

2. On September 12, 2005 Professor Jose E. Alvarez submitted an opinion on behalf of claimants responding to our opinion of July 19, 2005. We have now been asked to provide a rejoinder to the opinion of Professor Alvarez and to expand our previous opinion particularly with respect to the self-judging character of Article XI of the U.S.-Argentina BIT and the meaning of necessity under the treaty.

I. SUMMARY OF ARGUMENTS

3. The summary of our argument is as follows. First, Article XI of the U.S.-Argentina BIT and its underlying policy interests require a broad interpretation of the public order and national security exceptions. Second, at the time of the drafting of the treaty, the U.S. interpreted these provisions as self-judging and subject only to a good-faith determination. Third, the text, context, and negotiating history of the treaty support this interpretation. Fourth, Article XI of the treaty allows the states parties to take measures to protect economic security and political stability, as well as classic military security. Fifth, Article XI of the U.S.-Argentina BIT does not incorporate the customary international law of the necessity defense and, even if it did, the situation in Argentina between 2000 and 2002 met those requirements.
4. As discussed in our original opinion, in August 1992 the State Department submitted five BITs to the Senate for ratification. The BIT with Argentina was still pending at the time. As part of the materials submitted with these five treaties, the State Department included a Model U.S. Bilateral Investment Treaty, accompanied by an official “description” of each article.³ Article X of this model treaty is identical to Article XI of the U.S.-Argentina BIT. The description of Model Article X states:

³ United States Model Bilateral Investment Treaty (BIT) – February 1992 [hereinafter 1992 Model BIT] (with descriptions), Submitted by the State Department, July 30, 1992, *included in* Bilateral Investment Treaties With the Czech and Slovak Federal Republic, The People’s Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland, Hearing Before the Committee on Foreign Relations United States Senate, One Hundred Second Congress, Second Session, August 4, 1992 [hereinafter August 4, 1992 Hearings], at 65.

A Party's essential security interests include actions taken in times of war or national emergency, as well as other actions bearing a clear and direct relationship to the essential security interests of the Party concerned. **Whether these exceptions apply in a given situation is within each Party's discretion. We are careful to note, in each negotiation, the self-judging nature of the protection of a Party's essential security interests.**⁴

5. We agree with Professor Alvarez that all U.S. BITs must be presumed to follow whatever Model BIT is operative at the time they are negotiated unless otherwise specified in a protocol or annex to the treaty, both of which constitute documents relevant to determining context under the Vienna Convention. As Professor Alvarez himself points out repeatedly, the detailed Protocol to the U.S.-Argentina BIT makes no reference to Article XI, indicating that it has the same meaning as the model treaty. Since Professor Alvarez simply asserts, without specific evidence, that the baseline version of the essential security clause is non-self-judging, he regards the failure to mention the clause in the Protocol (and in the Letter of Submittal) as conclusive proof that the actual Art. XI in the U.S.-Argentina BIT is non-self-judging. However, given that in 1992 the State Department stated unequivocally that it regarded the essential security clause as self-judging and made clear that it was simply clarifying rather than changing its earlier position; and given that Argentina understands the clause to be self-judging, the silence of the Protocol on this clause is instead strong support for our position.
6. As discussed in our original opinion, the U.S. interpretation of the essential security clause in its BITs has become even more explicit over time, such that, by April 2000, Secretary Albright noted that the BIT under consideration, "makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith."⁵ Professor Alvarez interprets

⁴ 1992 Model BIT, *supra* note 3, (Emphasis added).

⁵ Letter of Submittal from the Secretary of State, April 24, 2000, *annexed to* U.S.-Bahrain Bilateral Investment Treaty.

this movement toward greater clarity as evidence that the U.S. was “experimenting with different resolutions of the issue”⁶ While he asserts that the plain meaning of the text in the U.S.-Argentina treaty requires that the clause be interpreted as non self-judging, he provides no evidence for this interpretation. Our interpretation, however, accords more closely with the 1992 policy of the U.S. Government that such clauses were self-judging and that the changing language of the clause was simply a way of making that interpretation more explicit in the text.

7. This interpretation also conforms to policy statements from the U.S. Department of State and U.S. Senate. In 1999 the U.S. signed a BIT with Bahrain that included an explicitly self-judging clause.⁷ The State Department Letter of Submittal of April 24, 2000, included with that treaty, specified that the language was not representative of a new policy, but, in the words of Secretary Albright “makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith.”⁸ And in 2000, when the State Department submitted yet another batch of BITs to the Senate, Senator Jesse Helms commented on the essential security clause in the following terms: “the United States considers this language to be self-judging, though, in the words of the State Department, ‘each Party would expect the provisions to be applied by the other in good faith’”⁹
8. Secretary Albright’s statements in the above two paragraphs highlight another key difference between our position and that of Professor Alvarez. He misstates our

⁶ Opinion of Jose E. Alvarez, September 12, 2005 at ¶ 34.

⁷ U.S.-Bahrain Bilateral Investment Treaty, at Art 14. The text reads: “This Treaty shall not preclude a Party from applying measures which 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.”

⁸ Letter of Submittal from the Secretary of State, U.S.-Bahrain Bilateral Investment Treaty, April 24, 2000.

⁹ Bilateral investment treaties with Azerbaijan, Bahrain, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Uzbekistan, and a protocol amending the bilateral investment treaty with Panama : report (to accompany treaty docs. 106-47; 106-25; 106-26; 106-29; 106-28; 106- 27; 106-30; 106-42; 106-31; 104-25; and 106-46). Available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:er023.106> (accessed October 29, 2003).

argument as interpreting Article XI to deny the arbitrability of the case altogether. His misstated interpretation would indeed vitiate investor protections by allowing governments to invoke the essential security clause whenever necessary to justify their actions. Instead, as we argued in our opinion, the essential security clause strikes a balance between a government's desire to ensure maximum rights for its investors abroad and its need to protect its own economic, political, and military security. It can take measures otherwise precluded by the treaty to protect its security interests when it deems them to be threatened, but must do so in good faith. When a government's invocation of the essential security clause is challenged by an investor, as in this case, the arbitral tribunal must determine whether this good faith requirement has been satisfied.

9. That is the task remaining before this tribunal. As we argued previously, the evidence of looming economic and social chaos in Argentina between 2000 and 2002 is overwhelming. The economic and social conditions gave rise to a national emergency on a scale easily sufficient to warrant the invocation of the public order and essential security clauses.

II. TEXT, CONTEXT, AND NEGOTIATING HISTORY

10. Professor Alvarez opens his opinion by noting, properly, that the U.S.-Argentina-BIT should be interpreted “according to the plain meaning of *its* text, including *its* context, and, if necessary to confirm this meaning, *its* particular negotiating history.”¹⁰ We agree. We disagree, however, with his analysis in each one of these categories.
11. To begin with, Article XI has no plain meaning. What is plain is that the text is ambiguous on its face. It allows a Party to take measures otherwise inconsistent with the treaty to the extent that they are “necessary for ... the protection of its own security interests,” without specifying who or what entity has the right to

¹⁰ Opinion of Jose E. Alvarez, September 12, 2005 at ¶ 9 (emphasis added).

determine the existence of that necessity.¹¹ It can thus be interpreted either as self-judging or non-self-judging, as indeed it has been by scholars and judges, as we argued in our original opinion at paragraph 23.

12. In interpreting the meaning of Article XI, Professor Alvarez makes much of the decision of the International Court of Justice in *Nicaragua v. the United States*, holding that the essential security clause in the U.S.-Nicaragua FCN Treaty was not self-judging and then disagreeing that the support of the contra insurgents in Nicaragua constituted a necessary defense of U.S. security interests.¹² Yet, in his scholarship, Professor Alvarez recognizes the limited scope of this decision. In his 1989 article, he wrote that “the determination of whether action is indeed within a party’s ‘essential security’ would appear to be an arbitrable issue under the BIT,” “[i]f the analysis of the ICJ in the Nicaragua Case is accepted as the relevant precedent.”¹³ As he properly noted in an accompanying footnote, “ICSID arbitrators would be free to accept or reject the ICJ precedent.”¹⁴
13. As noted in our original opinion, where the text of a treaty is ambiguous, as it is in this case, it is appropriate to turn to the context of the treaty and any protocols that may accompany it. Professor Alvarez repeatedly points to the absence of any mention of the essential security clause in either the Protocol or the Letter of Submittal as confirming his interpretation of the clause as non-self-judging.¹⁵ Yet

¹¹ Professor Alvarez specifically noted this ambiguity in his article describing the origins of both FCN treaties and BITs in 1989. Writing about the essential security clause in the standard FCN text – a text identical to that in the U.S.-Argentina BIT, he observed: “The text of the standard FCN does not resolve whether the general exceptions [referring to essential security clauses] constitute both a procedural as well as a substantive bar; it does not resolve whether dispute settlement as guaranteed between the parties by Article XXIV extends to the general exceptions of Article XXI [the essential security clause, e.g. the Article XI equivalent]. Jose E. Alvarez, *Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VIRG. J. INT’L L. 1, 16 (1989).

¹² Professor Michael Reisman, for one, agreed with Professor Lauterpacht. In his commentary on the *Nicaragua* case, he observed: “In the face of such explicit language [referring to the essential security clause], it is difficult to see how any tribunal could use the Treaty to subject to its own jurisdiction matters that had been expressly excluded.” W. Michael Reisman, *Comment: Has The International Court Exceeded its Jurisdiction?*, 80 AM. J. INT’L L. 128, 130-131 (1986).

¹³ Jose E. Alvarez, *Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VIRG. J. INT’L L. 1, 16 (1989).

¹⁴ *Id.*, at 37, n. 197.

¹⁵ Opinion of Jose E. Alvarez, September 12, 2005, at ¶ 19.

he reaches this conclusion only by assuming what he purportedly sets out to prove.

14. The State Department submitted the U.S.-Argentina BIT with a “lengthy protocol” that included “items normally placed in an annex . . . combined with items in the protocol.”¹⁶ All these items reflect departures from the model BIT. But the Protocol does not include any mention of a different understanding of Article XI from the model BIT. It follows that the parties understood Article XI in the U.S.-Argentina BIT to be identical to the comparable article (Article X) in the U.S. Model BIT.
15. Professor Alvarez agrees with us on this point.¹⁷ Indeed, he regards it as strong evidence for his case. But that is because he simply assumes, based on his reading of the “plain meaning” of the text of the essential security clause in the model treaty, that it is non-self-judging. An interpretation of the essential security clause in the U.S.-Argentina BIT as self-judging would thus, in his view, require that parties give a “special meaning” to the this clause, an understanding that would surely have to be discussed in the Protocol and the Letter of Submittal. What he overlooks is a clear statement by the State Department in its commentary on the Model BIT of 1992 that it regarded the essential security clause to be self-judging and that it had communicated that view to all its negotiating partners.
16. In addition, Professor Alvarez asserts that our interpretation of Article XI would violate the object and purpose of the treaty.¹⁸ Indeed, Professor Alvarez is correct to note that the object and purpose of the treaty is to “promote greater economic cooperation between [Parties] with respect to investment by nationals and

¹⁶ Responses of U.S. Department of State to Questions Asked by Senator Pell, *included in* Bilateral Investment Treaties with: Argentina, Treaty doc. 103-2; Armenia, Treaty Doc. 103-11; Bulgaria, Treaty Doc. 103-3; Ecuador, Treaty Doc. 103-15; Kazakhstan, Treaty Doc. 103-12; Kyrgyzstan, Treaty Doc. 103-13; Moldova, Treaty Doc. 103-14; and Romania, Treaty Doc. 102-36, Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Third Congress, First Session, September 10, 1993 [hereinafter September 10, 1993 Hearings], at 32.

¹⁷ Opinion of Jose E. Alvarez, September 12, 2005, at ¶ 22 (“[T]he “Letter of Submittal indicates that, subject to the exceptions specifically mentioned in that letter (reflected in the protocol to the treaty, and not mentioning Article XI, the Argentina BIT tracks the U.S. Model BIT being used at that time.”).

¹⁸ Opinion of Jose E. Alvarez, September 12, 2005, at ¶ 39.

companies of one Party in the territory of the other Party.”¹⁹ A self-judging interpretation of Article XI in no way undermines this purpose. The parties to a treaty may decide to limit the rights conveyed under that treaty based, for example, on national security concerns, but still have the overall intent of entering into the treaty to promote economic cooperation. That is exactly what occurred in the drafting of the U.S.-Argentina BIT, as is apparent from its drafting history and the historical context in which its negotiations were situated.

17. Finally, Professor Alvarez makes much of the importance attached by the United States to overcoming the Calvo Doctrine, a doctrine subscribed to by many Latin American countries that required investors to submit their disputes to local courts.²⁰ It is certainly true that the U.S. government emphasized the value of the U.S.-Argentina BIT because it was the first BIT to be completed with a Latin American country and that in overcoming the Calvo Doctrine it paved the way for similar agreements with other Latin American countries.²¹ Indeed, Assistant Secretary of State Daniel Tarullo told the Senate that the U.S.-Argentina BIT “contains an absolute right to international arbitration of investment disputes.”²² However, when questioned by Senator Pell as to “what way is there an ‘absolute’ right to arbitration in the treaty,” the State Department responded: “The BIT with Argentina provides that investors are given a choice among international arbitration, resort to local courts, or previously agreed-upon dispute settlement procedures, with the proviso that the choice of one precludes use of the others.”²³ Further, “[e]xhaustion of local remedies is not required or permitted.”²⁴

¹⁹ U.S.-Argentina Bilateral Investment Treaty, at Preamble.

²⁰ Opinion of Jose E. Alvarez, September 12, 2005, at ¶ 26.

²¹ Prepared Statement of Daniel K. Tarullo, Assistant Secretary of State for Economic and Business Affairs, *included in* Responses of U.S. Department of State to Questions Asked by Senator Pell, *included in* Bilateral Investment Treaties with: Argentina, Treaty doc. 103-2; Armenia, Treaty Doc. 103-11; Bulgaria, Treaty Doc. 103-3; Ecuador, Treaty Doc. 103-15; Kazakhstan, Treaty Doc. 103-12; Kyrgyzstan, Treaty Doc. 103-13; Moldova, Treaty Doc. 103-14; and Romania, Treaty Doc. 102-36, Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Third Congress, First Session, September 10, 1993 [hereinafter September 10, 1993 Hearings], at 8.

²² Oral Statement of Secretary Tarullo, *in* September 10, 1993 Senate Hearing, *supra* note 21, at 4.

²³ Responses of U.S. Department of State to Questions Asked by Senator Pell, *included in* September 10, 1993 Hearings, *supra* note 21, at 32.

²⁴ *Id.*

18. Nothing in the State Department’s testimony about overcoming the Calvo Doctrine mentioned insulating the “absolute right” to arbitration from invocation of the essential security exception. The right is absolute simply in the sense that an investor cannot be prevented from choosing arbitration as one of a number of options for dispute resolution and can proceed directly to that option without exhausting local remedies. Indeed, if the right to arbitration were in the sense that Professor Alvarez proposes, it would presumably mean insulation from invocation of essential security interests even if such invocation were non-self-judging, which would render Article XI a nullity.

III. A POLITICAL COMPROMISE: STRATEGIC AMBIGUITY

19. Throughout his opinion, Professor Alvarez repeatedly notes that the “U.S. certainly knows how to draft a self-judging exception when it wants to do so.”²⁵ Indeed. It also knows how to include language susceptible of multiple interpretations and to make its interpretation clear in supporting documents. Given the ambiguity of Article XI on its face, the key question is whether the parties intended the language of this treaty to be self-judging as written.²⁶ As described in our original opinion, the 1992 U.S. model BIT states explicitly that the Article XI language is intended to be self-judging. In submitting the U.S.-Argentine BIT to the Senate alongside other BITs in 1994, the executive branch affirmed that the Argentine treaty did not depart from the language of the 1992 model treaty except as specifically indicated, even though the Argentine treaty itself was negotiated and signed prior to the promulgation of the 1992 model treaty. Further, Professor Alvarez has cited no evidence to indicate that Argentina intended Article XI to be non-self-judging. On the contrary, given the significance of Argentina’s departure from the Calvo Doctrine after so many decades, it strains credulity to suppose that Argentina would have favored a stricter interpretation than the one espoused by the U.S.

²⁵ Opinion of Jose E. Alvarez, September 12, 2005, at ¶ 34.

²⁶ See, Vienna Convention on the Law of Treaties, at Art. 31 (4) (noting that “A special meaning shall be given to a term if it is established that the parties so intended”).

20. As for the U.S. position, Professor Alvarez himself offers the most convincing account of how and why the U.S. negotiators of the Argentinean BIT came to strike the compromise they did. In 1989 Professor Alvarez published an article, which he refers to in his opinion in this case, entitled “Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio.”²⁷ The Exon-Florio Amendment refers to the Omnibus Trade and Competitiveness Act of 1988, which permits the President to suspend or prohibit any acquisition, merger, or takeover of U.S. corporations by or with foreign entities if foreign control would threaten national security.²⁸ In his article, Professor Alvarez explained that “Exon-Florio became law . . . due to a consensus between the critics of foreign investment and its defenders: that the free flow of investment cannot be allowed to impinge on U.S. national security.”²⁹ However, as Professor Alvarez also recognized, “The balance struck in Exon-Florio between competitive freedom and national security is inherently unstable and ultimately poses grave risks for present U.S. international investment policy.”³⁰
21. His concern in writing his article, however, was not with the past but with the future. He argued, presciently, that “[i]n the wake of Exon-Florio, the United States needs to reexamine that policy and existing and future international commitments.”³¹ That is precisely the course the U.S. followed, such that by 1993, as discussed above, no less an authority than Professor Vandeveldé concluded that “it is difficult to avoid the conclusion that since 1984 the United States has interpreted the essential security interests exception to be self-judging, although the Russia BIT represents the first time since 1986 that the United States

²⁷ Jose E. Alvarez, *Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VIRG. J. INT’L L. 1 (1989).

²⁸ Exon-Florio was triggered by two events which further pushed U.S. investment policy toward the protection of national security: the attempted takeover of the Good Year Corporation and Fairchild Semiconductor, both companies important to the defense industry, by foreign investors. See Alvarez, *supra* note *supra* note 27 at 56.

²⁹ *Id.* at 14.

³⁰ *Id.* at 16.

³¹ Jose E. Alvarez, *Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VIRG. J. INT’L L. 1, 16 (1989).

has made its position clear publicly."³² The “strategic ambiguity” of the U.S. position was not, as Professor Alvarez would now have it, the result of deliberate bad faith on the part of U.S. negotiators. Far from it. It was the outcome of a complicated political process taking place over a number of years, in which competing economic and national security interests were being hashed out by different parts and sub-parts of the U.S. government. Such a process is hardly unique to the U.S. political system; the Argentine government has similarly had to balance competing interests in changing its policies toward foreign investment over the years.

22. Professor Alvarez apparently takes the view that the essential purpose of U.S. foreign investment law is to protect the interests of U.S. investors. He thus insists that an interpretation of Article XI as self-judging would defeat the object and purpose of the entire U.S.-Argentina BIT.³³ In fact, any national statute or treaty regulating foreign investment involves a series of trade-offs between the interests of multiple parties. In U.S. BITs negotiated since 1984, those interests are the preservation of a government’s latitude to protect its essential security interests versus the specific economic interests of its investors. As a scholar, Professor Alvarez may dislike the path the U.S. ultimately chose to follow in this particular

³² Kenneth J. Vandevelde, *Of Politics And Markets: The Shifting Ideology Of The BITs*, 11 INT’L TAX & BU.S. LAW 160, 174 (1993). In 1986 the State Department made clear that it shared with its treaty partners an understanding that certain issues would be subject to only limited arbitration and that the essential security provision would be understood as self-judging. While the State Department indicated it would consider “whether any future procedural action is necessary to underscore our interpretation,” it was the Senate itself that took further legislative action by attaching an understanding to each of these ten BITs, according to which “either party may take all measures necessary to deal with any unusual and extraordinary threat to its national security.” S. Exec. Rep. No. 32, 100th Cong., 2nd Sess. (1988) at 9-11. By 1992, however, in response to a question from Senator Pell as to whether the Administration would support attaching a similar understanding to the five BITs pending before the Senate, the Administration said it would not support such a move on the ground that it tended to delay the entry into force of a BIT due to the need for additional explanations to the treaty partner in question and because it was unnecessary. Responses of the Administration to Questions Asked by Senator Pell, in August 4, 1992 Hearings, Appendix, *supra* note 3, at 40.

³³ In fact, Assistant Secretary of State Daniel Tarullo testified in 1993 that “Argentina is engaged in the most comprehensive privatization program in its history and is implementing other wide-ranging market reforms as well. The BIT can help support these moves *and* get our companies in on the ground floor.” Prepared Statement of Assistant Secretary of State Daniel K. Tarullo, included in September 10, 1993 Hearings, *supra* note 16, at 8. Given this dual purpose of the U.S.-Argentina BIT, at least from the U.S. perspective, it is possible that the U.S. even appreciated the reciprocal need for the Argentinean government to protect itself should its reforms go sour.

case. But as a lawyer, he must recognize that the competition between those he so trenchantly described as “political protectionists” and the supporters of the rights of U.S. investors did not result in his preferred outcome, as stated plainly by the Administration in describing the 1992 model treaty and by a noted expert, Professor Vandeveld, whom Alvarez himself cites.

23. The strategic ambiguity that we referred to in our opinion is, as just discussed, the result of a complicated political process in the U.S. It helps explain why even though the U.S. government itself insisted on a self-judging interpretation, and said so in its representations to the Senate, the absence of an absolutely explicit statement to that effect in the clause itself still allows individual U.S. investors seeking to sue the Argentinean government, or individual Argentinean investors seeking to sue the U.S. government, to argue that the clause is non-self-judging. Leaving language intentionally ambiguous does not rise to the bad faith standard, but rather is an acceptable and even indispensable part of treaty negotiation and drafting.

24. In addition, Professor Alvarez urges strongly that the interpretation we put forward would “render the U.S. –Argentina BIT a *less* effective instrument for investor protection and for stable investment rules than were the older FCNs,” indeed “a less useful instrument of investor protection than the established customary international law rules governing state responsibility for harm inflicted on alien property.”³⁴ Here we agree with Professor Alvarez. That is precisely the risk the U.S. government was running when it determined that freedom to take national security actions otherwise contrary to treaty obligations outweighed the benefit of greater protection for U.S. investors. But in these cases, in these times, the economic interests of U.S. investors clash with the security interests of the entire U.S. people, as determined by the President.

IV. ARTICLE XI OF THE TREATY APPLIES TO ECONOMIC EMERGENCIES

³⁴ Opinion of Jose E. Alvarez, September 12, 2005, at ¶22.

25. As we stated in our original opinion of July 19, 2005, “Under any interpretation, the financial crisis, riots, and chaos of 2000 – 2002 constitute a national emergency sufficient to invoke the protections of Article XI.”³⁵ Professor Alvarez agrees that the provisions regarding public order in Article XI allow “a BIT party to take measures necessary to safeguard the lives of its citizens and to protect property, as in situations of hostilities or open riot...”³⁶ As we demonstrated in paragraphs 56-64 of our original opinion, this was precisely a case of open riot, one in which the lives of many citizens was imperiled and in which property was endangered. Indeed, if the events in Argentina did not constitute a national emergency, it is frankly hard to conceive of what would.
26. The essence of Professor Alvarez’s opinion on this matter is that the three types of non-precluded measures in Article XI—“the maintenance of public order,” “the fulfillment of obligations with respect to the maintenance or restoration of international peace and security” and “the protection of its own essential security interests”—apply only to “internal security” or “defense matters.”³⁷ Professor Alvarez, however, provides little or no evidence for his very narrow interpretation of these terms.
27. Professor Alvarez sings a very different tune on the nature and magnitude of a crisis that would qualify as a threat to Argentina’s essential security interests in his opinion than he does regarding U.S. essential security interests. In his 1988 article he contrasted the text of the Taiwanese and the Italian FCN treaties, which permit measures “necessary . . . for the protection of the essential interests of the country in times of national emergency,” with the Standard FCN Text art. XX(1)(d), allowing a party to take measures “necessary to protect its essential security interests.” He observed that the provision in the Taiwanese and the Italian treaties “may be narrower” than the standard FNC provision (which is the same as the model BIT provision), “since, at least under U.S. domestic law, a national

³⁵ Opinion of Anne-Marie Slaughter and William Burke-White, July 19, 2005 at ¶ 56.

³⁶ Opinion of Jose E. Alvarez, September 12, 2005, at ¶ 58.

³⁷ Opinion of Jose E. Alvarez, September 12, 2005 at ¶¶ 48, 50.

emergency is defined in terms of a grave or unusual external or internal threat or crisis of great magnitude.”³⁸

28. In his opinion, Professor Alvarez insists that a threat to essential security interests must be limited to situations in which a nation faces “the most important or serious” threats that involve “military or defense matters.”³⁹ Yet in 1988 he acknowledged that under U.S. domestic law a national emergency could be a “grave or unusual” threat that was either “external or internal,” *or* a “crisis of great magnitude.” Further, he assumed that the phrase a “threat to essential security interests” is broader than “national emergency,” meaning that even a lower level threat or crisis could suffice.
29. In addition, at no point in this entire discussion of the issue in his 1988 article does Professor Alvarez ever suggest that the threat must be military in nature. How could he? He himself looks to the definition of national emergency in the International Emergency Economic Powers Act, which was designed to enable the U.S. President to address “any unusual and extraordinary threat, which has its source in whole or in substantial part outside the United States, to the *national security, foreign policy, or economy.*”⁴⁰
30. The interpretation of the parties, the work of the International Law Commission and a number of arbitral tribunals all provide strong evidence that Article XI covers economic emergencies such as that experienced by Argentina. The United States understands Article XI’s reference to “essential security interests” to encompass economic and political interests. As Senator Helms made clear in 2000, an “essential security interest” would include a “national emergency” as well as a “state of war.” Broader still is the inclusion of “other actions that ‘have a clear and direct relationship to the essential security interests of the Party concerned.’”⁴¹ The necessity of a broad interpretation of security interests was confirmed by a representative of the first Bush administration in 1992, who

³⁸ Alvarez, *supra* 27, at n. 129.

³⁹ Opinion of Jose E. Alvarez, September 12, 2005, at ¶ 50.

⁴⁰ 50 U.S. C. §§ 1701-06 (1982), quoted in Alvarez, *supra* note 27, at 14 n.6.

⁴¹ Description of the U.S. Model BIT, *included in* August 4, 1992 Hearings *supra* note 3, at 65.

observed that security interests can not and should not be defined in such treaties as “[t]o do so would be to close off options that we may need to address security concerns that we cannot foresee today.”⁴²

31. Professor Alvarez relies heavily in his argument on the International Law Commission Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁴³ Yet, these same commentaries suggest a much broader reading of the “essential interests” of a state than Professor Alvarez asserts. According to the commentaries to Article 25, relating to the invocation of necessity, there are a “wide variety of [essential] interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population.”⁴⁴
32. Beyond the national security exception, Article XI of the U.S.-Argentina BIT allows states to take measures “necessary for the maintenance of public order.” Professor Alvarez argues that we overstate the scope of “public order.”⁴⁵ As we indicated in our original opinion, however, public order has a distinct, though broad meaning, and is reflected in common law concepts. Writing in 1986, a former Assistant Legal Adviser to the State Department observed, “in U.S. constitutional practice, this civil law concept is roughly the equivalent of the police power.”⁴⁶ This interpretation parallels the language in some other bilateral investment treaties, according to which “the maintenance of public order would include measures taken pursuant to a Party’s police powers to ensure public health and safety.”⁴⁷

⁴² Bilateral Investment Treaties with the Czech and Slovak Federal Republic, the Peoples’ Republic of the Congo, the Russian Federation, Sri Lanka, and Tunisia, and Two Protocols to Treaties with Finland and Ireland, p. 51 (1992).

⁴³ Jose E. Alvarez, *Political Protectionism and United States Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VIRG. J. INT’L L. 1, 16 (1989).

⁴⁴ International Law Commission, Commentaries on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, at Art 25, ¶ 14.

⁴⁵ Opinion of Jose E. Alvarez, September 12, 2005, at ¶ 48.

⁴⁶ K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments On Their Origin, Purposes, And General Treatment Standards*, 4 INT’L TAX & BUS. LAW. 105 (1986).

⁴⁷ See, e.g., Ecuador Bilateral Investment Treaty, available at <http://www.tcc.mac.doc.gov/cgi-bin/doi.cgi?204:64:842699924:44>.

33. This understanding of public order must be construed more widely than Professor Alvarez’s interpretation of the imposition of “martial law” and “establishing curfews.”⁴⁸ A state’s police power is effectively the domestic component of its national security. While international security addresses a state’s ability to manage threats from outside the state, police power or public order relates to a state’s ability to manage threats of domestic origin – riots, widespread social unrest, crime, the prospect of the actual disintegration of the fundamental order and individual security that it is the business of government to provide. As we extensively documented in our original opinion and need not repeat here, these are precisely the looming conditions that affected Argentina between 1999 and 2002.
34. Finally, as we noted in our original opinion, in the context of today’s particularly virulent international system, it is critical that the “public order” and “essential security” clauses of Article XI be interpreted broadly to include a range of new dangers that may threaten the existence of the state itself. In the present international system, the security threat posed by internal conflict or even state failure is often far greater than the likelihood of foreign invasion. Developments in countries including Bolivia, Colombia, and even Ecuador, make all too evident that economic crisis and political turmoil are closely interlinked. The crisis in Argentina was far more severe than anything faced on the continent today. As we documented in our original opinion, contemporary observers analogized the situation to Germany in the 1920s or the Great Depression in the United States. The Argentinean government had every reason to determine that the crisis posed a threats to public order and essential security interests—both situations explicitly provided for in Article XI of the treaty.

**V. ARGENTINA HAS MET THE REQUIREMENTS BOTH OF THE NON-
PRECLUDED MEASURES PROVISIONS OF ARTICLE XI AND OF THE
NECESSITY DEFENSE IN CUSTOMARY INTERNATIONAL LAW**

⁴⁸ Opinion of Jose E. Alvarez, September 12, 2005 at ¶ 48.

35. Professor Alvarez misstates the views expressed in our opinion of July 19, 2005 with respect to the relationship between Article XI of the US-Argentina Bilateral Investment Treaty and customary international law.⁴⁹ We never suggested that this Tribunal should ignore the rules of customary international law. Rather, our position remains that customary international law coexists with, but is independent from, the *lex specialis* regime of Article XI.⁵⁰ It remains our position that the US and Argentina contracted around background customary rules by creating a separate regime of non-precluded measures through Article XI of the BIT. Professor Alvarez in fact agrees that “the US-Argentina BIT, like all BITs, creates a *lex specialis* regime...”⁵¹
36. Professor Alvarez, however, misinterprets the way in which the *lex specialis* regime of the US-Argentina BIT interacts with background rules of customary international law. Basic rules of treaty interpretation indicate that, where a *lex specialis* rule speaks to identical issues as a customary rule or explicitly contracts around a customary rule, the more specific treaty rule governs among states parties.⁵² In contrast, where a treaty provision does not cover the same issues as a customary norm, preexisting customary rules will continue to operate alongside but independently of the treaty provisions.
37. In our opinion of July 19, 2005 we provided evidence for the independence of Article XI from background customary norms based both on case law and on the International Law Commission’s Articles on the Responsibility of States. Professor Alvarez fails to provide compelling reasons why this standard approach to the interaction among customary and *lex specialis* rules should be displaced.

⁴⁹ Opinion of Jose E. Alvarez, September 12, 2005 at ¶ 54 (stating that “Slaughter and Burke-White’s contentions about the lack of connection between Article XI and customary international law is all the more bizarre and inconsistent...”).

⁵⁰ Opinion of Anne-Marie Slaughter and William Burke-White, July 19, 2005 at ¶ 68.

⁵¹ Opinion of Jose E. Alvarez, September 12, 2005, at ¶ 52.

⁵² The Vienna Convention on the Law of Treaties makes takes this position with respect to its own interpretation. In its preamble, the treaty “Affirm[s] that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention.” Vienna Convention on the Law of Treaties, at Preamble.

38. If Professor Alvarez is arguing that Article XI of the BIT subsumes or otherwise incorporates traditional customary law defenses, the text of the treaty itself is clearly against him. Nowhere does the treaty indicate that Article XI precludes, subsumes, or incorporates those background customary defenses. Other articles of the treaty do specifically reference customary rules, either reaffirming them or supplanting them.⁵³ Article XI, in contrast, does not refer to the customary defense of necessity nor to “supervening impossibility of performance” under the Vienna Convention on the Law of Treaties.⁵⁴ Rather, the plain language of Article XI establishes that particular “measures necessary for the maintenance of public order, 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” shall not be precluded. Hence, the *lex specialis* rules of Article XI are available to the US and Argentina simultaneously but independently from background customary defenses such as necessity or *force majeure*.

39. Professor Alvarez is correct that “customary international defenses such as necessity are routinely considered by international dispute settlers, alongside treaties that otherwise create comparable *lex specialis* regimes.”⁵⁵ Professor Alvarez’s use of the term “alongside” is telling. He seems to acknowledge customary defenses coexist with—rather than restrict—the non-precluded measures defenses provided for in Article XI. Both sets of defenses are independently available to Argentina and the United States and should be separately considered by this Tribunal.

A. Argentina Has Satisfied the Requirements of Article XI of the Bilateral Investment Treaty

40. In his effort to reinterpret and restrict Article XI, Professor Alvarez confuses the applicable standards for invoking the non-precluded measures provisions of Article XI and those relevant to the customary defense of necessity. At times in

⁵³ U.S.-Argentina Bilateral Investment Treaty, at Arts II(2) and IV(2).

⁵⁴ Vienna Convention on the Law of Treaties, at Art. 61.

⁵⁵ Opinion of Jose E. Alvarez, September 12, 2005, at ¶52.

his analysis of Article XI, he borrows from the customary law defense of necessity, suggesting the appropriate standard is that “the act taken ‘is the only means for the State to safeguard an essential interest against a grave and imminent peril.’”⁵⁶ At other times, he adopts a far more lenient standard.⁵⁷ He notes, for example, that “reliance on Article XI requires showing a nexus between these specific challenged actions and maintaining public order or responding to a threat to its own essential security interests or to international peace and security.”⁵⁸

41. In our original opinion we opined based on the text, context, and negotiating history of the US-Argentina BIT, that the public order and national security exceptions should be interpreted as self-judging and subject only to a good faith test. We maintain this view. Yet, even under Professor Alvarez’s “nexus” standard, Argentina is fully justified in invoking Article XI of the BIT. He asserts that, if the Argentine “government can demonstrate that the specific acts taken in violation of the BIT respond to the underlying threat and are limited to remedying it,” the requirements for invoking the non-precluded measures provisions of Article XI are satisfied.

42. In our opinion of July 19, 2005 we provided significant evidence that the economic collapse and social upheaval in Argentina endangered the stability of the state, and threatened the health and safety of Argentine citizens across the country.⁵⁹ Likewise, we suggested that otherwise extreme economic measures including currency devaluation, freezing price index adjustments, and suspending tariff payments were a direct government response to these threats. Even by Professor Alvarez’s own “nexus” test, the challenged actions are permissible under the non-precluded measures provisions of Article XI.

B. In the Alternative, Argentina has also Satisfied the Independent Defense of Necessity in Customary International Law

⁵⁶ Opinion of Jose E. Alvarez, September 12, 2005, at ¶59.

⁵⁷ Opinion of Anne-Marie Slaughter and William Burke-White, July 19, 2005 at ¶ 73-76.

⁵⁸ Opinion of Anne-Marie Slaughter and William Burke-White, July 19, 2005 at ¶ 46.

⁵⁹ Opinion of Anne-Marie Slaughter and William Burke-White, July 19, 2005 at ¶ 56-64.

43. For Argentina's actions to be permissible, it need only prevail on *either* the *lex specialis* defense of non-precluded measures under Article XI *or* the customary necessity defense. Whether the actions of the Argentine government satisfy the more restrictive customary international law standards for the necessity defense is a wholly separate question from the analysis of Article XI. In our opinion of July 19, 2005 we argued that, in addition to establishing a defense under the non-precluded measures provisions of Article XI, Argentina has also met the requirements for a necessity defense in customary international law.
44. As we note above, Professor Alvarez effectively reads Article 25 of the International Law Commission's Draft Articles on the Responsibility of States into Article XI of the U.S.-Argentine BIT. However, his proposed definition of necessity in customary international law is more restrictive still. He repeatedly contends that for an act to be permissible under the customary law doctrine of necessity, it must be the "only means" to preserve the state. Professor Alvarez's test is far too crude. In reality, courts, tribunals and the International Law Commission have taken a much subtler and more nuanced approach that gives far more leeway to the state invoking necessity.
45. Articles 25 of the International Law Commission's Commentaries to the Articles on the Responsibility of States offer broader grounds for the invocation of necessity than Professor Alvarez admits and strongly suggest that the burden of proof is on the challenger of the "necessary" action, rather than on its defender. According to these commentaries, "the plea [of necessity] is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient."⁶⁰ In applying the no other means available aspect of the necessity defense, it is therefore appropriate not to ask merely if other means were available to Argentina, but if Claimants have shown that other *lawful* means were available to prevent a grave and imminent peril. Professor Alvarez seems to suggest, Argentina could have responded to the threats it faced by violating the rights of

⁶⁰ International Law Commission, Commentaries on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, at Art 25, ¶ 15.

investors other than Sempra and Camuzzi. But, to do so would potentially put Argentina in breach of other BIT obligations and hence would not be a lawful alternative means that precludes the necessity defense. To suggest otherwise would create a vicious circle in which the necessity defense would never be available.

46. Moreover, as we documented in our opinion of July 19, 2005, courts and tribunals have routinely applied a far more tractable test to the invocation of necessity than that suggested by Professor Alvarez.⁶¹ Rather than second-guess determinations of national governments, international judges and arbitrators asked to review the outcomes reached by the political bodies of diverse nations have engaged in an order-of-magnitude calculation as to the level of a particular nation's peril. Such "order-of-magnitude," rather than "only means available," calculations are evident in cases and controversies including *Seal Fisheries off the Russian Coast*, *French Company of Venezuela Rail Roads*, and *Société Commerciale de Belgique*.⁶² Professor Alvarez has failed to examine these precedents, noting only that the *Russian Indemnity* case did not accept an economic based claim to necessity.⁶³ While he is correct that the arbitral tribunal in that case found the "relatively small sum" involved did not give rise to necessity, the tribunal, in fact, "accepted the plea [of necessity] in principle."⁶⁴ Hence, in a situation involving a larger sum, as is the case here, the *Russian Indemnity* tribunal would likely have accepted the necessity defense.

47. Even the International Court of Justice has recognized the complexity of determining whether the defense of necessity is available in customary international law. In a footnote, Professor Alvarez cites to the *Gabcikovo-Nagymaros Projects Case* in support of his "only available means test." Again,

⁶¹ Opinion of Jose E. Alvarez, September 12, 2005, at ¶59 (emphasis added); Opinion of Anne-Marie Slaughter and William Burke-White, July 19, 2005 at ¶ 73-84.

⁶² See International Law Commission, Commentaries on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Article 25, ¶ 6; *French Company of Venezuela Railroads*, award, 10 UNRIAA 285, 353 (1905); *Société Commerciale de Belgique*, 1939, P.C.I.J., Series A/B, No. 78, p. 160, 178.

⁶³ Opinion of Jose E. Alvarez, September 12, 2005, at ¶59.

⁶⁴ International Law Commission, Commentaries on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, at Art 25, ¶ 7.

Professor Alvarez is, in part, correct. In *Gabcikovo*, the ICJ did ask whether the acts taken were the only means of safeguarding the environmental interest at stake. But, the Court was far more subtle than Professor Alvarez. The ICJ acknowledged that determinations of necessity and, particularly, alternative available means, “are all complex processes” and went on to consider in some detail Hungary’s contention as to “the absence of any ‘means’ to respond” to the potential environmental harm.⁶⁵ While the Court did reject Hungary’s claim of necessity, it did so only after a careful determination that other lawful means of avoiding the harm were readily available, namely that the dam in question was in Hungarian territory and “Hungary could construct the works needed to regulate flows along the old bed of the Danube.”⁶⁶

48. Hence, it is not sufficient to merely assert, as Professor Alvarez and Claimants do, that other means were available to Argentina.⁶⁷ Rather, before second-guessing the determinations of a national government, a tribunal must assure itself that alternative and otherwise lawful means available to the state would have been effective in alleviating the grave and imminent peril to the state.

49. Professor Alvarez contends that Argentina has not met its burden of proof with respect to the necessity defense. While we agree with Professor Alvarez that, generally, “the burden of proof is borne by the party that asserts such an affirmative defense,” once the state invoking necessity in customary international law demonstrates a grave and imminent peril, the burden shifts to Claimants to show the existence of a less restrictive and legal alternative course of action than the one chosen. This approach is fully consistent with the reasoning of the International Court of Justice in the *Gabcikovo-Nagymaros Projects Case* and the *Legal Consequences of the Construction of the Wall Case*. In both of these decisions, the ICJ examined in some detail alternative and otherwise legal actions available to the state invoking necessity that would have effectively addressed the grave and imminent peril. Professor Alvarez fails to propose any such specific

⁶⁵ *Gabcikovo-Nagymaros Projects* (ICJ) (Slovakia v. Hungary), Judgment of 25 September 1997.

⁶⁶ *Gabcikovo-Nagymaros Projects* (ICJ) (Slovakia v. Hungary), Judgment of 25 September 1997.

⁶⁷ Opinion of Jose E. Alvarez, September 12, 2005, at ¶59.

and legal alternative courses of action available to Argentina to address the imminent peril created by the financial crisis discussed above. In the absence of such less restrictive legal alternatives, Argentina's necessity defense in customary law should prevail.

VI. CONCLUSION

50. Argentina hid behind the Calvo Doctrine for the better part of a century. It finally agreed to open up to international arbitration of investment disputes, placing its faith not in a unilaterally proclaimed doctrine but instead in a bilaterally negotiated investment treaty with the United States. Article XI of that treaty allowed it sufficient latitude to defer payment on its financial obligations in case of severe national crisis: "the maintenance of public order," "the fulfillment of obligations with respect to the maintenance or restoration of international peace and security" and "the protection of its own essential security interests." Under the Calvo Doctrine such latitude would have been provided by sympathetic national tribunals; by forswearing that doctrine Argentina was placing its faith in Article XI and the willingness of international tribunals to apply it in accordance with its terms and its underlying object and purpose.
51. Professor Alvarez would deny the very legitimacy of attempting to strike a balance between a state's real security needs and its economic desire to attract foreign investment. In his view, any interpretation of the U.S.-Argentine BIT that would harm the interests of U.S. investors would defeat the object and purpose of the treaty. Moreover, he denies the very ability of states to negotiate around or out of the constraints imposed on them by customary international law. In Professor Alvarez's view, Article XI cannot be self-judging, notwithstanding the ambiguity on its face and the clear intent of the parties, because customary international law demands an objective standard. Essential security interests cannot include economic interests, even when both the law and the history of both states parties make clear that they anticipated economic emergencies as threats to essential

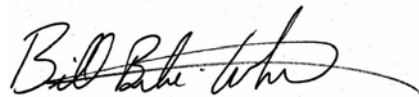
security interests, because “security” in customary international law refers only to military security. Finally, in Professor Alvarez’s view, Argentina and the United States cannot negotiate any more latitude for the protection of their essential security interests than that provided for by the necessity defense under customary international law.

52. If, instead, our interpretation of Article XI is correct, international tribunals will still have plenty of business. They will have to determine whether the Argentine government or other governments in similar situations acted in good faith in invoking the essential security interests clause in a bilateral or multilateral investment treaty. Foreign investors in Argentina and similar countries will also still have plenty of protection under national and possibly international contract law, even if they if their original claims under the BIT in question are found to be blocked by the non-precluded measures clause. BITs will continue to allow states to advance and protect foreign investment without putting themselves in a political and economic straitjacket. In today's ever more turbulent times, interpreting treaties to accommodate all these competing interests is essential, not only for states and individuals, but for the strength and legitimacy of the international legal system itself.

We declare under penalty of perjury that the foregoing is true and correct.
Executed on December 2, 2005 in London, United Kingdom and
Philadelphia, Pennsylvania, respectively.



Anne-Marie SLAUGHTER



William BURKE-WHITE