forfeiture of assets linked to money laundering activities (paras. 219–20).[3] Based on these laws the Asset Forfeiture Unit of the Colombian Attorney General's Office seized the Meritage property in 2016 (para. 229). The investigation had revealed irregularities in previous transactions involving the property and the authorities argued that further transfers of the ownership needed to be prevented (para. 231).

The claimants unsuccessfully sought to contest the seizure before specialized asset forfeiture courts, the Bogotá Superior Court, and the Supreme Court of Justice. While some of these domestic proceedings before the Superior Tribunal of Bogotá and the Second Criminal Court Specialized in Asset Forfeiture were still ongoing, the claimants initiated arbitration under the TPA, seeking more than $255 million in compensation for the confiscation of the property and negative spillover effects on other business activities that they had been conducting in Colombia. According to the claimants, Colombia's actions breached the TPA's protections against unlawful expropriation and violated guarantees of fair and equitable treatment, national treatment, and full protection and security.

To defend the sequestration, Colombia invoked the essential security interests exception in Article 22.2(b) of the TPA,[4] the interpretation of which emerged as the crucial issue in the proceedings. Colombia argued that its essential security interest was "to fight the activities of a criminal organization whose members, including those of the highest rank, have successively held the Meritage Lot and have engaged in money laundering operations that permeate its transfers up to the present" (paras. 418, 766).

Colombia's interpretation of Article 22.2(b) of the TPA varied at different stages of the proceedings. It claimed variously that the invocation of the provision meant that the tribunal "lacks jurisdiction," was "non-justiciable," or only allowed for a "prima facie test" (paras. 422, 427, 440). The common denominator of these different legal categorizations was that the tribunal was "bound to apply the exception automatically."[5] For Colombia, the reinforced self-judging language made it "explicitly clear that the State parties intended to retain the right to unilaterally determine the legality of such extraordinary measures, which thus cannot be subject to judicial adjudication."[6] Arguably, "the applicable standard does not allow,

[3] The tribunal focused on Law 1708 of January 20, 2014.

[4] U.S.-Colombia Trade Promotion Agreement, *supra* note 1. Article 22.2(b) of the TPA provides: "Nothing in this Agreement shall be construed: to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." In addition, footnote 2 to the provision specifies that "[f]or greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding . . . the tribunal or panel hearing the matter shall find that the exception applies."

[5] Seda and Others v. Colombia, ICSID Case No. ARB/19/6, Respondent's Rejoinder on Jurisdiction and Merits, para. 27 (Feb. 16, 2022).

[6] *Id.*, para. 35.

let alone require, the Tribunal to assess whether the measures were adopted in good faith or in an arbitrary or discriminatory manner."[7] The only finding the tribunal was permitted to make was that Colombia had decided to invoke the clause.

By contrast, the claimants argued that the tribunal was required to conduct at least a good faith review of Colombia's invocation of the essential security requirement under Article 26 of the Vienna Convention on the Law of Treaties (VCLT) (para. 278). They also claimed that Colombia had breached this good faith standard, as it had not initially classified the interest in fighting organized crime as a national security matter; nor had it established a rational nexus between the seizing of the property and the fight against a cartel.

The United States participated in the proceedings as a non-disputing party to support Colombia's arguments. Because of the provision's "clearly self-judging" nature it argued that the tribunal was barred from carrying out a good faith review and that the state parties alone could ensure that the provision was invoked in good faith (paras. 599, 605).

The tribunal sided with Colombia in dismissing the case on the basis of the essential security interests exception. At the same time, it held that it was tasked with conducting a good faith review of Colombia's invocation of Article 22.2(b) of the TPA (para. 655). As a starting point, and consistent with the decision of the International Court of Justice (ICJ) in *Nicaragua v. United States* as well as investment tribunal awards, the tribunal held that the self-judging character of a norm must be explicit (para. 722).[8] The wording ("it considers necessary"), according to the tribunal, left "no doubt that this provision is self-judging" (para. 638).

Nevertheless, the tribunal determined that the standard of review for the self-judging provision was scarcely impacted by footnote 2 to Article 22.2 of the TPA.[9] It found that the clause left "an important matter open: what is the standard of review" (para. 661). In particular, as the footnote established that the tribunal had to make a "finding" and the provision fell "short of the express language exempting the measure . . . from any review" the matter was not "non-justiciable" (paras. 659, 723–25). As the TPA had not—in the tribunal's view—explicitly ruled out *any* review, and to avoid abuse, it decided to apply a good faith standard drawing on the approach by the ICJ and World Trade Organization (WTO) panels for self-judging provisions without reinforcing language. Under this "light-touch" review, the tribunal evaluated the classification of certain interests as "security interests" and the plausibility of the measure for satisfying such interests—that is, the nexus between the measure and the stated security interests (paras. 650, 655).

Applying this standard, the tribunal did not find any basis for rejecting Colombia's claim that the fight against organized crime qualified as an essential security interest (para. 782). It also found that Colombia's seizing of the property was plausibly linked to its efforts to combat organized crime (paras. 792–93). Consequently, it concluded that the property seizure was "placed outside of the scope of the Treaty" (para. 801) and the case was dismissed.

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[7] Seda and Others v. Colombia, ICSID Case No. ARB/19/6, Respondent's Post-Hearing Submission, para. 71 (Aug. 25, 2022).

[8] Military and Paramilitary Activities in and Around Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ Rep. 14, paras. 222, 282 (June 27, 1986). For awards of investment tribunals, see, e.g., Deutsche Telekom AG v. Republic of India, PCA Case No 2014-10, Interim Award, paras. 225, 231 (Dec. 13, 2017).

[9] To recall, footnote 2 to the provision specifies that "[f]or greater certainty, if a Party invokes Article 22.2 in an arbitral proceeding . . . the tribunal or panel hearing the matter shall find that the exception applies." U.S.-Colombia Trade Promotion Agreement, *supra* note 1.

Colombia declared its win "historic,"[10] and with good reason: it was the first case in which an explicit self-judging provision was invoked before an investment tribunal, and the first time an investment tribunal recognized the self-judging character of a provision and dismissed a claim on that basis.[11] Furthermore, the award in *Seda v. Colombia* is one of the first occasions when a security exception has been accepted in investment arbitration proceedings.[12] Its interpretation of the reinforced self-judging provision marks the latest chapter in the dynamic development of self-judgment before international judicial bodies.[13]

Against this background, I argue that the most important contribution of *Seda v. Colombia* to investment law, and international law more generally, lies in the fact that the tribunal conducted a review of Colombia's invocation of Article 22.2(b) of the TPA *at all*. By doing so, the tribunal rejected the arguments by Colombia and the United States that a "clarificatory" footnote could preclude a tribunal from conducting good faith review, as would be required for a regular self-judging provision.

Article 22.2(b) of the TPA exemplifies what is typically known as an explicit "self-judging" or "self-judgment" provision.[14] The wording "it considers necessary" confers particular authority to the state invoking the exception, which underpins the self-judging nature of the clause.

While most states traditionally argued that the invocation of explicit self-judging provisions was beyond judicial scrutiny, a series of rulings by international judicial bodies have established that even explicit self-judging provisions remain subject to good faith review by competent judicial bodies.[15] This has become widely accepted. Good faith review dictates that the judicial body does not assess whether the invocation of the self-judging element was substantively "correct" but solely whether it occurred in good faith.[16] This is usually done by analyzing whether states acted in compliance with the purpose of a particular norm as opposed to invoking the clause arbitrarily.[17]

[10] Colombia Press Release, En histórica decisión de tribunal internacional, Colombia se salvó de pagar más de un billón de pesos en el caso Meritage (June 27, 2024), *at* https://www.italaw.com/sites/default/files/case-documents/italaw181764_0.PDF.

[11] In the past, self-judgment arguments were based on claims of "implicit" self-judgment. *See, e.g.*, El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, para. 603 (Oct. 31, 2011), CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Award, paras. 366–74 (May 12, 2005); LG&E v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, para. 214 (Oct. 3, 2006).

[12] Although the awards in *Devas v. India* and *Tenoch v. India* also accepted India's defense in this regard. *See* CC/Devas v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, para. 501 (July 25, 2016); Luke Eric Peterson, *Investigation: In Still-Confidential* Tenoch v. India *Award, Brower and Stern Fall Out Over Availability of National Security Defence to Justify Measures Taken Against Russian Investors*, IA REPORTER (Oct. 28, 2020), *at* https://www.iareporter.com/articles/investigation-in-still-confidential-tenoch-v-india-award-brower-and-stern-fall-out-over-availability-of-national-security-defence-to-justify-measures-taken-against-russian-investors.

[13] *See* Fabian Eichberger, *Self-Judgment in International Law: Between Judicialization and Pushback*, 37 LEIDEN J. INT'L L. 915 (2024).

[14] *See* Stephan Schill & Robyn Briese, *"If the State Considers": Self-Judging Clauses in International Dispute Settlement*, 13 MAX PLANCK UN Y.B. L. ONLINE 61 (2009).

[15] Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 ICJ Rep. 177, para. 145 (June 4); Russia—Measures Concerning Traffic in Transit, Panel Report, WT/DS512/R, paras. 7.132, 7.138 (Apr. 26, 2019).

[16] ESMÉ SHIRLOW, JUDGING AT THE INTERFACE: DEFERENCE TO STATE DECISION-MAKING AUTHORITY IN INTERNATIONAL ADJUDICATION 177 (2021).

[17] William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 312 (2010).

Footnote 2 to Article 22.2 of the TPA makes the exception part of a newer generation of self-judging provisions that especially the United States and India have increasingly incorporated into some of their investment agreements. Whereas the U.S. variant usually employs the "shall find" language,[18] the Indian treaties frequently lay down that the invocation of the clause "shall be non-justiciable."[19] These "reinforced self-judging" provisions, while varying in their wording, go further than classic self-judgment by further emphasizing, or *reinforcing*, the state's authority to decide on the application of the clause.[20]

Although good faith review is a lenient standard, the tribunal's approach in *Seda v. Colombia* appears to expand the role of judicial bodies in relation to self-judging provisions. This becomes clear when considering how the effect of reinforced self-judgment has been viewed. In the past, commentators have largely rejected any ability of international judicial bodies to review invocations of reinforced self-judging provisions. According to José Alvarez and Kathryn Khamsi, reinforced self-judging language such as in *Seda* "strongly suggests" a provision's invocation to be "an entirely unreviewable matter not subject to any 'good faith' gloss."[21] With regard to the Indian formula, Andrew Newcombe and Lluis Paradell claimed that it "would seem to make state invocation of the security exception completely immune from arbitral review, even with regard to whether it was made in good faith."[22] While these observations were made before *Russia – Traffic in Transit* and the subsequent string of WTO panel decisions interpreting the General Agreement on Tariffs and Trade security exception in recent years,[23] they demonstrate the weight which scholars have attributed to the reinforcement of self-judging provisions—through either clarificatory footnotes or annexes to treaties.

If one is to interpret reinforced self-judging provisions effectively, one has to consider what the reinforcement adds to "regular" self-judging language.[24] All tribunals that have ruled on self-judging provisions so far have found that their review—if it is to be accepted at all—must be limited to a good faith review of the provision in light of the self-judgment wording.[25] This standard is indeterminate at its fringes but has to be located at the

[18] Other examples of the American practice include: U.S.-Panama FTA, Art. 21.2 and footnote (*signed* June 28, 2007, *entered into force* Oct. 31, 2012); Korea-U.S. FTA, Art. 23.2 and footnote (*signed* June 30, 2007, *entered into force* Mar. 15, 2012).

[19] This is often done in an annex, exchange of letters, or interpretative note. *See, e.g.*, India-Singapore Comprehensive Economic Cooperation Agreement, Art. 6.12(4) (*signed* June 29, 2005, *entered into force* Aug. 1, 2005) (in conjunction with exchange of letters); India-Malaysia FTA, Art. 12.2, Annex 12-2 (*signed* Feb. 18, 2011, *entered into force* July 1, 2011); Joint Interpretative Note of Bangladesh and India on the 2009 Bangladesh-India BIT, 7 (Oct. 4, 2017).

[20] On the notion of "reinforced" self-judgment. *See* Eichberger, *supra* note 13, Sec. 4.4.

[21] José E. Alvarez & Kathryn Khamsi, *The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime*, *in* Y.B. INT'L INVEST. L. & POL'Y 379, 465 (Karl P. Sauvant ed., 2009) (emphasis removed).

[22] ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT 495 (2009).

[23] *E.g.*, Saudi Arabia—Measures Concerning the Protection of Intellectual Property Rights, Panel Report, WT/DS567/R (June 16, 2020); United States—Origin Marking Requirement, Panel Report, WT/DS597/R (circulated Dec. 21, 2022).

[24] On effective treaty interpretation, Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48, 60–61 (1949).

[25] *Djibouti v. France*, *supra* note 15, para. 145; *Russia—Traffic in Transit*, *supra* note 15, paras. 7.132, 7.138; *LG&E v. Argentina*, *supra* note 11, para. 214 (in an *obiter dictum*).

deferential end of a tribunal's scrutiny of state actions.[26] There does not seem to be a standard available that is "more lenient" than a good faith review and the corresponding plausibility test. If self-judging provisions are only subject to a good faith review, an effective interpretation of reinforced self-judging provisions would seem to require eliminating the ability of judicial bodies to conduct even that level of review.

While the tribunal correctly points out the risk of abuse arising out of this approach (paras. 638, 722), there is little indication that international law would not allow for provisions to be interpreted this way. There is no obligation for states to submit to the competence of international judicial bodies. Even when states generally agree to the jurisdiction of such bodies to rule on disputes arising under a treaty, they are free to exempt parts of the treaty from this competence.[27] Additionally, states are generally free to tailor the power of such third parties to rule on disputes.[28] They may—and do—create quasi-judicial bodies or employ non-judicial means of dispute settlement, such as conciliation, conducted by entities not endowed with the power to make decisions binding on states.[29] On this basis, it could be argued that states are free to establish judicial bodies that are only competent up until the point when a state invokes a reinforced self-judging provision.

This approach likely was unappealing to the tribunal as it would have been obliged to simply accept the invocation of the provision and dismiss the case without further consideration. Its "hook" to enter a prolonged analysis of the security exception and conduct the good faith review was that footnote 2 to Article 22.2 of the TPA required it "to find that the exception applies," which the tribunal distinguished from the Indian formula declaring the invocation non-justiciable (paras. 713–18). The issue with this interpretation is that it effectively renders the footnote meaningless, as the tribunal ended up applying exactly the same standard it would have used, had Colombia invoked a regular self-judging provision.

It remains to be seen what impact the *Seda v. Colombia* award will have on treaty-making and future decisions. States determined to preserve space for unilateral decision making within otherwise judicialized treaties may consider shifting to the Indian variant of reinforced self-judgment. However, one should hope that this remains an exception. States that choose to rely on international judicial bodies in the first place can sufficiently protect sensitive interests through regular self-judging language. Requiring judicial bodies to accept the unilateral determination of a state party, while legally possible, does little to foster trust in peaceful resolution of disputes through law. If states wish to avoid judicial dispute resolution, they are free to specify alternative mechanisms in their agreements. But if they decide to employ judicial bodies, it is prudent not to undermine the bodies' authority—whether through legal or non-legal means. The tribunal in *Seda v. Colombia*

[26] Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545, 556 (2014); SHIRLOW, *supra* note 16, at 178.

[27] On "modulations," see CLÉMENT MARQUET, LE CONSENTEMENT ÉTATIQUE À LA COMPÉTENCE DES JURIDICTIONS INTERNATIONALES 159 (2022).

[28] Although multilateral agreements, such as the ICSID Convention, could potentially serve as a limited factor in this regard. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 UNTS 159.

[29] *See, e.g.*, United Nations Convention on the Law of the Sea, Art. 297(3)(b), Dec. 10, 1982, 1883 UNTS 397.

tried balancing these considerations but it appears unlikely that this decision will be the final word on self-judgment.

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European Union and Certain Member States — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Malaysia); European Union — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Indonesia). *At* https://www.wto.org.
World Trade Organization, Mar. 5, 2024; Jan. 10, 2025.

At the center of two recent World Trade Organization (WTO) disputes[1] was the European Union's (EU) biofuels regime. Among other things, it establishes a binding target for the share of renewable energy in transport that each EU member must achieve by 2030. Indonesia and Malaysia contested a gradual phase-out of palm oil-based biodiesel from eligibility to count toward that target share.

The phase-out results from the European Commission's (Commission) determination that the cultivation of oil palm carries an elevated risk of greenhouse gas (GHG) emissions associated with indirect land use change (ILUC). ILUC refers to the displacement of agricultural production onto previously uncultivated land (potentially, in a different region of the world) after existing food or feed crop fields are repurposed for growing biofuel feedstock. ILUC-associated emissions may be especially significant if the uncultivated areas being converted to arable land are carbon-rich forests and wetlands.

While the complainants made claims under several provisions of the WTO agreements, this note focuses on the panel's analysis and conclusions under Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement), which establishes a non-discrimination obligation in respect of technical regulations. Partially addressing long-standing criticism of the Appellate Body's interpretation of this provision, the panel formally adhered to, but significantly relaxed, the legal test that the Appellate Body established in *US—Clove Cigarettes* and *US—Tuna II*. It never inquired into whether the measure at issue was "calibrated to" the ILUC risks of the different kinds of feedstock, as the *Tuna II* standard would suggest. Instead, it asked whether scientific evidence provided "a reasonable basis" for the measure as designed and applied by the EU. The panel's analysis was thus less focused on whether the detrimental impact of the measure "stem[med] exclusively from a legitimate regulatory distinction" and more on whether "the measure and distinction at issue bore a rational relationship to the regulatory purpose invoked."[2]

[1] WTO Panel Report, European Union and Certain Member States — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Malaysia) (EU and Certain Member States — Palm Oil (Malaysia)), WT/DS600/R (adopted on Apr. 26, 2024); WTO Panel Report, European Union — Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels (Indonesia) (EU — Palm Oil (Indonesia)), WT/DS593/R (adopted on February 24, 2025).

[2] This is the standard the United States has argued for. *See* WTO, Dispute Settlement Body, Minutes of Meeting, para. 3.11 (Apr. 26, 2024).