SEPARATE OPINION OF JUDGE IWASAWA

Allocation of the burden of proof in the context of exhaustion of local remedies — When the applicant makes a prima facie case that the remedies are ineffective, it is incumbent on the respondent to demonstrate that they are in fact effective — The combination of the distinctive features of the measures adopted by the United States and the primacy accorded to a more recent statute over a treaty has led the Court to conclude that the relevant companies had no reasonable possibility of obtaining redress — This reasoning does not automatically apply to other circumstances in States where a statute enacted after a treaty prevails over the treaty.

Standard of review for security exceptions in treaties — The Respondent has the burden of proving that the conditions set forth in Article XX (1) (d) *of the Treaty of Amity are met — The provision gives the invoking State a fair measure of discretion — The tests of proportionality and least restrictive alternatives are too stringent for security exceptions —In assessing whether a measure is necessary to protect a State's essential security interest, an international court should determine whether the measure was rational in light of a consideration of the reasonably available alternatives known to the State at the time — The United States has not demonstrated that Executive Order 13599 was a measure necessary to protect its essential security interests.*

The standard of the most constant protection and security is of particular relevance in the form of protection from physical harm by third parties — The standard is not one of strict liability but of due diligence — Full protection and security is better understood as providing for protection different from fair and equitable treatment and should be interpreted as referring to protection from physical harm.

1. I agree for the most part with the conclusions and reasoning of the Court in this Judgment. I regret that I had to vote against operative clause (3) of paragraph 236, in which the Court finds that the United States has violated its obligations under Article III, paragraph 1, of the Treaty of Amity. I will refrain from discussing the reasons for my vote on this clause, since I largely share the views expressed in the opinions of other judges who voted against it.

2. I will discuss three other topics in this opinion: the exhaustion of local remedies, security exceptions in treaties, and the most constant protection and security. As regards the exhaustion of local remedies, I will focus on some points which are not addressed at length by the Court in the Judgment. The other two topics — security exceptions and the most constant protection and security — are issues of significance in international economic law which are often raised in cases and are attracting increasing attention in literature.

I. Exhaustion of Local Remedies

3. In the present case, the Court does not refer to the burden of proof with respect to the exhaustion of local remedies, even though it affords a significant basis for its conclusions. In previous cases on diplomatic protection, the Court has explained the burden of proof in connection with the exhaustion of local remedies. In the *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy)* [hereinafter *ELSI*] case, the Court observed first that "the United States [the applicant] was very much aware that it must satisfy the local remedies rule", and then that "it was for Italy [the respondent] to demonstrate that there was . . . some local remedy that had not been tried; or at least, not exhausted. This burden Italy never sought to deny."[1] In the *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* [hereinafter *Diallo* case], reaffirming its statements in the *ELSI* case, the Court declared that,

> "[i]n matters of diplomatic protection, it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person . . . of the obligation to exhaust available local remedies (see *(ELSI)*, [. . .]. pp. 43-44, para. 53). It is for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted (see *ibid.*, p. 46, para. 59)."[2]

4. In international law, as a rule, the principle *onus probandi incumbit actori* applies; it is incumbent on the claimant to prove a claim[3]. In the context of exhaustion of local remedies, the burden of proof is allocated as

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[1] *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, pp. 43-44, para. 53, and p. 46, para. 59.

[2] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 600, para. 44.

[3] E.g. *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162.

follows[4]. Since the exhaustion of local remedies is one of the requirements for the exercise of diplomatic protection[5], an applicant which exercises diplomatic protection must specify that the injured person has exhausted local remedies[6]. If the respondent raises the objection that local remedies have not been exhausted, it must identify the remedies which have not been exhausted[7]. The applicant then has to demonstrate either that those remedies were exhausted or that exceptions to this rule apply, for example, that the remedies are ineffective[8]. When the applicant makes a prima facie case that the remedies are ineffective, it is the respondent which must prove that the remedies are in fact effective[9].

5. In cases concerned with complaints brought by individuals, international human rights courts have adopted a different distribution of the burden of proof for the exhaustion of local remedies. The respondent State bears the initial burden of demonstrating that an effective remedy exists. Once the respondent has discharged this burden, it falls on the individual to prove either that it has exhausted that remedy or that the remedy is ineffective[10]. This specific distribution of the burden of proof adopted by international

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[4] Judge Lauterpacht explained the distribution of the burden of proof in his separate opinion in the *Norwegian Loans* case:

> "(1) As a rule, it is for the plaintiff State to prove that there are no effective remedies to which recourse can be had; (2) no such proof is required if there exists legislation which on the face of it deprives the private claimants of a remedy; (3) in that case it is for the defendant State to show that, notwithstanding the apparent absence of a remedy, its existence can nevertheless reasonably be assumed". (*Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, separate opinion of Judge Lauterpacht, p. 39.)

[5] See e.g. *Interhandel (Switzerland* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27; Article 14 (1) of the ILC Articles on Diplomatic Protection.

[6] E.g. American and British Claims Commission, *Napier Case*, 14 November 1872, in *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. III, p. 3154 (J. Moore (ed.), 1898).

[7] "In order to contend successfully that international proceedings are inadmissible, the defendant State must prove the existence . . . of remedies which have not been used." *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, *Reports of International Arbitral Awards (RIAA)*, 6 March 1956, Vol XII, p. 119.

[8] For example, the Permanent Court of International Justice held that until it had been clearly shown that the courts of the defendant had no jurisdiction to entertain a suit by the applicant's company, the Court could not accept the contention of the applicant that the rule as to the exhaustion of local remedies did not apply in the case. *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 19.

[9] See *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 600, para. 44.

[10] E.g. European Court of Human Rights, *Akdivar and Others* v. *Turkey*, Judgment of 16 September 1996, No. 21893/93, para. 68; Inter-American Court of Human Rights, *Velásquez-Rodríguez* v. *Honduras*, Judgment of 29 July 1988, paras. 59-60.

human rights courts does not necessarily apply in inter-State diplomatic protection cases.

6. In the present case, the Respondent raises the objection that local remedies have not been exhausted with regard to some of the Applicant's claims (see Judgment, paras. 55-56 and 59). In response, the Applicant has made a prima facie case that the remedies offered by the legal system of the United States are ineffective (see *ibid*., paras. 58 and 60). In these circumstances, it is incumbent on the Respondent to demonstrate that they are in fact effective.

7. Iran complains of a succession of legislative and executive measures which have effectively removed the remedies available to Iranian companies, agencies and instrumentalities to challenge enforcement actions against their assets. United States courts are bound to apply these measures which leave little room for judicial appreciation. Iran contends that the comprehensive régime created by the United States' measures "is in practice not reviewable in the local courts". For its part, the United States maintains that local remedies provide a reasonable possibility of redress. However, as the Court points out, "[t]he Iranian companies that succeeded in having certain measures set aside by the courts were only able to do so by demonstrating either that the contested measures fell outside the scope of the statute on which they were said to be founded, or that they were contrary to the statute itself" (Judgment, para. 71).

8. It is the combination of these distinctive features of the measures adopted by the United States and the primacy accorded to a more recent federal statute over a treaty in the jurisprudence of the United States which has led the Court to conclude that the companies in question had no reasonable possibility of successfully asserting their rights in United States court proceedings. The Court adopted this reasoning in the particular circumstances of the present case (Judgment, para. 72). Therefore, this reasoning does not automatically apply to other circumstances in States where a statute enacted after a treaty prevails over the treaty.

II. The Security Exception in Article XX (1) *(d)* of the Treaty of Amity

9. The United States claims that Executive Order 13599 falls within the security exception set out in Article XX (1) *(d)* of the Treaty of Amity. While the Court rejects this claim in one short paragraph (Judgment, para. 108), I will make a more detailed analysis of the claim and give additional reasons in support of the Court's conclusion.

10. I will focus in particular on the standard of review to be used for analysing claims made under security exceptions such as Article XX (1) *(d)* of

the Treaty of Amity. Many treaties, including other treaties on friendship, commerce and navigation, international investment agreements, and multilateral and regional trade agreements, contain security exceptions. In recent years, States have frequently invoked a security exception in a treaty to claim that measures which are inconsistent with the substantive provisions of the treaty are justified. I consider that the standard of review to be used by international courts for analysing such claims is of crucial importance.

11. Article XX (1) of the Treaty of Amity provides:

> "The present Treaty shall not preclude the application of measures: . . . *(d)* necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests."

The United States argues that Executive Order 13599 was a measure necessary to protect its essential security interests and was not precluded by the Treaty.

12. Article XX (1) *(d)* may be considered as an affirmative defence. Pursuant to the principle of *reus in excipiendo fit actor* (the defendant, by raising an exception, becomes a plaintiff), the respondent — in this case, the United States — bears the burden of proving that the conditions set out in Article XX (1) *(d)* are met. The Court confirms that this burden is placed on the Respondent, declaring that "it was for the United States to show that Executive Order 13599 was a measure necessary to protect its essential security interests" (Judgment, para. 108).

13. Like Article XX (1) of the Treaty of Amity, Article XXI of the General Agreement on Tariffs and Trade of 1994 [hereinafter GATT 1994] provides for security exceptions, but its formulation is significantly different. Article XXI of the GATT 1994 reads as follows:

> "Nothing in this Agreement shall be construed
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> . . . . . .
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> *(b)* to prevent any contracting party from taking any action *which it considers* necessary for the protection of its essential security interests
>
> (i) relating to fissionable materials or the materials from which they are derived;
>
> (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried

on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations." (Emphasis added.)

14. In *Russia — Measures concerning Traffic in Transit*, a case filed by Ukraine under the World Trade Organization (WTO) dispute settlement procedures, Russia argued that Article XXI *(b)* (iii) of the GATT 1994 was "totally 'self-judging'". The WTO panel pointed out that "the adjectival clause 'which it considers'" in the *chapeau* of Article XXI *(b)* "can be read to qualify only the word 'necessary' . . . or to qualify also the determination of these 'essential security interests'; or finally and maximally, to qualify the determination of the matters described in the three subparagraphs of Article XXI *(b)* as well". The panel concluded that the clause does not qualify the determination of the circumstances in subparagraph (iii), and that for action to fall within the scope of Article XXI *(b)*, "it must objectively be found to meet the requirements in one of the enumerated subparagraphs". It thus rejected the argument that Article XXI *(b)* (iii) was "totally 'self-judging'"[11].

15. In the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States)*, the Court analysed Article XXI (1) *(d)* of the Treaty of Friendship, Commerce and Navigation [hereinafter FCN Treaty] between Nicaragua and the United States, which is the equivalent provision to Article XX (1) *(d)* of the Treaty of Amity between Iran and the United States. Neither treaty contains the phrase "which it considers" or a similar expression. In the *Military and Paramilitary Activities* case and in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States)*, the Court made clear that the security exceptions in these treaties were not "self-judging", stating that, "by the terms of the Treaty itself, whether a measure is necessary to protect the essential security interests of a party is not . . . purely a question for the subjective judgment of the party"[12]. Given this clear statement by the Court, both Parties accept that Article XX (1) *(d)* of the Treaty of Amity is not "self-judging"[13].

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[11] Panel Report, *Russia — Measures concerning Traffic in Transit*, WT/DS512/R and Add.1, adopted 26 April 2019, paras. 7.26, 7.63, 7.101-7.102.

[12] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 141, para. 282. See also *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 183, para. 43.

[13] Reply of Iran, paras. 10.19-10.21; Rejoinder of the United States, para. 7.18.

16. In the *Military and Paramilitary Activities* case, the Court contrasted Article XXI of the GATT 1994 with Article XXI of the FCN Treaty between Nicaragua and the United States, and emphasized that the latter "speaks simply of 'necessary' measures, not of those considered by a party to be such"[14]. It appears that the Court attempted to distinguish between treaties which contain the phrase "which it considers" and others which do not, suggesting that the latter are not "self-judging".

17. In the *Oil Platforms* case, however, the Court itself explained that "[o]n the basis of [Article XX (1) *(d)* of the Treaty of Amity], a party to the Treaty may be justified in taking certain measures *which it considers* to be 'necessary' for the protection of its essential security interests"[15], even though Article XX (1) *(d)* does not contain the phrase "which it considers".

18. In *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, the Court acknowledged that Article 2 *(c)* of the Convention on Mutual Assistance in Criminal Matters between Djibouti and France affords "a very considerable discretion" to the requested State because Article 2 *(c)* contains the phrase "[i]f the requested State considers". In parentheses, the Court mentioned the *Military and Paramilitary Activities* and *Oil Platforms* cases as examples of "the competence of the Court in the face of provisions giving *wide discretion*"[16]. Thus, the Court acknowledged that the security exception clauses at issue in those cases, respectively Article XXI (1) *(d)* of the FCN Treaty between Nicaragua and the United States and Article XX (1) *(d)* of the Treaty of Amity between Iran and the United States, give wide discretion to the contracting parties, even though the said clauses do not contain the phrase "which it considers".

19. The presence of the phrase "which it considers" certainly makes explicit the granting of discretion to the State concerned. However, even in the absence of such a phrase, security exceptions should be understood as affording the invoking State a fair measure of discretion[17].

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[14] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222.

[15] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 183, para. 43 (emphasis added).

[16] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145 (emphasis added).

[17] An arbitral tribunal used the term "margin of appreciation" to convey the idea of the discretion given by security exceptions to the invoking State: *Continental Casualty Company* v. *The Argentine Republic*, ICSID Case No. ARB/03/9, Award of 5 September 2008, para. 181. See also *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A.* v. *Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016, paras. 388, 398-399 (accepting the term "margin of appreciation" in the context of exam-

20. The Parties to the present case disagree on the standard that the Court should use in reviewing the United States' claim under Article XX (1) *(d)* and on the conclusion that it should reach. Iran argues that an examination of necessity entails an assessment of proportionality, finding its authority in WTO and investment arbitration jurisprudence. For its part, the United States contends that Article XX (1) *(d)* gives wide discretion to a State acting in good faith.

21. In *Russia — Measures concerning Traffic in Transit*, the WTO panel set out the standard to be used in reviewing measures taken under Article XXI (Security Exceptions) of the GATT 1994. It acknowledged that the article is partly "self-judging", suggesting that the phrase "which it considers" qualifies not only the word "necessary" but also the determination of the "essential security interests". The panel thus admitted that "it is left, in general, to every Member to define what it considers to be its essential security interests". However, according to the panel, "the discretion of a Member to designate particular concerns as 'essential security interests' is limited by its obligation to interpret and apply Article XXI *(b)* (iii) of the GATT 1994 in good faith", and "[t]he obligation of good faith . . . applies not only to the Member's definition of the essential security interests . . . but also, and most importantly, to their connection with the measures at issue". The panel further explained that

> "this obligation [of good faith] is crystallized in demanding that the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests, i.e. that they are not implausible as measures protective of these interests"[18].

The analytical framework enunciated by the panel in *Russia — Measures concerning Traffic in Transit* has generally been accepted by the Members of the WTO and followed by subsequent panels[19].

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ining a claim concerned with fair and equitable treatment, stating that tribunals should pay "great deference" to governmental judgments of national needs in matters such as the protection of public health). Compare it with *ibid.*, concurring and dissenting opinion of Mr Born, Arbitrator, paras. 87, 137-138, 188.

[18] *Russia — Measures concerning Traffic in Transit*, *supra* note 11, paras. 7.63, 7.101-7.102, 7.131-7.133, 7.138. Ukraine did not file an appeal and the report was adopted by the WTO Dispute Settlement Body on 26 April 2019. Ukraine stated that "[t]he Panel had made a very important and welcome contribution" and that "[m]ost importantly, the Panel had found the existence of appropriate circumstances to be a crucial element for justification under Article XXI of the GATT 1994". WTO Dispute Settlement Body, Minutes of Meeting Held on 26 April 2019, WT/DSB/M/428, p. 20.

[19] In *Saudi Arabia — IPRs* (case filed by Qatar), the parties (Qatar and Saudi Arabia), multiple intervening third parties, and the panel all agreed with the analytical framework adopted

22. This Court also has considered that clauses containing the phrase "which it considers" or a similar expression are subject to a good faith review. In the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)* case, the Court accepted that Article 2 *(c)* of the Convention on Mutual Assistance in Criminal Matters, which contains the phrase "[i]f the requested State considers", provides the requested State with "a very considerable discretion". It stressed, however, that "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"[20].

23. In respect of security exception clauses which do not contain the phrase "which it considers" or a similar expression, the standard of review should be more rigorous than a good faith review. In the *Military and Paramilitary Activities* case, the Court gave a brief outline of the standard to be used in reviewing the measures taken under the security exception clause in the FCN Treaty between Nicaragua and the United States, namely "[t]he Court has . . . to assess whether the risk run by [the] 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary'"[21]. The Court emphasized that "the measures taken must not merely be such as tend to protect the essential security interests of the party taking them, but must be 'necessary' for that purpose"[22]. This statement was reaffirmed in the *Oil Platforms* case with regard to Article XX (1) *(d)* of the Treaty of Amity[23].

24. As the Court explained in the *Military and Paramilitary Activities* case, in the first stage of inquiry, an international court must assess whether the risk run by the essential security interests is reasonable. The ordinary meaning of the term "essential security interests" in its context suggests that it relates to the existential core of State functions, such as the protection of

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by the panel in *Russia — Measures concerning Traffic in Transit*. Panel Report, *Saudi Arabia — Measures concerning the Protection of Intellectual Property Rights*, WT/DS567/R and Add.1, circulated on 16 June 2020, paras. 7.243-7.255, 7.271. See also Panel Report, *United States — Certain Measures on Steel and Aluminium Products* (China), WT/DS544/R, Add.1 and Suppl.1, circulated on 9 December 2022, para. 7.128, and other panel reports in related cases brought by Norway (DS552), Switzerland (DS556) and Türkiye (DS564); Panel Report, *United States — Origin Marking Requirement* (Hong Kong, China), WT/DS597/R, circulated on 21 December 2022, para. 7.185.

[20] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 229, para. 145.

[21] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 117, para. 224.

[22] *Ibid*., p. 141, para. 282.

[23] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 183, para. 43.

its territory and its population from external threats and the maintenance of internal public order. It is for the State invoking the exception to articulate the nature of the essential security interests at stake sufficiently precisely to demonstrate their legitimacy in light of the object and purpose of the treaty.

25. In the second stage of inquiry, an international court must examine whether the measures are "necessary" to protect the essential security interests. The Court has stated that the measures must not be "merely useful" nor "merely be such as tend to protect" the essential security interests, but rather must be "necessary" to protect them.

26. In the present case, Iran puts forward a stringent test to assess the necessity of a measure. It argues that "[a]n examination of necessity inevitably entails an examination of proportionality", relying on WTO and investment arbitration jurisprudence[24]. The test of proportionality requires an assessment of any adverse impact resulting from the measure in relation to the achievement of the objectives pursued by it. In the areas of international human rights law and domestic constitutional law, courts — both international and domestic — have used the proportionality test in evaluating measures that restrict human rights. In contrast, the WTO adjudicatory bodies have not applied the proportionality test. Commentators have explained that this is because the WTO is not institutionally ready for a balancing of values and interests. On the other hand, a number of investment arbitral tribunals have used the proportionality test in the context of fair and equitable treatment[25] and indirect expropriation[26]. However, investment arbitral tribunals have not used the proportionality test for security exceptions[27]. In my view, the proportionality test is too stringent for security exceptions.

[24] CR 2022/16, p. 40, para. 10 (Pellet).

[25] E.g. *Occidental Petroleum Corporation and Occidental Exploration and Production Company* v. *The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award of 5 October 2012, para. 404; *Philip Morris* v. *Uruguay*, *supra* note 17, paras. 409-410.

[26] E.g. *Técnicas Medioambientales Tecmed S.A.* v. *The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003, para. 122; *Fireman's Fund Insurance Company* v. *The United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award of 17 July 2006, para. 176 *(j)*.

[27] Some commentators have given *Continental Casualty* v. *Argentina* as an example of an investment arbitral tribunal relying on a proportionality test. In fact, however, the tribunal referred to the test of least restrictive alternatives. *Continental Casualty* v. *Argentina*, *supra* note 17, paras. 193-195. See also *Deutsche Telekom AG* v. *The Republic of India*, PCA Case No. 2014-10, Interim Award of 13 December 2017, para. 239.

27. Whereas Iran invokes WTO and investment arbitration jurisprudence in support of its contention that the Court should examine the proportionality of the measures, in those cases the WTO adjudicatory bodies and investment arbitration tribunals in fact used the test of least restrictive alternatives, not of proportionality. For example, in *Korea — Various Measures on Beef*, the WTO Appellate Body quoted the following statement of a GATT panel with approval:

> "[A] contracting party [of the GATT] cannot justify a measure inconsistent with another GATT provision as 'necessary' in terms of Article XX *(d)* if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the *least degree of inconsistency* with other GATT provisions."[28]

The test of least restrictive alternatives is not the same as the test of proportionality.

28. Panels and the Appellate Body of the GATT/WTO established the test of least restrictive alternatives to assess the "necessity" of measures under Article XX (General Exceptions) of the GATT 1994. They articulated the test first in relation to subparagraph *(d)*, which concerns measures "necessary to secure compliance with laws or regulations"[29]. They subsequently extended it to subparagraph *(b)* concerning measures "necessary to protect human, animal or plant life or health"[30], and then to subparagraph *(a)* pertaining to measures "necessary to protect public morals"[31]. It is inappropriate to import the test of least restrictive alternatives, which was developed for general exceptions under Article XX, into security exceptions under Article XXI. The test of least restrictive alternatives is also too stringent for security exceptions. The WTO adjudicatory bodies have not extended this

[28] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 165, quoting Panel Report, *United States — Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989, para. 5.26 (emphasis added). See also *Deutsche Telekom* v. *India*, *supra* note 27, para. 239.

[29] E.g. Panel Report, *United States — Section 337 of the Tariff Act of 1930*, *supra* note 28, para. 5.26.

[30] E.g. Panel Report, *Thailand — Restrictions on Importation of and Internal Taxes on Cigarette*s, BISD 37S/200, adopted 7 November 1990, para. 75.

[31] Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and Corr.1, adopted 20 April 2005, para. 308 (finding on Article XIV *(a)* of the GATS, an equivalent to Article XX *(a)* of the GATT 1994).

test to measures under Article XXI. As explained above, the test articulated for Article XXI by the panel in *Russia — Measures concerning Traffic in Transit* is much less stringent than the test of least restrictive alternatives developed by the WTO adjudicatory bodies for Article XX.

29. Essential security interests relate to the State's most vital interests. Concerns relating to national security are more sensitive than many other public concerns. In the *Mutual Assistance in Criminal Matters* case, the Court acknowledged that security exception clauses give States "wide discretion" (see paragraph 18 above). To adopt a stringent test requiring a very high threshold would signify prioritization of commerce, investment, trade and the like over national security. In the sensitive context of national security, it is for the national authorities of a State to make the initial assessment of the existence of a risk and what is necessary to respond to that risk. An international court should be wary of substituting itself for the State to override the latter's decisions *ex post facto*. On the other hand, it is the function of an international court to prevent abuse by reviewing a measure taken by a State with a view to ensuring that discretion is exercised reasonably and in good faith[32].

30. Based on these considerations, I am of the view that, in assessing whether a measure is necessary to protect a State's essential security interests under a clause which does not contain the phrase "which it considers" or a similar expression, such as Article XX (1) *(d)* of the Treaty of Amity, an international court should determine whether the measure was rational in light of a consideration of the reasonably available alternatives known to that State at the time. In making this evaluation, it should take into account the importance of the security interests at stake, and appraise the contribution the measure was designed to make towards the protection of those interests and its effectiveness in this regard, as well as its impact on commerce, investment, trade and the like. In addition, the court should ascertain whether the State followed proper procedures in exercising its discretion[33]. It is widely recognized in national administrative law that, when an authority neglects to follow proper procedures, it can amount to a misuse of discretionary powers (*excès de pouvoir*).

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[32] See *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Judgment, I.C.J. Reports 2020*, p. 323, para. 73.

[33] Cf. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, declaration of Judge Keith, pp. 280-281, paras. 7-8.

31. While Article XX (1) *(d)* of the Treaty of Amity gives the invoking State a fair measure of discretion, I agree with the Court that in the present case the United States "has not convincingly demonstrated" that Executive Order 13599 was a measure necessary to protect its essential security interests (Judgment, para. 108).

32. In this regard, I take particular note of the following. The United States identifies its essential security interests as "preventing terrorist attacks and the financing of terrorist activities . . . and halting the advancement of Iran's ballistic missile program". Executive Order 13599 implements the requirements of Section 1245 *(c)* of the 2012 National Defense Authorization Act (NDAA). Whereas Section 1245 refers to a report of the Treasury stating that "Treasury is calling out the entire Iranian banking sector . . . as posing terrorist financing, proliferation financing, and money laundering risks for the global financial system", Executive Order 13599 indicates, as the purpose of the measures, the "deceptive practices" of the Iranian banking sector "to conceal transactions of sanctioned parties", "the deficiencies in Iran's anti-money laundering regime and the weaknesses in its implementation", and "the continuing and unacceptable risk posed to the international financial system", but does not mention the security interests of the United States. Executive Order 13599 mainly affected the assets of Bank Markazi at issue in the *Peterson* case, which are outside the Court's jurisdiction. Other assets affected by Executive Order 13599, notably the assets of Bank Melli and Bank Saderat, had been blocked before 2012 pursuant to other decisions made under the authority of Executive Order 13382 of 2005. Executive Order 13599 does not establish a régime of individualized measures; it applies generally to all Iranian financial institutions. Whereas the United States refers to certain United Nations Security Council resolutions in justifying Executive Order 13599, this Executive Order is broader in scope than what was called for in the relevant resolutions.

III. The Most Constant Protection and Security

33. Iran argues that the United States has violated its obligation under Article IV, paragraph 2, of the Treaty of Amity to provide "the most constant protection and security" to the property of Iranian companies. It maintains that the obligation is not limited to protection against physical harm but also includes legal protection (see Judgment, paras. 170-171).

34. Treaties use different terms to refer to this standard: "constant protection"; "full protection"; "continuous protection"; adding "security" before or after "protection"; adding "the most" before the adjective, and so forth. Tribunals have not considered these variations as having any substantial significance[34]. The standard is commonly referred to as "full protection and security".

35. This standard has traditionally been understood as protection from physical harm. *AAPL* v. *Sri Lanka* (1990), the first investment arbitration case brought under an international investment agreement, was also the first case which addressed this standard. Sri Lankan security forces had destroyed a shrimp farm during a counter-insurgency operation. This case thus concerned protection from physical harm[35]. The standard of full protection and security was subsequently applied by other arbitral tribunals in situations where the investment was affected by physical violence[36].

36. At the beginning of this century, however, some arbitral tribunals started to consider that the standard extends beyond protection from physical harm and includes legal protection. Nonetheless, these tribunals have differed in the degree to which they have broadened the scope of the standard[37].

37. On the other hand, other arbitral tribunals have continued to maintain that the standard refers only to protection from physical harm[38]. For

[34] E.g. *Frontier Petroleum Services Ltd.* v. *The Czech Republic*, PCA Case No. 2008-09, Final Award of 12 November 2010, para. 260.

[35] *Asian Agricultural Products Ltd. (AAPL)* v. *Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of 27 June 1990.

[36] E.g. *American Manufacturing and Trading, Inc.* v. *Republic of Zaire*, ICSID Case No. ARB/93/1, Award of 21 February 1997, para. 6.05; *Wena Hotels Ltd.* v. *Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000, paras. 82 and 84; *Tecmed.* v. *Mexico*, *supra* note 26, paras. 175-177.

[37] E.g. *CME Czech Republic B.V.* v. *The Czech Republic*, Partial Award of 13 September 2001, para. 613; *Azurix Corp.* v. *The Argentine Republic*, ICSID Case No. ARB/01/12, Award of 14 July 2006, paras. 406-408; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *The Argentine Republic*, ICSID Case No. ARB/97/3, Award of 20 August 2007, para. 7.4.17; *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award of 24 July 2008, para. 729; *National Grid P.L.C.* v. *The Argentine Republic*, Award of 3 November 2008, paras. 187-189; *Frontier Petroleum Services* v. *The Czech Republic*, *supra* note 34, para. 263; *Global Telecom Holding S.A.E.* v. *Canada*, ICSID Case No. ARB/16/16, Award of 27 March 2020, paras. 664-665.

[38] E.g. *Saluka Investments B.V.* v. *The Czech Republic*, PCA Case No. 2001-04, Partial Award of 17 March 2006, paras. 483-484; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi* v. *Republic of Turkey*, ICSID Case No. ARB/02/5, Award of 19 January 2007, paras. 258-259; *BG Group Plc.* v. *The Republic of Argentina*, Final Award of 24 December 2007, paras. 324-326; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S.* v. *The Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award of 29 July 2008, para. 668; *Liman Caspian Oil BV and NCL Dutch Investment BV* v. *The Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award of 22 June 2010, para. 289; *Suez, Sociedad General*

example, the tribunal in *Saluka* v. *The Czech Republic* (2006) stated that "the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force"[39]. The tribunal in *BG Group* v. *Argentina* (2007) found it "inappropriate to depart from the originally understood standard of 'protection and constant security'"[40]. The tribunal in *Suez and Vivendi* v. *Argentina* (2010) carried out a detailed analysis of the standard, including its historical development. It then pointed out that "an overly extensive interpretation of the full protection and security standard may result in an overlap with the other standards of investment protection, which is neither necessary nor desirable", concluding that "this Tribunal is not persuaded that it needs to depart from the traditional interpretation given to this term"[41].

38. In support of the proposition that the standard includes legal protection, Iran refers to the *ELSI* case in which the Chamber of the Court examined whether there had been a violation of "the most constant protection and security" provision in the FCN Treaty between Italy and the United States. Iran points out that the Chamber's examination was made on the basis of the United States' argument "that the 'property' to be protected under this provision of the FCN Treaty was not the plant and equipment the subject of the requisition, but the entity of ELSI itself"[42]. However, this does not mean that the Chamber applied the standard as requiring more than protection from physical harm. The Chamber simply did not rule on this point.

39. In the present case, the Court makes a number of important statements with respect to the standard of full protection and security. In particular, it observes that the "core" of the standard "concerns the protection of property from physical harm", and emphasizes that this standard "is of particular significance and relevance in the form of protection of property from physical harm by third parties". The Court confirms that the standard is not one of strict liability but requires each State "to exercise due diligence" in

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de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. *The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010, paras. 158-179; *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014, para. 622; *Olin Holdings Ltd.* v. *State of Libya*, ICC Case No. 20355/MCP, Final Award of 25 May 2018, paras. 364-365; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG* v. *Kingdom of Spain*, ICSID Case No. ARB/15/36, Award of 6 September 2019, para. 576.

[39] *Saluka Investments B.V.* v. *The Czech Republic*, *supra* note 38, para. 484.

[40] *BG Group* v. *Argentina*, *supra* note 38, para. 326.

[41] *Suez and Vivendi* v. *Argentina*, *supra* note 38, paras. 161-169, 174, 179.

[42] *Elettronica Sicula S.p.A. (ELSI) (United States of America* v. *Italy), Judgment, I.C.J. Reports 1989*, p. 64, para. 106.

providing protection from physical harm within its territory. It notes that FCN treaties and international investment agreements often provide for fair and equitable treatment and full protection and security "consecutively or even in the same sentence", and considers that "[t]hese two separate standards" would overlap significantly if the full protection and security standard were interpreted to include legal protection (Judgment, para. 190). Accordingly, the Court concludes that the provision relating to the full protection and security standard was not intended to apply to situations covered by the obligation to provide fair and equitable treatment (*ibid*., para. 191) and unanimously rejects Iran's submission in this respect (*ibid*., para. 236 (9)).

40. Extending the scope of protection of the standard of full protection and security to include legal protection would make this standard similar to the standard of fair and equitable treatment. Indeed, some tribunals have considered that full protection and security is absorbed in fair and equitable treatment[43]. Triggered by the recent tendency to expand full protection and security beyond physical protection, some treaties have expressly limited the standard to protection from physical harm[44]. In order to avoid an overlap between separate standards, full protection and security is better understood as providing for protection different from fair and equitable treatment. Unless the relevant treaty expressly provides otherwise, full protection and security should be interpreted as referring to protection from physical harm.

(Signed) IWASAWA Yuji.

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[43] See *Occidental Exploration and Production Company* v. *The Republic of Ecuador*, London Court of International Arbitration Case No. UN 3467, Final Award of 1 July 2004, para. 187; *Azurix* v. *Argentina*, *supra* note 37, paras. 407-408.

[44] E.g. 2007 US-Korea Free Trade Agreement, Art. 11.5 (2) *(b)*; 2016 EU-Canada Comprehensive Economic and Trade Agreement, Art. 8.10 (5); 2016 Rwanda-Morocco Reciprocal Promotion and Protection of Investments Agreement, Art. 2 (2); 2018 EU-Singapore Investment Protection Agreement, Art. 2.4 (5); 2019 EU-Viet Nam Investment Protection Agreement, Art. 2.5 (5). See also 2012 United States Model Bilateral Investment Treaty, Art. 5 (2) *(b)*; 2019 Dutch Model Bilateral Investment Treaty (Netherlands), Art. 9 (1).