

**INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES**

EL PASO ENERGY INTERNATIONAL COMPANY	)	
	)	
Claimant,	)	Case No. ARB/03/15
	)	
- against -	)	WITNESS STATEMENT
	)	OF ANNE-MARIE
THE REPUBLIC OF ARGENTINA,	)	<u>SLAUGHTER</u> and
	)	<u>WILLIAM BURKE-WHITE</u>
Respondent.	)	
	)	
	)	
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WE, ANNE-MARIE SLAUGHTER and WILLIAM BURKE-WHITE, declare as follows:

1. I, Anne-Marie SLAUGHTER, am the Dean of the Woodrow Wilson School of Public and International Affairs at Princeton University and the Bert G. Kerstetter '66 University Professor of Politics and International Affairs. I also served as President of the American Society of International Law for a two year term ending in March 2004.
  
2. From 1994 until August 2002, I was the J. Sinclair Armstrong Professor of International, Foreign and Comparative Law at Harvard Law School and the Director of Graduate and International Legal Studies at Harvard Law School.

3. From 1989 to 1994 I taught at the University of Chicago Law School as Assistant Professor of Law and International Relations. From 1987 to 1989 I served as Executive Director of the Program on International Financial Systems at Harvard Law School.
4. From 1984 to 1987 I served as an associate to Professor Abram Chayes in his representation of Nicaragua in the suit brought by Nicaragua against the United States in the International Court of Justice. I also worked with Professor Chayes on an ICSID arbitration representing the government of Egypt, a case against Ferdinand and Imelda Marcos on behalf of the government of the Philippines in U.S. court, and a case against the U.S. Government on behalf of the Marshall Islands in U.S. court.
5. I received a J.D. from Harvard Law School and an M.Phil. and D.Phil. in International Relations from Oxford University. My B.A. is from Princeton University.
6. I have taught courses in international litigation, international regulatory cooperation, public international law, and international law and international relations. I have written over fifty articles in the area of international law and international relations, and have twice received the Francis Deak Award for best article by a younger scholar in the *American Journal of International Law*. My writings include work on international financial regulation, transnational regulatory cooperation, universal jurisdiction, the Act of State doctrine, the effectiveness of supranational adjudication, the European Court of Justice, judicial globalization, international criminal law, international administrative law, and the legalization of international regimes.
7. I have edited several books on the relations between the European Court of Justice and national courts, legalization and world politics, and method in international law. In August 2000 I delivered a special course on International Law and International Relations as part of the Millennial Lectures of the Hague Academy of International Law. I am the author of *A New World Order*, which

- was published by Princeton University Press in April 2004. Over the past two years, I have also written extensively on US foreign policy, the war on terrorism, and US relations with the United Nations.
8. I serve on the Board of Directors of the United States Council on Foreign Relations and the World Peace Foundation. I have also served on the Board of Editors for numerous international journals, including the *American Journal of International Law* and the journal *International Organization*.
  9. I, William BURKE-WHITE, am Assistant Professor of Law at the University of Pennsylvania School of Law. From 2003-2005, I was Lecturer in Public and International Affairs and Senior Special Assistant to the Dean at the Woodrow Wilson School of Public and International Affairs at Princeton University.
  10. I received my J.D. magna cum laude from Harvard Law School, an M.Phil. and a Ph.D. in International Relations from Cambridge University. My B.A. is from Harvard College.
  11. I have taught courses at the University of Pennsylvania, Princeton University, and Cambridge University in public international law, sovereign bankruptcy, American foreign policy, international courts and arbitral tribunals, international criminal law, and human rights. I have published numerous articles on public international law and international relations and have received the Francis Deak Award for the best article by a student author in an international law journal. My writings have addressed topics including the extraterritorial validity of domestic law, the effectiveness of international courts and institutions, transitional justice, and legal reform.
  12. We have been asked to opine on the proper interpretation of the U.S.-Argentina Bilateral Investment Treaty [hereinafter U.S.-Argentina BIT], specifically Articles XI and IV(3), in light of general principles of international law and international relations and of the geopolitical context in which the United States defines its security interests.

13. Article XI of the U.S.-Argentina BIT specifically allows the U.S. and Argentina to take measures that would otherwise be inconsistent with their obligations under the treaty where necessary to maintain public order or protect their essential security interests. If, as we argue, the conditions for the invocation of Article XI were met, the range of measures taken by Argentina to respond to the extraordinary economic crisis that underlies this dispute were not precluded by the U.S.-Argentina BIT.
  
14. The summary of our argument is as follows. First, Article XI of the US-Argentina BIT and its underlying policy interests require a broad interpretation of the public order and national security exceptions contained therein. 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, investor expectations can be clarified and the international investment regime strengthened by requiring states to make a good faith determination of their essential security interests. Fifth, Article XI of the U.S.-Argentina BIT incorporates such a good faith requirement. Sixth, Article XI of the treaty allows the states parties to take measures to protect economic security and political stability and the economic crisis and political upheaval in Argentina from 2000-2002 was sufficient to invoke this provision, as Argentina determined in good faith. Seventh, the non-precluded measures provisions of Article XI of the U.S.-Argentina BIT are distinct from the necessity defense in customary international law. Eighth, the requirements of necessity in customary law are also satisfied by the facts of this dispute. Ninth, as Argentina's actions are not precluded by the BIT, no internationally wrongful act has been committed and the treaty provides no grounds of relief for Claimant. Finally, Argentina's actions have been fully consistent with Article IV(3) of the treaty.

**I. ARTICLE XI OF THE U.S.-ARGENTINA BIT AND ITS UNDERLYING POLICY INTERESTS REQUIRE A BROAD READING OF THE PUBLIC ORDER AND NATIONAL SECURITY EXCEPTIONS.**

15. The U.S.-Argentina BIT specifically allows the two states parties to take measures that would otherwise be inconsistent with their treaty obligations when public order or national security is threatened. Article XI reads: “This Treaty shall not preclude the application by either Party of 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.”
16. The history of Article XI is instructive as to its interpretation. When the U.S. first started negotiating BITs in the early 1980s, its overriding aim was to “to insulate private investment from politically driven foreign or domestic public policy.”<sup>1</sup> From the beginning, however, the U.S. recognized that this separation of politics and the market could not be complete; that in some cases market arrangements would have to be subordinate to political policy considerations.<sup>2</sup> One of the principal ways the BITs provided for this contingency was in “the ‘non-precluded measures’ provision,” which “permitted parties to take measures necessary to promote certain sovereign interests.”<sup>3</sup> Article XI is the “non-precluded measures provision” in the U.S.-Argentina BIT. It allows both parties to take measures necessary to maintain public order and to protect their “essential security interests.”
17. Between 1982, when the U.S. developed its first model draft for BITs, and 1991, when it concluded the BIT with Argentina, the U.S. executive and legislative branches began to insist on a much more expansive interpretation of “non-precluded measures” in all BITs. The catalyst for this reinterpretation was a suit brought by Nicaragua against the U.S. in 1984 in the International Court of

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<sup>1</sup> Kenneth J. Vandavelde, *Of Politics And Markets: The Shifting Ideology Of The BITs*, 11 INT'L TAX & BUS. LAW. 159, 160- 61 (1993).

<sup>2</sup> Vandavelde, *supra* note 1, at 164.

<sup>3</sup> Vandavelde, *supra* note 1, at 164.

Justice. Nicaragua based jurisdiction in part on the alleged U.S. violation of the U.S.-Nicaraguan Friendship, Commerce, and Navigation treaty. The U.S. objected to the idea that a commercial treaty could restrict actions it deemed vital for the protection of its national security.<sup>4</sup> Indeed, as will be discussed further below, the U.S. argued that the “essential security interests exception” in the FCN treaty, which was very similar to the non-precluded measures provision in various BITs then under negotiation, was self-judging.

18. The ICJ nevertheless granted jurisdiction over the suit based in part on the U.S.-Nicaraguan Friendship, Commerce, and Navigation treaty. Thereafter, the U.S. began taking special care to ensure that it had sufficient latitude within any specific BIT to take any measures it deemed necessary to protect its essential security interests. The legislative history of the first batch of ten bilateral investment treaties submitted to the U.S. Senate for advice and consent in 1988 illustrates the point. The U.S. Department of State released a formal policy statement on these treaties that specifically sought to avoid the “Nicaragua problem,” noting that the U.S. had negotiated these treaties “with certain assumptions about the scope of their obligations and the kinds of issues which they submit to compulsory arbitration, assumptions we believe our treaty partners share. Specifically... the United States Government preserves its right to protect its essential security interests.”<sup>5</sup> Even so, the U.S. Senate refused to ratify the treaty until an executive understanding was attached, according to which “either Party may take all measures necessary to deal with any unusual and extraordinary threat to its security.”<sup>6</sup>

19. These clarifications were designed to ensure that nothing in an investment treaty would constrain U.S. freedom of action when security or public order issues were

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<sup>4</sup> Vandevelde, *supra* note 1, at 171.

<sup>5</sup> Bilateral Investment Treaties with Panama, Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt and Grenada: Hearings Before the Senate Comm. on Foreign Relations, 99th Cong., 2d Sess. (1986), *as quoted* in Jose E. Alvarez, *Political Protectionism And United States International Investment Obligations In Conflict: The Hazards Of Exon-Florio*, 30 VA. J. INT'L L. 1, 38 (1989).

<sup>6</sup> S.Exec.Rep. No. 32, 100th Cong., 2d Sess. (1988) (Senate Foreign Relations Committee recommending that Senate give advice and consent to BITs with Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada), at 9-11, *as quoted* in Jose E. Alvarez, *supra* note 5, at 39.

at stake. However, from the point of view of the original ideology underlying the U.S. drive to conclude BITs, this shift “weaken[ed the BIT] as an instrument for regulating host-state governments, facilitating uncompensated expropriations or other host-state impairments of investment.”<sup>7</sup> U.S. policymakers understood the potential consequences of their actions, but were prepared to take the risk of greater host country latitude to impair investments as the price for guaranteeing their own relative freedom of action. In the ratification process of a similar bilateral investment treaty in 1992, the Senate considered whether “the protections afforded investors diminished if each party can be the sole judge of its interests” and concluded that, despite these risks, the provisions were “in the national interest.”<sup>8</sup> The U.S. policy that bilateral investment treaties include a wide margin for the protection of national security and the maintenance of public order continues to date. At least 27 bilateral investment treaties to which the U.S. is a party contain security and public order provisions.<sup>9</sup>

**II. THE NON-PRECLUDED MEASURES PROVISION IN THE BILATERAL-INVESTMENT TREATY SHOULD BE INTERPRETED AS SELF-JUDGING, SUBJECT ONLY TO GOOD FAITH REVIEW**

20. Throughout the entire period during which the U.S.-Argentina BIT was negotiated, signed, and ratified, the U.S. had a clear policy that the standard language contained in Article XI of the U.S.-Argentina BIT was self-judging and that either party could determine whether particular measures it might take were justified on public order or national security grounds.

21. 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. In 1988, during the period of negotiation and prior to the

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<sup>7</sup> Vandevelde, *supra* note 1, at 170-171.

<sup>8</sup> 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).

<sup>9</sup> See, Trade Compliance Center, <http://www.tcc.mac.doc.gov/cgi-bin/doiit.cgi?205:64:28669879:0>, (accessed July 1, 2006).

ratification of the U.S.-Argentina BIT, the U.S. Senate considered and ratified a group of eight bilateral investment treaties. These treaties were drafted based on a then-operative model treaty discussed by the Senate in the ratification process. Article X of this model treaty contains language identical to Article XI of the U.S.-Argentina BIT. In the ratification process, the U.S. Senate attached an understanding to each of the treaties, according to which “[u]nder Article X of the treaty either party may take all measures necessary to deal with any unusual and extraordinary threats to national security.”<sup>10</sup> The Senate did not intend any change in the treaty as negotiated, however. On the contrary, the commentary to the model treaty states explicitly that the understanding merely “clarifies and highlights the importance of this article.”<sup>11</sup> In the view of the US Senate, the text of the non-precluded measures article itself—identical to that in the U.S.-Argentina BIT— accorded “to the United States [the right] to take whatever steps deemed necessary by the President for national security reasons, notwithstanding any other provisions of the treaties.”<sup>12</sup> The position of the U.S. in 1988 was thus extremely clear—the President could take any measures he deemed necessary to protect national security.

22. In August 1992 the State Department submitted five additional BITs to the Senate for ratification. The BIT with Argentina was still pending at that time. As part of the materials submitted with these five treaties, the State Department included a Model U.S. BIT, accompanied by an official “description” of each article.<sup>13</sup>

Article X of this model treaty is identical to Article XI of the U.S.-Argentina BIT.

The description of Model Article X states:

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*

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<sup>10</sup> S. Exec. Rep. No. 32, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988) at 9-11.

<sup>11</sup> S. Exec. Rep. No. 32, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988) at 8.

<sup>12</sup> S. Exec. Rep. No. 32, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988) at 8.

<sup>13</sup> United States 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.

*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.*<sup>14</sup>

Once again the US position is unambiguous and the State Department confirmed it had made this position apparent to its negotiating partners.<sup>15</sup>

23. The Protocols to the U.S.-Argentina BIT are silent with respect to the non-precluded measures provision and in no way differentiate it from the model BIT discussed above. Given that, in 1992, the State Department confirmed unequivocally that it regarded the essential security clause as self-judging and made clear it was simply clarifying rather than changing its earlier position, the silence of the Protocol on this clause in the U.S.-Argentina Treaty is strong support for the self-judging nature of the provision.
24. The U.S. interpretation of the essential security clause in its BITs has become even more explicit over time. In the late 1990s the State Department responded to a Senate request for more detailed letters of submittal outlining the U.S. interpretation of key provisions of the BIT in question. The Letters of Submittal from a number of these later BITs reference a long-standing interpretation of the essential security clause as self-judging. In 1999, the U.S. signed a BIT with Bahrain that included an explicitly self-judging clause.<sup>16</sup> The State Department Letter of Submittal of April 24, 2000 included with that treaty specified 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.”<sup>17</sup>

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<sup>14</sup> 1992 Model BIT, *supra* note 13 (emphasis added).

<sup>15</sup> *Id.*

<sup>16</sup> Treaty Between the Government of the United States of America and The Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment with Annex And Protocol, September 29, 1999, 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.”

<sup>17</sup> Letter of Submittal from the Secretary of State, April 24, 2000, *annexed to* U.S.-Bahrain Bilateral Investment Treaty, *supra* note 16.

### III. TEXT, CONTEXT, AND NEGOTIATING HISTORY

25. The U.S.-Argentina BIT should be interpreted based on its text and, where ambiguities result, its preparatory work and particular negotiating history.<sup>18</sup> 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 maintenance of public order [or] ... the protection of its own security interests,” without specifying who or what entity has the right to determine the existence of that necessity. It can thus be interpreted either as self-judging or non-self-judging, as indeed it has been by scholars and judges.
26. On the one hand, as Judge Hersch Lauterpact recognized in *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY*: it is “doubtful whether any tribunal acting judicially can override the assertion of a state that a dispute affects its security.”<sup>19</sup> On the other hand, the ICJ did just that 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.<sup>20</sup>
27. When the text is ambiguous, as it is in this case, we turn to context, noting the overall structure of the treaty and hence the placement of the article in the treaty. The placement of this article in the context of the larger treaty confirms our interpretation. The non-precluded measures provisions of Article XI come after all the substantive provisions governing the treatment of foreign investment. This

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<sup>18</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Arts. 31 and 32.

<sup>19</sup> HERSCH LAUTERPACT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 188 (1933).

<sup>20</sup> Professor Michael Reisman, for one, agreed with Professor Lauterpact. 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).

positioning is fully consistent with the description of this article as the “general exceptions” article, allowing governments a way out of their treaty obligations when necessary to protect their security or public order. In both the 1988 and the 1992 model BITs, the non-precluded measures clause comes near the end of the treaty, following Article VIII, which provides for exclusions from dispute settlement, and Article IX, which provides for the preservation of rights or entitlements to more favorable treatment than provided for in the BIT.

Collectively, these three articles follow Articles V, VI, and VII, which address dispute resolution, and Articles I, II, III, and IV, which specify each party’s obligations to provide equal treatment to the other party’s investors. Articles VIII, IX and X (including the non-precluded measures provisions) qualify the substantive obligations of the BIT, providing for exclusions, preservation, and exemptions. It is significant that Article XI is not specifically linked to the provisions for dispute resolution in Article VIII, which would be the case if Article XI were merely an exclusion from dispute settlement. In contrast, the general exceptions permitted by Article XI transcend the treaty regime entirely, subject only to the overriding obligation inherent in all international agreements of acting in good faith.

28. In establishing the context for a particular treaty provision, it is also appropriate to look to any Protocol accompanying the treaty, as an “agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.”<sup>21</sup> The Letter of Submittal drafted by the State Department for presentation of the treaty to the Senate is not such an agreement, but sheds light on the negotiating history. The absence of any mention of the essential security clause in the Protocol to the U.S.-Argentina BIT is strong evidence that both Argentina and the United States understood the clause to be self-judging. To see why, it is necessary to understand the standard negotiating process for BITs, at least for the United States and Europe. The U.S. and many European nations work from model texts to provide maximum uniformity of treatment across many

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<sup>21</sup> Vienna Convention on the Law of Treaties, *supra* note 18, Art. 31(2).

different countries.<sup>22</sup> When the U.S. Government submitted five BITs to the Senate in 1992, Senator Pell asked the Administration to explain the “specific advantages for the United States . . . gained by using a model treaty” and to submit the model treaty currently in use.<sup>23</sup> The Administration responded as follows:

Use of a model BIT and conclusion of agreements in accord with it has the advantage of establishing consistently high standards of treatment in the countries with which we negotiate. It also aids in negotiations because our partners realize that we are advocating global standards, not *ad hoc* standards for each country.<sup>24</sup>

29. In a subsequent question, Senator Pell asked why some BITs are accompanied by Protocols that specify deviations from the model treaty text, particularly “when there are already variations from the model text in the main articles.” The Administration responded:

Because the U.S. utilizes a model text in all of our BIT negotiations it is our preference to use a protocol and not the main body of text to make those changes. In addition, protocols often further refine, interpret, or apply an obligation to a specific situation that may be a subset of the issue covered in the body of the BIT.<sup>25</sup>

In other words, U.S. policy is to put any substantial deviations from or refinements of the model text into a protocol. Hence, if a protocol exists for a particular BIT and notes changes to specific articles, any articles not listed are presumed to be identical in text and meaning to the model BIT.

30. That is precisely the case with the U.S.-Argentina BIT. The State Department submitted this BIT with a “lengthy protocol” that included “items normally placed in an annex . . . combined with items in the protocol.”<sup>26</sup> All these items reflect

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<sup>22</sup> See Comparison of U.S. model treaty with British, German, French, Dutch, and Swiss model treaties in August 4, 1992 Hearings, *supra* note 13, at 22-25.

<sup>23</sup> Responses of the Administration to Questions Asked by Senator Pell, in August 4, 1992 Hearings, *supra* note 13, at Appendix, 31.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, at 32.

<sup>26</sup> 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

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. An interpretation of the essential security clause in the U.S.-Argentina BIT as non-self-judging would thus require that parties give a “special meaning” to this clause, an understanding that would surely have to be discussed in the Protocol and the Letter of Submittal.

31. The State Department drafted a new U.S. Model BIT as of February 1992 and submitted it to the Senate with five BITs (Czech and Slovak Federal Republic, People’s Republic of the Congo, Russia, Sri Lanka, and Tunisia) in July 1992 in preparation for hearings in early August. This new model BIT updated the model of 1988. The language of Article X in both model treaties is identical (and identical to the language of Article XI in the U.S.-Argentina BIT). However, unlike the 1988 Model BIT,<sup>27</sup> the 1992 Model BIT is accompanied by a Description of the United States Model BIT containing detailed commentary on each article. As quoted above, this explanation makes explicit that “[w]hether these exceptions apply in a given situation is within each Party’s discretion,” and affirms that the State Department is “careful to note, in each negotiation, the self-judging nature of the protection of a Party’s essential security interests.”
32. The State Department presented the entire 1992 Model BIT, including Article X, as confirming and clarifying its position in the 1988 Model BIT and indeed the Model BIT before that. Again in response to Senator Pell’s questioning about the use of a model BIT in the 1992 hearings, the State Department noted: “While from time to time minor improvements have been made in the model text, these

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Foreign Relations, United States Senate, One Hundred Third Congress, First Session, September 10, 1993 [hereinafter September 10, 1993 Hearings], at 32.

<sup>27</sup> The Administration apparently had a “clause by clause analysis” of the first ten BITs that it submitted to the Senate in 1986, but this analysis was never submitted to the Senate. At the August 1992 Senate hearings Senator Pell asked the Administration why this analysis had not been submitted to the Senate with the treaties themselves; the Administration said it did not know and apologized for the oversight. Administration Responses to Questions Submitted by Senator Pell, *in* August 4, 1992 Hearings, *supra* note 13, at 16.

have not substantively affected the core rights of the treaty . . . .”<sup>28</sup> Later in this same set of questions, Senator Pell turned specifically to the national security provisions of all the pending BITs before the Senate, asking whether the State Department would support the attachment of a Senate understanding like that attached to 8 BITs ratified in 1988 and mentioned above.<sup>29</sup> The State Department replied that it did not support such an attachment, on the grounds that it had caused delay of entry into force of those BITs due to the need for additional explanations to the governments involved, *and because*

We believe that the understanding [attached] by the Senate to earlier BITs . . . is unnecessary to preserve U.S. authority under IEEPA [the International Economic Emergency Powers Act] because the article of the treaties on reserved rights (usually article X) clearly encompasses that statute.<sup>30</sup>

33. The IEEPA, passed in 1982, grants the President broad economic powers to cut off trade, interfere with private contracts, and restrict private financial transactions pursuant to a declaration of national emergency, which he can declare in response to a range of military, diplomatic, or economic threats.<sup>31</sup> Such a determination is entirely and solely within the President’s discretion, subject only to American judicial review of the constitutionality of the statute itself. Thus, the State Department’s explanation, in 1992, of why a Senate understanding like the one attached in 1988 was unnecessary for the 1992 treaties is a statement that it considered Article X of the Model BIT to be self-judging as far back as 1986. The Description of the 1992 Model BIT simply makes that position explicit.

34. This was the view of contemporaneous observers. Dean Kenneth Vandeveld of the Thomas Jefferson School of Law has written extensively on the interpretation of US bilateral investment treaties<sup>32</sup> and provided testimony before the US Senate

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<sup>28</sup> August 4, 1992 Hearings, *supra* note 13, at 31.

<sup>29</sup> S. Exec. Rep. No. 32, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988) at 9-11.

<sup>30</sup> August 4, 1992 Hearings, *supra* note 13, at 40.

<sup>31</sup> 50 U.S.C.A. §§ 1701-06 (1982).

<sup>32</sup> See Vandeveld, *supra* note 1, at 174.

during the ratification hearings for the U.S.-Russia BIT.<sup>33</sup> He notes that, at the request of the Russian negotiators,<sup>34</sup> a provision was added in the Protocol to the treaty making explicit that “the Parties confirm their mutual understanding that whether a measure is undertaken by a Party to protect its essential security interests is self-judging.”<sup>35</sup> Notwithstanding Professor Vandevælde’s dismay at this understanding,<sup>36</sup> he wrote, in an article published only a year later: “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 has made its position clear publicly.”<sup>37</sup>

35. A year later, when the State Department submitted the U.S.-Argentina BIT to the Senate, along with the BITs for Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania, Chairman Pell again submitted detailed questions, including questions about even the smallest deviations of the BITs presented from the text of the 1992 Model BIT. The State Department’s responses make clear that the Argentine, Bulgarian, and Romanian BITs were negotiated based on an earlier prototype BIT than the 1992 prototype, presumably the 1988 Model BIT.<sup>38</sup> At the same time, the State Department was emphatic that, while

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<sup>33</sup> Statement of Kenneth J. Vandevælde, Associate Professor of Law, Western State University College of Law, San Diego, California, *included in* August 4, 1992 Hearings, *supra* note 13, at 73.

<sup>34</sup> *See* Vandevælde, *supra* note 1, at 174 (noting: “indeed, the protocol language apparently was inserted in the Russia BIT not because of any considerations peculiar to that BIT, but merely because the Russian negotiators suggested its inclusion”).

<sup>35</sup> Treaty Between the United States of America and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, signed June 17, 1992, Protocol, 31 ILM 794 (1992), ¶ 8.

<sup>36</sup> *See generally*, Statement of Kenneth J. Vandevælde, Associate Professor of Law, Western State University College of Law, San Diego, California, *included in* August 4, 1992 Hearings, *supra* note 13, at 73.

<sup>37</sup> Vandevælde, *supra* note 1, at 174. 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, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1988) at 9-11.

<sup>38</sup> *See, e.g.* State Department Responses to Questions Submitted by Senator Pell, *in* September 10, 1993 Hearings, *supra* note 26, at 31-33 (with reference to expropriation compensation, “[t]he wording of this paragraph in the Argentine and Bulgarian BITS is based on an earlier BIT prototype”; similarly, with reference to compensation calculations, “[t]he wording of this paragraph in the Argentine and Bulgarian

the different prototypes accounted for differences in wording, they did not change the substantive obligations of the treaties based on them. Indeed, Senator Pell asked specifically about the differences between the Argentine BIT and the Ecuadorian BIT. The State Department responded that the “differences in the BITs reflect the different circumstances in each country, as well as the fact that the Argentine BIT is based on an earlier version of the prototype BIT . . . . However, the obligations contained in the two treaties are essentially the same.”<sup>39</sup>

36. Further, the State Department insisted repeatedly that it had identified and explained any differences that did exist. According to the US State Department’s analysis of the Ecuador and Argentina BITs, for instance, “[e]ach BIT’s variations from the prototype are discussed in the letter from the Secretary of State to the President describing that treaty.”<sup>40</sup> In an earlier general question Senator Pell pressed as to why, “[s]ince negotiations presumably commence with the prototype BIT,” the Letter of Submittal does “not contain detailed explanations on changes from, additions to, or deletions from that Prototype?”<sup>41</sup> The State Department responded specifically with references to the Letters of Submittal for Argentina, Bulgaria, and Romania, noting that each of these letters “describe[s] significant provisions which differ from some of the past BITs or which warrant special attention.”<sup>42</sup> Thus, here again the *absence* of any mention of the essential security clause in the Letter of Submittal for Argentina is strong evidence that the two parties both accepted a self-judging interpretation of that clause.

37. The United States has continued to maintain the position that the invocation of non-precluded measures provisions, such as that included in Article XI of the U.S.-Argentina BIT, are to be determined by the state invoking the clause. In its December 1993 Preliminary Objection to the jurisdiction of the ICJ in the *Case Concerning Oil Platforms*, the US relied on Article XX of the 1955 U.S.-Iran

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BITS is based on an earlier BIT prototype” [which contained a differently worded but substantively equivalent phrase]).

<sup>39</sup> *Id.* at 37.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 27.

<sup>42</sup> *Id.*

FCN Treaty, according to which “[t]he present Treaty shall not preclude the application of measures ... (d) necessary ... to protect its essential security interests.”<sup>43</sup> Likewise, in its counter memorial on the merits of June 1997, the United States argued that Article XX of that treaty, very similar in language to Article XI of the US-Argentina BIT, “leaves each party wide discretion to determine, according to its own best judgment of the circumstances, the measures necessary to protect its security interests.”<sup>44</sup>

38. Given the overwhelming evidence that the United States interpreted Article XI as self-judging and the lack of any evidence that Argentina understood it as non-self-judging, the non-precluded measures provisions should be interpreted as self-judging and subject only to a good faith requirement.

#### **IV. THE NEED TO CLARIFY INVESTOR EXPECTATIONS**

39. A tribunal considering this case might still wish to address two relevant questions. First, notwithstanding all the evidence just presented concerning U.S. intentions regarding the self-judging nature of Article XI, an interpretation with which Argentina apparently agrees, it is certainly true that U.S. negotiators know how to be even more explicit in the text of the treaty if they want to be. Thus why shouldn't a tribunal insist on an international version of what in U.S. domestic law is known as a “clear statement rule”: a doctrine that insists that lawmakers, whether a legislature or parties to a treaty, be absolutely explicit about their intention?<sup>45</sup> Second, given that one of the primary aims of the entire law governing foreign investment is to promote such investment by stabilizing investor expectations, how might a finding that the non-precluded measures clause in all U.S. BITs is self-judging affect the evolution of that body of law?

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<sup>43</sup> Preliminary Objections of the United States of America, Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), ICJ, 16 December 1993, ¶3.36.

<sup>44</sup> Counter Memorial on the Merits of the United States of America, Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), ICJ, 23 June 1997, ¶3.38

<sup>45</sup> *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991).

40. The answer to both questions moves us from the realm of pure law to the underlying policy questions that shape the overall contours of foreign investment law in general and bilateral investment treaties in particular. In the first instance, insisting that states make their desire for a self-judging non-precluded measures clause absolutely explicit will almost certainly result in BITs that do just that. The formula in the US-Bahrain Bilateral Investment Treaty, according to which “[t]his 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,” is likely to spread.<sup>46</sup>
41. Such a result may increase the clarity of investor expectations, but is also likely to undermine their confidence in the security of their investments. This scenario is precisely what Professor Alvarez worried about when he railed against the triumph of political protectionism over investor safeguards in the late 1980s.<sup>47</sup> Investors and their lawyers will henceforth know that nations reserve the unequivocal right to deviate from their obligations under the treaty if, acting in good faith, they themselves deem their essential security interests to be at risk. Equally problematic, this increased specificity may prevent the conclusion of successful negotiations in some cases, and is even more likely to make ratification by national legislatures more difficult. Many important international agreements are founded on a measure of constructive ambiguity.
42. A better result would be to interpret each BIT in accordance with its specific terms under the rules of the Vienna Convention, looking first at the plain meaning of the text and second, in cases of textual ambiguity, seeking to determine the intent of the parties by looking to context, the *travaux préparatoires*, and the circumstances of the treaty’s conclusion. Where, as we contend here, that

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<sup>46</sup> See Treaty Between the Government of the United States of America and The Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment with Annex and Protocol, September 29, 1999, Art. 14.

<sup>47</sup> Alvarez, *supra* note 5, at 16 (expressing concern that “[t]he 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”).

- investigation reveals the parties in fact intended a particular non-precluded measures clause to be self-judging, then the tribunal should honor that intent subject to a good faith requirement. The good faith requirement, in turn, should be carefully interpreted and applied.
43. The good faith requirement ensures that a national government takes its treaty obligations seriously. If a government can take measures essential to protect its national security interests but *must take them in good faith*, then it must itself take the details of its treaty obligations into careful account. In other words, if the terms of a non-precluded measures clause require that it be invoked only to protect essential security interests, then the government in question must identify those interests and be prepared to defend its determination of their essential nature. This approach would be akin to imposing a “giving reasons requirement” on the government for whatever actions it chooses to take.<sup>48</sup>
44. The role of a court or arbitral tribunal should be to review this determination and any associated government action within the terms of the treaty to assess the good faith nature of the government action. Over time, this two-step process could be expected to encourage the development of a standard procedure on the part of the government for making such a determination, as procedural regularity is a standard component of assessing good faith. It would also encourage governments to keep a record of their decision-making processes, another positive contribution to the rule of law generally.
45. Overall, the best protection for investors lies precisely in the good faith of host governments, good faith in hewing to treaty obligations even in times of crisis. A system in which contracts are made and treaties are negotiated only to be tossed aside in time of crisis, with some post-hoc compensation available to investors, is decidedly second best to a system in which the government has internalized its treaty obligations as a part of its domestic procedures. Governments are unlikely to enter into investment protection treaties in the first place unless they retain the flexibility to defend their essential security interests. Investors are unlikely to

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<sup>48</sup> Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 181.

place much confidence in these treaties unless they think that governments operate under some degree of constraint in invoking the need to defend those interests. The best compromise is an interpretative approach to any specific treaty that requires a government to recognize that its potential liability for departing from the obligations imposed depends on the degree to which it demonstrably operates within the overall treaty framework in a good faith determination that its essential interests are at stake.

## V. ARTICLE XI INCORPORATES A GOOD FAITH REQUIREMENT

46. In determining whether Article XI applies to this case, the panel should take account of the expressed intent of both the U.S. and Argentina themselves to determine when circumstances allowing them to take measures that would be otherwise precluded by the treaty had arisen pursuant to Article XI. Yet, such determinations must still be made in good faith.<sup>49</sup>
47. The principle of good faith is a fundamental component of treaty interpretation and is incorporated into Article XI of the US-Argentina BIT.<sup>50</sup> While the good faith requirement alone is not a direct source of international legal obligation, is crucial to the interpretation and application of Article XI of the US-Argentina BIT.
48. It has long been the U.S. position that it is free, within the confines of good faith, to determine the existence of a national security or public order emergency itself. As Senator Helms noted in September 2000, “the United States considers this language to be self-judging, though, in the words of the State Department, ‘each

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<sup>49</sup> See, e.g., *Nuclear Tests Case (Australia v. France)*, 1974 ICJ 253, ¶ 46 at 268 (December 20) (finding “one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith”). The U.S. has long accepted this good faith requirement in treaty interpretation. According to the Restatement (3<sup>rd</sup>) of the Foreign Relations Law of the United States §325, “[a]n international agreement is to be interpreted in good faith.” See also Vandeveld, *supra* note 1, at 176-77 (“The better view is that, where the security interest is self-judging, it is nevertheless subject to a requirement of good faith”).

<sup>50</sup> See, *Vienna Convention on the Law of Treaties*, *supra* note 18, Art. 26.

Party would expect the provisions to be applied by the other in good faith.”<sup>51</sup> A 1998 review of bilateral investment treaties by the United Nations Committee on Trade and Development observed: “The United States has taken the position that the determination of whether a measure is necessary for the protection of a country’s essential security interests is a matter exclusively within its competence, not subject to review by any international tribunal.”<sup>52</sup>

49. Without a good faith requirement, a self-judging essential security clause truly would have the potential to vitiate the substantive obligations of a BIT. The host government could simply invoke the clause whenever it wished to justify a breach of those obligations. Hence even Judge Schwebel, who supported the U.S. interpretation of the essential security clause in its FNC treaty with Nicaragua, held that it would still be up to a tribunal to determine whether a party had invoked that clause in good faith.<sup>53</sup> Argentina has never challenged the existence of a good faith requirement in the negotiating history of the treaty nor in the present suit or related suits under the U.S.-Argentina BIT. We thus conclude that under the terms of the treaty, both the U.S. and the Argentine governments are required to act in good faith in invoking Article XI to justify measures that would otherwise be precluded under the treaty.

## **VI. THE ARGENTINE GOVERNMENT HAS ACTED IN GOOD FAITH UNDER ARTICLE XI**

50. The Tribunal must determine whether the Argentine Government has acted in good faith under Article XI. The good faith requirement applies to each of the articles of the BIT, though the standard of analysis under each article may differ,

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<sup>51</sup> 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](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:er023.106), (accessed July 1, 2006).

<sup>52</sup> UNITED NATIONS COMMITTEE ON TRADE AND DEVELOPMENT, BITS IN THE MID 1990S 86 (1998).

<sup>53</sup> See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.)*, 1986 ICJ 14, ¶105, at 311 (June 27) (dissenting opinion of Schwebel) (finding that “the Treaty fails to provide a basis of jurisdiction for the Court in this case, certainly for the central questions posed by it, unless, at any rate, United States reliance upon Article XXI(1)(d) is, on its face, without basis”).

depending on the nature of the substantive obligations contained in the particular article. In examining the good faith nature of Argentina's invocation of Article XI, the tribunal must conduct both a legal and a factual analysis. The legal analysis concerns the scope of "measures necessary to protect public order" and the definition of "essential security interests." Specifically, do these terms encompass economic crisis as well as military crisis? The factual analysis requires a determination whether the actual situation in Argentina from 2000-2002 was of sufficient gravity to rise to the level of a threat to public order and to Argentina's essential security interests.

51. The appropriate review of whether Argentina's actions were taken in good faith involves two basic questions: first, whether Argentina has engaged in honest and fair dealing and, second, whether there is a rational basis for Argentina's assertion of the non-precluded measures provisions of Article XI. Perhaps the best articulation of the honesty and fair dealing element of the concept of good faith is contained in the 1935 Harvard Research on the Law of Treaties, according to which "[t]he obligation to fulfill in good faith a treaty engagement requires that its stipulations be observed in their spirit as well as according to their letter, and that what has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise."<sup>54</sup> The question then is whether Argentina has acted honestly and to the best of its ability. Argentina's general conduct, specifically, the public invocation of a national emergency through Law 25.561, discussed below, meets this standard.
52. The second element of a good faith review involves a determination of whether there was a rational basis for Argentina's invocation of Article IX. This element of the good faith test may have been best expressed by the International Whaling Commission in its evaluation of the good faith requirements of the UN Convention on the Law of the Sea.<sup>55</sup> According to the Commission, good faith

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<sup>54</sup> *Research in International Law Under the Auspices of the Faculty of the Harvard Law School, Part III*, 29 SUPP. AM. J. INT'L L. 977-92, 981 (1935) [hereinafter Harvard Research].

<sup>55</sup> See United Nations Convention on the Law of the Sea, December 10, 1982, 21 ILM 1261 (1982), Art. 300 (providing "States Parties shall fulfill in good faith the obligations assumed under this Convention and

requires “fairness, reasonableness, integrity and honesty in international behaviour.”<sup>56</sup> The reasonableness requirement stressed by the Commission requires that the state have some rational basis for its actions. For Article XI to be invoked in good faith, the question is whether a reasonable person in the state’s position *could have* concluded that there was a threat to national security or public order sufficient to justify the measures taken. The severe economic crisis in Argentina between 1999 and 2002, as discussed below, provides a clear rational basis for Argentina’s invocation of Article XI.

53. The good faith standard by which a tribunal must evaluate Argentina’s invocation of Article XI fully respects the intent of the parties in drafting, signing, and ratifying the treaty. Moreover, it explicitly avoids the second guessing of government policy choices for which judicial bodies may be poorly positioned. Yet, it still imposes significant constraints on the freedom of states to take non-precluded measures by reviewing the honesty and reasonableness of governmental action, thereby ensuring considerable investor protection. As discussed below, Argentina’s invocation of Article XI and the measures taken to address the economic crisis fully meet both prongs of the good faith test.

**A. Article XI Permits the States Parties to Take Measures to Protect Economic Security and Political Stability As Well as Classic Military Security**

54. Several provisions in Article XI specifically encompass the measures that a state might deem necessary to stabilize its economy as a fundamental underpinning of political and social order. Indeed, the reference to “measures necessary to protect public order” is akin to a state’s police power. Writing in 1986, a former Assistant Legal Adviser to the State Department observed, “in U.S. constitutional practice,

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shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right”).

<sup>56</sup> International Whaling Commission, Resolution 2001-1 (2001).

this civil law concept is roughly the equivalent of the police power.”<sup>57</sup> 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.”<sup>58</sup>

55. 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 discussed below, these are precisely the looming conditions that affected Argentina between 1999 and 2002.

56. In addition to the public order provision, Article XI’s reference to “essential security interests” deliberately encompasses economic as well as political interests. As Senator Helms stated 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.”<sup>59</sup> The necessity of a broad interpretation of security interests was confirmed by a representative of the first Bush administration in 1992, who observed that security interests cannot 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.”<sup>60</sup> Likewise, in the Nicaragua Case, the ICJ observed: “the concept of essential

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<sup>57</sup> K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments On Their Origin, Purposes, And General Treatment Standards*, 4 INT’L TAX & BUS. LAW. 105, 121 (1986).

<sup>58</sup> See, e.g., U.S.-Ecuador Bilateral Investment Treaty, available at <http://www.state.gov/documents/organization/43558.pdf>.

<sup>59</sup> Description of the U.S. Model BIT, *included in* August 4, 1992 Hearings *supra* note 13, at 65.

<sup>60</sup> 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).

security interests certainly extends beyond the concept of an armed attack, and has been subject to very broad interpretations in the past.”<sup>61</sup>

57. A broad interpretation of “essential interests” is also suggested by the International Law Commission’s Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.<sup>62</sup> According to the commentaries to Article 25, relating to the invocation of necessity defense in customary international law, 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.”<sup>63</sup>

58. Even in the far more restrictive case of the necessity defense in customary international law, a number of tribunals have accepted—at least in principle—that severe economic strife can imperil a state’s essential interests. In the *Russian Indemnity Case*, the Ottoman Government asserted that an extremely difficult financial situation imperiled the essential interests of the state, sufficient to invoke a necessity defense. The arbitral tribunal found “[t]he exception of *force majeure*, invoked in the first place, is arguable in international public law, as well as in private law; international law must adapt itself to political exigencies. The Imperial Russian Government expressly admits ... that the obligation for a State to execute treaties may be weakened if the very existence of the State is endangered, if observation of the international duty is ... *self-destructive*.”<sup>64</sup> Though the tribunal determined that the amount in controversy—6 million francs—was too small a sum to “have imperiled the existence of the Ottoman Empire or seriously

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<sup>61</sup> Military and Paramilitary Activities In and Against Nicaragua, *supra* note 53, ¶224.

<sup>62</sup> Alvarez, *supra* note 5, at 16 (1989).

<sup>63</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, U.N. GAOR, 56th Sess., Supp. 10, Ch. 4, U.N. Doc. A/56/10, Art 25, ¶ 14 (2001).

<sup>64</sup> *Russian Indemnity Case*, 11 U.N.R.I.A.A. 431, 443 (1912).

endangered its internal or external situation,”<sup>65</sup> it “accepted the plea in principle.”<sup>66</sup>

59. Similarly, in the *Société Commerciale de Belgique* case, the Greek Government cited serious economic difficulties as an excuse for failure to pay a sum to a Belgian company.<sup>67</sup> Again, according to the International Law Commission, “the Court implicitly accepted the basic principle.”<sup>68</sup> Both parties in the *Serbian Loans* case accepted a similar argument.<sup>69</sup> In the *Forests in Central Rhodope* case, “the parties to the dispute agreed that very serious financial difficulties could justify a different mode of discharging the obligation other than that originally provided for.”<sup>70</sup>

60. Far more recently and based on very similar facts to the case before us, the arbitral tribunal in the case of *CMS Gas Transmission Company v. The Argentine Republic* observed: “there is nothing in the context of customary international law or the object and purpose of the treaty that could on its own exclude major economic crises from the scope of Article XI.”<sup>71</sup> Each of these decisions underscores the fact that economic emergencies can and often do threaten the types of essential interests enumerated in Article XI.

61. 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. We live in a world in which the security threat posed by internal conflict or even state failure is often far greater than the likelihood of foreign

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<sup>65</sup> *Id.*

<sup>66</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 25, ¶ 7.

<sup>67</sup> *Société Commerciale de Belgique (Belgium v. Greece)*, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15).

<sup>68</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 25, ¶ 8.

<sup>69</sup> Case Concerning Certain Serbian Loans (France v. Kingdom of the Serbs, Croats and Slovenes), 1929 P.C.I.J. (ser. A) No. 20. *See also* International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 25, p. 141, fn. 410.

<sup>70</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 25, p. 141, fn. 407.

<sup>71</sup> *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award of May 12, 2005, ¶ 359.

invasion. As is evident today in countries like Bolivia, Colombia, and even Ecuador, economic crisis and political turmoil are closely interlinked. The economic melt-down in Argentina was far more severe than anything faced on the continent today. Contemporary observers analogized the Argentine situation to Germany in the 1920s or the Great Depression in the United States. The Argentine Government had every reason to conclude that the crisis posed a threat both to public order and to essential security interests—both situations explicitly provided for in Article XI of the treaty.

62. The U.S.–Argentina BIT must be interpreted in this context and construed to give both the United States and Argentina particular latitude in exercising the public order and security exceptions. The policy intent of the U.S. Government was to protect the ability of states to preserve national security and maintain public order. The U.S.-Argentina BIT does not specify any limitations on the public order exception. Given its drafting history, the evolution of U.S. policy with regard to any given state’s latitude to determine the nature and scope of non-precluded measures and, hence, the open-ended construction of Article XI, the treaty must be read to allow freedom of action when essential security, health, and safety are at stake.

**B. Argentina’s Financial Crisis Qualifies as a Threat Both to Public Order and Argentina’s Essential Security Interests Under Article XI**

63. Under any interpretation, the financial crisis, riots, and chaos of 2000 – 2002 in Argentina constitute a national emergency sufficient to invoke the protections of Article XI. This is not a difficult case. The situation in Argentina between 2000 and 2002 presented a significant threat to both public order and national security. Argentina’s invocation of the public order exception to the bilateral investment treaty was exactly the circumstance for which the provision was intended. Numerous reports have likened the period in Argentina to the U.S. Great

Depression of the 1930s.<sup>72</sup> Throughout 2001, Argentina experienced a period of financial collapse. In one day alone, the Argentine peso lost 40% of its value.<sup>73</sup> According to The Economist, throughout the collapse, “income per person in dollar terms . . . shrunk from around \$7,000 to just \$3,500” and “unemployment [rose] to perhaps 25%.”<sup>74</sup> This economic chaos meant that, by late 2002, over half the Argentine population was living below the poverty line.<sup>75</sup>

64. Beginning in late November 2000, massive strikes swept Argentina. On November 23, 2000, “millions of workers stayed off the job... in the largest national strike in years as a union-led protest against government austerity measures paralyzed Argentina.”<sup>76</sup> One striker was fatally shot; schools and businesses were shut down; transportation, energy, banking, and health services were closed.<sup>77</sup> On May 22, 2001, demonstrators barricaded highways in protests across the country.<sup>78</sup> Again on July 20, 2001, “a general strike against harsh spending cuts in Argentina brought much of the country to a standstill.”<sup>79</sup> Protesters blocked roads with flaming tires and the national airline suspended all flights in “one of the biggest labor protests in years.”<sup>80</sup> The government was in a “crisis atmosphere” after stocks fell 12 percent the week before over concerns over Argentina’s solvency.<sup>81</sup>

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<sup>72</sup> See, e.g., *Liberty’s Great Advance*, THE ECONOMIST, June 28, 2003 (“Argentina has endured an economic collapse to match the Great Depression of the 1930s.”); Lesley Wroughton, *Argentina’s Request for 75% Cut in Debt Angers Creditors*, THE GLOBE AND MAIL, September 23, 2003 (“Striking a debt restructuring deal with its creditors is essential for Argentina as it struggles to recover from an economic slump deeper than the 1930s U.S. Great Depression.”). See also, Certificate Concerning the State of Necessity in Argentina, Guillermo Nielsen, Secretary of Finance of Argentina, January 2003 [hereinafter Nielsen Declaration].

<sup>73</sup> Nielsen Declaration, ¶ 11.

<sup>74</sup> *A decline without parallel - Argentina’s collapse – Explaining Argentina’s economic collapse*, THE ECONOMIST, Special Report, March 2, 2002.

<sup>75</sup> Nielsen Declaration, ¶ 5.

<sup>76</sup> *One Dead As Argentina Is Paralyzed By Biggest National Strike In Years*, THE CANADIAN PRESS, November 24, 2000.

<sup>77</sup> *Id.*

<sup>78</sup> Laurence Norman, *Protests, rising social tensions as Argentina’s economy continues to struggle*, ASSOCIATED PRESS NEWSWIRES, May 22, 2001.

<sup>79</sup> *Strike over cutbacks brings Argentina to a standstill*, THE SCOTSMAN, July 20, 2001.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

65. On August 8, 2001, Argentina was hit with another wave of roadblocks and thousands of protesters marched in the capital.<sup>82</sup> In December 2001, one day of riots left 30 civilians dead and led to the resignation of President Fernando de la Rúa and the collapse of the government.<sup>83</sup> One author has described the situation at the end of 2001 as “potentially explosive,” marked by “domestic political weakness and a lack of external support with depression, deflation, hyper-unemployment (20 percent of the active population), extreme poverty (14 million people), [and] high external debt (142,000 million dollars).”<sup>84</sup> A “final social explosion toward the end of December ... finished the Alliance government in a painful and bloody manner.”<sup>85</sup>
66. This economic collapse and social upheaval caused the fall of numerous presidential administrations during December 2001, endangered the stability of the state, and threatened the health and safety of Argentine citizens across the country.<sup>86</sup> One commentator notes a “tragic spectacle of a succession of five presidents taking office over a mere ten days.”<sup>87</sup> Hospitals ran short of essential medications,<sup>88</sup> “several politicians [were] beaten up and abused on the street,” and “dozens of bank branches [were] attacked.”<sup>89</sup>

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<sup>82</sup> Diego Giudice, *Flooding On Argentina's Famed Pampas Adds To The Misery Of A Country In Economic Crisis*, ASSOCIATED PRESS NEWSWIREs, November 30, 2001.

<sup>83</sup> Nielsen Declaration, ¶ 8.

<sup>84</sup> DEBORAH L. NORDEN, *THE UNITED STATES AND ARGENTINA* 127 (2002). Another author concurred: “We have also seen the human face of crises. In Ecuador and Argentina, we have seen middle-class savers, trying to withdraw their life’s savings, beating futilely on the doors of banks that have been closed for a bank holiday in the midst of a national liquidity crisis. In 2002, Argentina is experiencing a breakdown not just of its financial system, but its political institutions and social order as well.” DOMINIC BARTON, ROBERTO NOWELL & GREGORY WILSON, *DANGEROUS MARKETS: MANAGING IN FINANCIAL CRISES* 3 (2002).

<sup>85</sup> NORDEN, *supra* note 84, at 127.

<sup>86</sup> *A decline without parallel - Argentina's collapse – Explaining Argentina's economic collapse*, *supra* note 74.

<sup>87</sup> PAUL BLUSTEIN, *AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF AND THE BANKRUPTING OF ARGENTINA* 1 (2005).

<sup>88</sup> *A decline without parallel - Argentina's collapse – Explaining Argentina's economic collapse*, *supra* note 74.

<sup>89</sup> *Id.*

67. In this general climate, the various measures taken by the Argentine Government that provide the substantive basis of Claimant's arguments<sup>90</sup> were fully justifiable under the national security and public order provisions of Article XI. During this period, Argentina faced a public order threat that also endangered the health, safety, and security of the Argentine state and its people. This is a world in which the security threat posed by possible state failure is often far greater than the likelihood of foreign invasion. When states fail—as we have witnessed so clearly in Afghanistan and elsewhere—the essential security of the state and the very survival of its citizens are jeopardized. The economic melt-down in Argentina had the potential to cause such catastrophic state failure and should thus be understood both as a threat to public order and to essential security interests—both situations explicitly provided for in Article XI of the treaty.

68. Given these facts, on January 6, 2002 Argentina explicitly declared a public emergency, terminated the currency board, *pesified* all obligations in foreign currencies and altered the financial arrangements of certain government contracts through Law 25.561. The law itself declares a public order emergency that is protected under the treaty. Article 1 of Law 25.561 reads: “Pursuant to provisions contained in article 76 of the National Constitution, a public emergency with regards to social, economic, administrative, financial, and foreign exchange matters is declared, delegating to the executive branch the powers contemplated by the present law...”<sup>91</sup> Article 19 states that it is a “public order” law. This declaration of public emergency, justified by the preservation of public order and made in good faith, put all parties on notice that Argentina deemed itself to be in an emergency situation and that various legal measures would be taken to address that emergency. As such, Law 25.561 is sufficient to trigger the provisions of Article XI of the BIT which, in turn, establishes that the measures taken by Argentina would not be precluded by the treaty.

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<sup>90</sup> See generally, *El Paso Energy International v. The Republic of Argentina*, Claimant's Memorial on the Merits.

<sup>91</sup> Law 25.561, January 6, 2002, Art 1.

69. Though we leave the economic impact of the measures taken under Argentine law to experts in that field, from the perspective of treaty interpretation, the measures included in Law 25.561 exhibit a good faith connection to the facts of the crisis sufficient to qualify as “measures *necessary for* the maintenance of public order...or the Protection of its own essential security interests.”<sup>92</sup> The actions taken by Argentina through Law 25.561 and related legislation include the *pesification* of all obligations, the temporary restrictions on the international transfer of funds, and the temporary suspension of the payments of foreign debt. Each of these measures is logically related to the factual crisis and, as framed in Law 25.561, appear to have been intended by Argentina to be part of a good faith effort to resolve the public order and national security emergency through a unified program of economic restructuring.<sup>93</sup>

70. The provisions regarding public order in Article XI allow a BIT party to take measures “in respect of health and public safety.” As demonstrated above, this was a case of open riot, one in which the health and safety of many citizens were imperiled. Indeed, if the events in Argentina did not constitute a national emergency, it is frankly hard to conceive of what would. Argentina’s crisis made headlines around the world, shaking an entire society to its foundations. Its invocation of the essential security clause is manifestly and objectively in good faith.

71. A recent account from a respected and objective financial analyst describes “the collapse of the Argentine economy, which commenced a couple of weeks after the withdrawal of the IMF Mission in early December 2001” as “one of the most

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<sup>92</sup> Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, November 14, 1991, Art. XI (emphasis added).

<sup>93</sup> In the interpretation of treaties between the United States and Nicaragua and the United States and Iran, the International Court of Justice has required 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.” *Military and Paramilitary Activities In and Against Nicaragua*, *supra* note 53, ¶282; *Oil Platforms (Islamic Republic of Iran v. U.S.)*, 2003 ICJ 161, ¶43 (November 6). Both of those cases involved the use of force by a state and, therefore, incorporated the stricter requirements of self-defense in Article 51 of the UN Charter and customary international law. With respect to the economic measures taken by Argentina in response to an actual threat to the state’s public order or essential security interests, a broader interpretation of “necessary for” based on a logical connection between the threat and the acts taken in response or a showing of a less restrictive alternative by Claimants is appropriate. *See infra* ¶¶ 72-78.

spectacular in modern history.”<sup>94</sup> He notes that the “country descended into anarchy” and that “national output shrunk 11 percent in 2002, leaving nearly one quarter of the workforce unemployed and a majority of the population below the poverty line, even as prices soared for basic food items such as bread, noodles, and sugar.”<sup>95</sup> Moreover, he attributes much of the blame for the crisis to the policies International Monetary Fund (IMF) and “global financial markets,” observing “the IMF may be fairly accused of what might be called ‘poster-child syndrome’ in the enthusiasm it manifested for the country’s adoption of the reforms that the Fund favored...the consequences were grave...but global financial markets were even more grievously at fault in this regard.”<sup>96</sup>

## **VII. IN THE ALTERNATIVE, ARGENTINA HAS MET THE NECESSITY REQUIREMENTS OF ARTICLE XI**

72. If this tribunal declines to interpret Article XI as self-judging, it must then engage in a substantive review of whether Argentina faced a threat to its public order and/or essential security interests and whether the measures it took were in fact necessary to maintain public order and defend its essential security interests. It has been suggested that the relevant test to determine the necessity of the measures taken by Argentina is whether these actions were the *only* means to preserve the state.<sup>97</sup> Such an interpretation mistakenly reads into Article XI the general requirements of the necessity defense in customary international law and as articulated by Article 25 of the International Law Commission’s Draft Articles on the Responsibility of States.

73. This approach is improper for three reasons. First, to equate Article XI with the necessity defense in customary international law vitiates the object and purpose of the article and arguably of the U.S.-Argentina BIT as a whole. Second,

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<sup>94</sup> BLUSTEIN, *supra* note 87, at 1.

<sup>95</sup> BLUSTEIN, *supra* note 87, at 2.

<sup>96</sup> BLUSTEIN, *supra* note 87, at 201.

<sup>97</sup> See *CMS Gas Transmission Company v. The Republic of Argentina*, *supra* note 71.

in testing the validity of Argentina's actions, the burden is on the Claimant to demonstrate the existence of a less restrictive alternative course of action manifestly available to Argentina and equally able to meet the policy goals than the one chosen. Third, even if this tribunal finds that Article XI incorporates customary international law with respect to necessity, the dire economic situation in Argentina meets the stricter customary law requirements for the necessity defense.

74. A far better and more practical test for meeting the "necessary for" requirement in the Treaty is to require Claimants to show a less restrictive and legal alternative course of action that was clearly available to Argentina and would have adequately maintained public order or protected the state's essential security. Claimants have not met the full burden of their claim, which is not only to assert lack of necessity, but actually to demonstrate a legal alternative course of action that could have achieved the requisite policy goals.<sup>98</sup> Only when a manifestly available alternative policy has been asserted that, *prima facie*, would meet the policy goals of protecting the state's essential security or public order would the burden shift to Respondents to show why the alternative put forward would not suffice.

**A. To Equate Article XI with the Necessity Defense in Customary Law Would Violate the Object and Purpose of the Article and the U.S.-Argentina BIT**

75. One of the principal reasons that states enter into bilateral treaties is to contract around background principles of customary international law in their relations with one another where they decide that alternate rules better meet their interests. As long as such treaties do not violate *jus cogens* rules,<sup>99</sup> this practice of contracting around customary international law is fully appropriate and generally

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<sup>98</sup> Merely providing a catalogue of alternative policy options, as do Claimants in their memorial, is insufficient. See *El Paso Energy International vs. The Republic of Argentina*, Claimant's Memorial on the Merits, at ¶580. Rather, Claimants must show that a specific less restrictive alternative course of action was clearly available to the state and would have had an equally likely possibility of protecting the state's essential security and public order.

<sup>99</sup> See Vienna Convention on the Law of Treaties, *supra* note 18, Art. 53 (providing that treaties are invalid if they conflict with *jus cogens* norms).

recognized in international law. Most notably, Article 55 of the International Law Commission's Articles on the Responsibility of States confirms the principle that *lex specialis derogat legi generali*. Namely, according to Article 55, “[t]hese articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”<sup>100</sup> The ILC commentaries to Article 55 further indicate, “when defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach.”<sup>101</sup>

76. As recognized by Claimants in this case, Article XI of the U.S.-Argentina BIT creates just such a set of *lex specialis* rules and determines the conditions for when there has been a breach.<sup>102</sup> Such a *lex specialis* rule is entirely separate from the necessity defense in customary international law. Consider the early origins of the necessity defense, such as the Anglo-Portuguese Dispute of 1832. The British government was advised that Portugal could invoke necessity to appropriate British property, on the following ground:

[T]he Treaties between this Country and Portugal are [not] of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State.<sup>103</sup>

It follows that if a treaty itself provides for derogation from the treaty obligations in the case of peril to the safety or even existence of a state, it does so separately from any underlying necessity defense in customary international law.

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<sup>100</sup> *Responsibility of States for Internationally Wrongful Acts*, G.A. Res. 56/83, U.N. GAOR, 56th Sess., U.N. Doc. A/RES/56/83, Art. 55 (2002).

<sup>101</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 55, ¶ 1.

<sup>102</sup> *El Paso Energy International v. The Republic of Argentina*, Claimant's Memorial on the Merits, ¶393.

<sup>103</sup> A.D. MCNAIR (Ed.), *INTERNATIONAL LAW OPINIONS*, vol. II, 232 (1956), *as quoted in* International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 25, ¶ 5.

77. Conversely, if Article XI provides the Argentine and the U.S. governments with no more latitude to safeguard their essential security interests than the necessity defense in customary international law, why would they have bothered even to negotiate the article? Article XI itself makes no reference to “necessity” *per se*, nor indeed to the rules of customary international law. Moreover, given the importance of the Argentine government’s willingness to depart from the Calvo Doctrine in the BIT, a doctrine that was itself self-proclaimed *lex specialis*, it is hard to believe that it would have been willing simply to revert to the general rules of customary international law on an issue as sensitive as foreign investment.
78. A far more natural understanding of Article XI is that the parties intended to provide themselves with an escape clause from the obligations of the treaty in cases where they deemed their essential security interests were at risk. That understanding is completely consistent with the plain meaning of the text, which refers to “measures necessary for the maintenance of public order... or the protection of its own essential security interests.” We address the proper interpretation of “necessary for” below. But if the evident object and purpose of this clause is to provide such special protections, then to ignore the text and the negotiating history of this clause in favor of a preexisting doctrine of customary international law would violate the Vienna Convention’s most basic rule of treaty interpretation.<sup>104</sup> Moreover, it vitiates the value of the treaty both for the parties involved and for any other states contemplating the negotiation of a BIT.
79. As advanced above, both Argentina and the United States envisaged that the phrase “necessary for” in Article XI would be for them to interpret, consistent with their understanding of Article XI as self-judging within the margin of discretion afforded by the good faith requirement. From this vantage point, it is unnecessary for the tribunal to determine precisely what courses of action may or may not have been “necessary for” the protection of Argentina’s public order or

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<sup>104</sup> See Vienna Convention on the Law of Treaties, *supra* note 18, Art. 31(1) (providing: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”).

the maintenance of its essential security interests. Rather, it need only determine whether the Argentine government concluded in good faith that the measures it took were necessary to those ends.

**B. An Objective Interpretation of “Necessary For” Implies a Least Restrictive Alternative Test**

80. At least one tribunal has observed that under the customary law doctrine of necessity, an action is only permissible if it is the “only means” to preserve the state.<sup>105</sup> In fact, however, the commentaries to Article 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts themselves offer considerably more leeway than this and strongly suggest that the burden of proof is on the challenger of the “necessary” action, rather than on its defender.
81. According to the ILC 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.”<sup>106</sup> In interpreting the no other means available aspect of the necessity defense, it is therefore appropriate not to ask merely if other means were available, but if other *lawful* means were available to Argentina to prevent a grave and imminent peril.
82. Yet how is a tribunal to determine whether these other lawful alternatives existed? At the very least, such an inquiry will require a comparison of the course of action chosen by Argentina with other proffered ways of protecting Argentina’s essential security interests. But here the burden surely must be on the Claimant to present those alternatives. This process is analogous to the “least restrictive alternative” test in U.S. constitutional law, whereby both state governments and the federal government are allowed to undertake an action that burdens citizens’ rights if it is necessary to further an essential state interest, but only if it is the least restrictive alternative available.<sup>107</sup> If challengers of the action can identify a less restrictive

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<sup>105</sup> See *CMS Gas Transmission Company v. The Republic of Argentina*, *supra* note 71.

<sup>106</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 25, ¶ 15.

<sup>107</sup> See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (observing: “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle

alternative than the one chosen, a court will typically invalidate the means actually adopted and send the government back to the drawing board.<sup>108</sup>

83. The burden is on Claimants to demonstrate that Argentina's action was not necessary to preserve the state because it had less restrictive legal options available to it that would have met the state's security and public order needs. Claimants have not offered any other means that were available to preserve the state and deal with Argentina's financial collapse, open riots, and governmental instability.<sup>109</sup>

### **VIII. THE MOST FAVORED NATION PROVISION OF THE US-ARGENTINA BIT DOES NOT LIMIT THE APPLICABILITY OF ARTICLE XI**

84. In their memorial, Claimant suggests that the most favored nation clause of Article II(1) of the US-Argentina BIT can be relied upon to circumvent the non-precluded measures provisions of Article XI even if it is self-judging.<sup>110</sup> Claimant suggests that since Argentina has BITs with certain other countries that do not include a non-precluded measures provision, the most favored nation clause of Article II(1) entitles US investors to protections equivalent to those accorded to investors from other countries under BITs that do not include a non-precluded measures provision.

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fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose").

<sup>108</sup> See generally LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, §§ 16-6-16-8 (1978).

<sup>109</sup> See *El Paso Energy International v. The Republic of Argentina*, Claimants Memorial on the Merits.

<sup>110</sup> See generally, *El Paso Energy International v. The Republic of Argentina*, Claimant's Memorial on the Merits, at fn. 759 (arguing: "[c]onsequently, since Argentina has signed other BITs with countries beside the United States that provide a higher level of substantive protection, the Claimant would be entitled to claim the benefit of any more favorable provision"). Article II(1) of the US-Argentina BIT provides: "Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Protocol to this Treaty." US-Argentina BIT, Art. II(i).

85. This argument simply does not hold up. Claimant’s interpretation would again vitiate the purpose of Article XI. First, it is clear from the ordinary meaning of Article XI that it applies to the entire treaty and thus also limits the applicability of Article II(1) in cases of national security or public order emergency. Article XI provides: “This Treaty shall not preclude....”<sup>111</sup> The language “this Treaty” means what it says—all of the provisions of the treaty, including Article II(1). The placement of Article XI after all the substantive provisions of the treaty, including Article II(1), buttresses the plain meaning of its language.
86. Some ICSID tribunals have found that most favored nation clauses in BITs may, at times, allow investors to benefit from higher protections specified in other BITs to which the state against whom claims are made is party.<sup>112</sup> This practice is, however, far from uniform and has been rejected in a number of cases.<sup>113</sup> Moreover, ICSID tribunals have made clear that these MFN clauses are inapplicable with respect to public policy matters and issues that go to the heart of the bargain struck between contracting states.
87. The Tribunal in *Tecmed v. Mexico* found that certain articles of a BIT “due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties.... Their application cannot therefore be impaired by the principle in the most favored nation clause.”<sup>114</sup> Even the *Maffezini* tribunal, which affirmed a broad reading of the most favored nation clause, found “the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the

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<sup>111</sup> Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, November 14, 1991, Art. XI.

<sup>112</sup> See Emilio Agustín Maffezini v. Kingdom of Spain, Decision on Jurisdiction, ICSID Case No. ARB/97/7, 40 I.L.M. 1129, 1135-1139 (¶¶ 38-64).

<sup>113</sup> See Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13 (Jan. 31, 2006), 39-40 (¶¶ 115-119); Plama Consortium Limited v. Republic of Bulgaria, Decision on Jurisdiction, ICSID Case No. ARB/03/24 (Feb. 8, 2005), 20 ICSID REV.—FOR. INV. L. J. 262, 320-333 (¶¶ 183-227) (2005).

<sup>114</sup> *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (May 29, 2003) (unofficial English translation), 22 (¶ 69).

case.”<sup>115</sup> The non-precluded measures provisions of Article XI of the US-Argentina BIT exist precisely to preserve the contracting parties’ ability to make critical public policy decisions affecting vital national security interests. These provisions cannot be vitiated by a most favored nation clause.

88. The principle of effectiveness in treaty interpretation requires that Article XI be given substantive meaning in interpreting the treaty. The text and context of Article XI make clear that it is a temporary opt-out provision of the treaty as a whole, including the most favored nation clause of Article II. As the ICJ held in the *Case Concerning South West Africa*, “[i]t is an acknowledged rule of treaty interpretation that treaty clauses must not only be considered as a whole, but must also be interpreted so as to avoid as much as possible depriving one of them of practical effect for the benefit of others.”<sup>116</sup> Reading the most favored nation clause of Article II of the US-Argentina BIT to bar the invocation of the non-precluded measures provision of Article XI would not only deny Article XI any practical benefit with respect to the other provisions of the U.S.-Argentine BIT, it would also mean that the Argentine government’s freedom of action in any one BIT would be a function of a patchwork of provisions in a host of other BITs, each of which would have to be read against various others in an interpretative exercise worthy of a GATT negotiation. Given that the purpose of Article XI is manifestly to allow both treaty parties a means to take urgent action necessary in a crisis to protect vital national interests, such a reading would render it ineffective just when it is most needed.

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<sup>115</sup> *Maffezini v. Spain*, *supra* note 112, at 1139 (¶ 62). The panel noted that allowing investors to take advantage of the most favored nation clause in such a way would lead to “disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions.” *Id.* (¶63).

<sup>116</sup> *Case Concerning South-West Africa*, Advisory Opinion, 1950 ICJ 187. The ICJ reached a similar conclusion in the *Iranian Oil Case*, observing “The Government of the United Kingdom ... asserts that a legal text should be interpreted in such a way that a reason and meaning can be attributed to every word in the text. It may be said that this principle should in general be applied when interpreting the text of a treaty...” *Anglo-Iranian Oil Company (United Kingdom v. Iran)* 1952 ICJ 105. *See also* G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-54: Treaty Interpretation and Certain Other Treaty Points*, 33 BRIT. Y.B. INT’L L. 203, 222 (1957); Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties*, in INTERNATIONAL LAW 173, 190 (Malcolm D. Evans ed., 2003) (observing: “that “all provisions of the treaty or other instrument must be supposed to have been intended to have significance and to be necessary to express the intended meaning. Thus an interpretation that renders a text ineffective and meaningless is incorrect”).

**IX. IN THE ALTERNATIVE, ARGENTINA’S PERIL ROSE TO THE LEVEL SUFFICIENT TO JUSTIFY THE NECESSITY DEFENSE IN CUSTOMARY INTERNATIONAL LAW**

89. The defense of necessity in customary international law is independently and separately available to Argentina. There is no evidence that either the U.S. or Argentina sought to link Article XI and the customary defense of necessity. Nor is there evidence that they sought Article XI to replace or subsume the necessity defense in customary law.

90. Courts and tribunals actually confronted with the necessity defense in customary international law have adopted a highly tractable approach to deciding whether the plea is justified. Recognizing that judges and arbitrators should not second-guess the specific outcomes reached by political bodies, particularly international judges and arbitrators asked to review the outcomes reached by the political bodies of diverse nations, these courts and tribunals have instead engaged in an order-of-magnitude calculation as to the level of a particular nation’s peril. This approach harmonizes at a deep level with the collective nature of the necessity defense, preventing a court from micro-managing a government’s good faith decision on behalf of its people.

91. Thus, according to the commentaries to Article 25 of the Draft Articles of State Responsibility,

Unlike distress (Article 24), necessity consists not in danger to the lives of individuals in the charge of a state official, but in a grave danger to the essential interests of the state or of the international community as a whole.<sup>117</sup>

The condition arises where “there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity

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<sup>117</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 25, ¶ 2.

- on the other.”<sup>118</sup> The issues that must be decided then becomes whether: 1) the alleged interest relied on by the State invoking the necessity defense is in fact an “essential” interest; and 2) whether that interest is in fact genuinely imperiled.
92. In an early example of state practice, Russia prohibited sealing in an area of the high seas on grounds of necessity to prevent the depletion of fur seal populations there. In the ensuing *Seal Fisheries off the Russian Coast* controversy, Russia offered to negotiate with Great Britain a longer-term arrangement later.<sup>119</sup> The United Kingdom accepted this argument in an exchange of letters, notwithstanding the fact that other means of warding off unrestricted hunting would have been possible, such as initial Russian cooperation with Great Britain.
93. In the *French Company of Venezuela Rail Roads* award (1905) the umpire strictly limited damages, finding “no lawful responsibility in the respondent Government. It can not be charged with responsibility for the conditions which existed in 1899, prostrating business, paralyzing trade, and commerce, and annihilating the products of agriculture; nor for the exhaustion and paralysis which followed; nor for its inability to pay for its debts... All these are misfortunes incident to government, to business, and to human life.”<sup>120</sup>
94. In several other cases, courts and tribunals have acknowledged the validity of the necessity defense, even though they have denied it on the facts in question. These cases have included situations where economic difficulties result in urgent peril to the state and other policy choices might have protected the wronged creditor. For example, in the *Russian Indemnity Case* discussed above, the Ottoman Government justified its failure to pay Russian debt on grounds of necessity and, in the words of the International Law Commission, the arbitral panel “accepted

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<sup>118</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 25, ¶ 1.

<sup>119</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art. 25, ¶ 6; *see also* Michael F. Keiver, *The Pacific Salmon War: The Defence of Necessity Revisited*, 21 DALHOUSIE L. J. 408, 411 (1998).

<sup>120</sup> *French Company of Venezuela Railroads*, 10 UNRIAA 285, 353 (1905).

the plea in principle.”<sup>121</sup> Yet, they found that the “relatively small sum of six million francs due to the Russian claimants would [not] have imperiled the existence of the Ottoman Empire.”<sup>122</sup>

95. This is precisely an order of magnitude calculation. Similar issues were raised in the *Société Commerciale de Belgique* case, in which Greece owed certain funds to two Belgian companies and argued that “by reason of its budgetary and monetary situation...it was materially impossible for the Greek Government” to make payment.<sup>123</sup> The Permanent Court of International Arbitration could not directly address the financial situation in Greece because, “according to the clear declarations made by the parties during the proceedings, the question of Greece’s capacity to pay is outside the scope of the proceedings before the Court.”<sup>124</sup> Nevertheless, the Court again accepted financial peril as a ground for a necessity defense, observing that, if it had the power to do so, it would be inclined to declare the economic situation in Greece a legitimate ground for non payment.
96. In the words of the PCIJ, “the Court could only make such a declaration after having itself verified that the alleged financial situation really exists and after having ascertained the effect that the execution of the awards would have on that situation.”<sup>125</sup> Clearly frustrated that such an analysis was outside the terms of reference in the case, the PCIJ noted in its decision that the Belgian Government had accepted in its oral submissions to the Court that economic conditions could be a ground for necessity. Specifically, the Belgian agent accepted that his country would have to take into account “the ability of Greece to pay.”<sup>126</sup> Had the PCIJ been able to consider this issue, it would not have examined the details of the Greek refusal to pay, but rather whether the amount of the sums in question were sufficiently large in relation to Greek reserves.

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<sup>121</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 25, ¶ 7.

<sup>122</sup> *Russian Indemnity Case*, *supra* note 64, at 443.

<sup>123</sup> *Société Commerciale de Belgique*, *supra* note 67, at 178.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*, at 178.

<sup>126</sup> *Id.*

97. In the case of Argentina, an order of magnitude calculation cuts in favor of the necessity defense in customary law. As we argued above, both the sums at stake and the wider situation of financial collapse jeopardized the very existence of the state. The government faced economic collapse, open riots, strikes, and protests for a period of almost two years.
98. In its memorial, Claimant argues that “[t]he necessity defense is barred even where a combination of factors led to the situation if the government’s action was one of the contributing factors.”<sup>127</sup> Claimant bases this contention on Article 25(2) of the ILC Draft Articles, according to which: “necessity may not be invoked by a State as a ground for precluding wrongfulness if... (b) the State has contributed to the situation of necessity.”<sup>128</sup>
99. The ILC Draft Articles essentially create a spectrum of available defenses to liability based on the State’s intent and contribution to the situation. At one end of the spectrum are cases in which the state intentionally created the circumstances of necessity. In such cases, no defenses are available. The drafting history of Article 25 reveals that its original intent was to preclude the necessity defense where the state *intentionally* sought to bring about the situation of necessity – a straightforward protection against a bad faith evasion of legal obligations. As the commentaries to the 1980 version of the Draft Articles indicate: “[i]t would obviously be out of the question for a state to intentionally create a situation of danger to one of its major interests solely for the purpose of evading obligations to respect a subjective right of another State.”<sup>129</sup>
100. At the other end of the spectrum are cases in which the State made no contribution whatsoever to the situation. In these cases all three defenses—duress, force majeure, and necessity—are available. In the middle, are cases in which the state may have unwittingly contributed to the situation of necessity. In these cases

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<sup>127</sup> *El Paso Energy International v. The Republic of Argentina*, Claimant’s Memorial on the Merits ¶573.

<sup>128</sup> International Law Commission, Draft Articles on the Responsibility of States, *supra* note 100, Art. 25.

<sup>129</sup> Addendum to the Eighth Report on State Responsibility, by Roberto Ago, Special Rapporteur, U.N. Doc. A/CN.4/318/ADD. 5-7, reprinted in [1980] 2 Y.B. Int’l L. Comm’n Pt. 1 at 19-20 (¶ 13) (footnotes omitted), U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1).

of unwitting contribution, the defenses of force majeure or distress are available as they may be invoked in “situations in which a State may have unwittingly contributed to the occurrence of material impossibility.”<sup>130</sup> Likewise, in cases of unwitting contribution, the necessity defense remains available as long as the state’s contribution was peripheral and was not the immediate cause of the situation of necessity.<sup>131</sup> The ILC commentaries to Article 25(2) indicate that for a plea of necessity to be precluded due to Article 25(2)(b), the “contribution to the situation of necessity must be sufficiently substantial and not merely incidental or peripheral.”<sup>132</sup>

101. The history of Article 25 confirms that the necessity defense was intended to be unavailable where a state unwittingly contributed to the situation of necessity only if that contribution was causal of the situation of necessity. The provision in the 1980 version of the ILC draft articles dealing with necessity, as proposed by then-Rapporteur Roberto Ago, explicitly required causation for the necessity defense to be barred. Article 33 of that text stipulated that the plea of necessity is unavailable “if the occurrence of the situation of ‘necessity’ was caused by the State claiming to involve it as a ground for its conduct.”<sup>133</sup> Though the final language adopted by the Commission differs, the drafters’ intent was only to exclude the necessity defense where the state was a substantial or principal cause of the situation of necessity.

102. Analyzing the facts of the Argentine financial crisis in light of this spectrum of defenses indicates that the necessity defense should be available to Argentina. In the Argentinean situation, it strains credulity to think that Argentina

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<sup>130</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, at 188.

<sup>131</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, at 188.

<sup>132</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, at ¶25(2).

<sup>133</sup> Addendum to the Eighth Report on State Responsibility, by Roberto Ago, Special Rapporteur, U.N. Doc. A/CN.4/318/ADD. 5-7, *reprinted in* [1980] 2 Y.B. Int'l L. Comm'n Pt. 1 at 19-20 (¶13) (footnotes omitted), U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1).

intentionally sought to cause the financial collapse of 2000-2001. In fact, all actions taken by Argentina were intended—even if unsuccessfully—to avoid just such a state of necessity. Hence, any contribution by Argentina to the situation was unwitting.

103. Within the range of unwitting contributions to a state of necessity, any contribution Argentina many have made was not sufficiently substantial or proximate to bar the necessity defense. In order to contribute substantially to a situation of necessity, the state must have a degree of direct control over the events in question. In the *Gabčíkovo-Nagymaros Project Case*, for example, the ICJ denied the necessity defense, in large part because Hungary had direct and substantial control over the construction of the dam. In that case, the Court references a number of clear policy choices that directly caused the situation of necessity in deciding to limit the applicability of the defense.<sup>134</sup> In contrast, Argentina had only very limited control over its economic situation as a range of external factors and intervening events—including IMF policies and the state of the global economy—had considerable bearing on the actual results of Argentina’s economic policies.<sup>135</sup> Without such direct control, Argentina could not have been the proximate cause or even have made a substantial contribution to the economic crisis. In fact, a necessity defense was accepted in principle in *Société Commerciale de Belgique*, discussed above, which likewise involved choices of economic policy not dissimilar to those facing Argentina in 2000-2002.<sup>136</sup>

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<sup>134</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. para. 57 (Sept. 25). These decisions included asking that works on the dam “go forward more slowly,” asking that “works to be speeded up,” and suspending and abandoning the project.

<sup>135</sup> *See, generally*, BLUSTEIN, *supra* note 87, at 1.

<sup>136</sup> *See supra* ¶¶ 90-91.

**X. ARGENTINA’S TREATMENT OF EL PASO ENERGY AND ITS INVESTMENT IS CONSISTENT WITH ARTICLE IV(3) OF THE BILATERAL INVESTMENT TREATY**

104. Argentina’s actions during this crisis are fully consistent with Article IV(3) of the treaty, which provides for equal treatment of national and foreign companies in the case of war or national emergency. The article states: “Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.”<sup>137</sup> In interpreting a similar provision of the United Kingdom - Sri Lanka Bilateral Investment Treaty, the *Asian Agricultural Products* tribunal defined the host state’s responsibility as according the foreign company “treatment no less favourable than: (i) - that which the host State accords to its own nationals and companies; or (ii) - that accorded to nationals and companies of any Third State.”<sup>138</sup>

105. As already discussed above, the financial crisis in Argentina between 2000 and 2002 constituted and was officially declared to be a national emergency. Article IV(3) anticipates that companies of the host state and the investing state may suffer losses in such circumstances and requires only that the host state treat foreign and domestic companies equivalently in responding to such emergencies. Argentina did precisely this. Argentina adopted a series of measures in response to the crisis which Claimant argues reduced the value of its assets, and constituted indirect expropriation.<sup>139</sup> These actions were of a general nature and impacted the

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<sup>137</sup> US-Argentina BIT, Art. IV(3).

<sup>138</sup> *Asian Agricultural Products Ltd. (Aapl) v. Republic Of Sri Lanka*, ICSID Case No. ARB/87/3, Award of June 27, 1990, ¶ 66.

<sup>139</sup> See *El Paso Energy International v. The Republic of Argentina*, Claimant’s Memorial on the Merits, ¶

Argentine economy as a whole. The termination of the currency board and the *pesification* of obligations provided for in Law 25.561 of 6 January 2002 and implemented through Decree 214/02, 471/02, and 644/02 were of general applicability, including both national and foreign companies.<sup>140</sup> Likewise, Decree 1570/01, often referred to as the “Corralito,” was aimed at all actors within the Argentine economy. Regulation of hydro-carbon transfers were likewise aimed at all producers. No differentiation is made between foreign and national companies nor do the laws in any way discriminate against foreign companies. Accordingly, they comply with Argentina’s limited obligation to treat foreign corporations equally with domestic corporations in times of national emergency.

**XI. NO COMPENSATION IS AVAILABLE TO CLAIMANTS UNDER THE U.S.-ARGENTINA BIT**

106. Article XI of the U.S. – Argentina BIT provides that the treaty “shall not preclude the application” of certain measures “necessary for the maintenance of public order or the protection of its own essential security interests.” Actions by either party to the treaty which qualify under this provision, even though they might otherwise violate the treaty, do not constitute a breach of the treaty or an internationally wrongful act. As such measures do not equate to a treaty breach or an internationally wrongful act, the U.S.-Argentina BIT provides no grounds for compensation.

107. The breach of an international legal obligation is an absolute requirement for the existence of an internationally wrongful act and, hence, any obligation to compensate for such an act. Article 2 of the International Law Commission Draft Articles on the Responsibility of States confirms that for an action to give rise to an “internationally wrongful act of a State” that “action” must “constitute[] a breach of an international obligation of the State.”<sup>141</sup> The ICJ and its predecessor have confirmed this interpretation on a number of occasions. In the *Phosphates in*

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<sup>140</sup> Law 25.561, Title III.

<sup>141</sup> International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* note 100, Art. 2.

*Morocco Case*, the PCIJ found that an internationally wrongful act must be “contrary to the treaty right[s] of another State.”<sup>142</sup> Likewise, the PCIJ held in the *Chorzów Factory Case* that state responsibility flowed from the “breach of an engagement.”<sup>143</sup> In the *Iran Hostages* case, the ICJ noted that, to determine whether an internationally wrongful act had occurred, “it must consider the... compatibility or incompatibility [of the actions] with the obligations of Iran under treaties in force.”<sup>144</sup> In its commentaries to the Draft Articles on State Responsibility, the International Law Commission recognizes “there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State.”<sup>145</sup>

108. As discussed above, the measures taken by Argentina in response to the crisis were not precluded by the U.S.-Argentina BIT. Such acts do not, therefore, constitute a breach of the treaty, nor do they amount to an internationally wrongful act by Argentina. As a result, the U.S.-Argentina BIT offers Claimants no relief and provides no grounds for compensation. Pursuant to Article 31 of the ILC Draft Articles, compensation is only due for “injury caused by the internationally wrongful act.”<sup>146</sup> As the PCIJ found in the *Chorzów Factory Case*, “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”<sup>147</sup> Conversely, where no engagement has been breached, there is no ground for relief and no compensation is owed. While Claimants may be able to seek relief in other *fora* outside of the context of the U.S.-Argentina BIT, Article XI of the treaty specifically permits the actions taken by Argentina.

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<sup>142</sup> *Phosphates in Morocco (Italy v. France)*, 1938 P.C.I.J. (ser. A/B) No. 74 (Preliminary Objections, June 14).

<sup>143</sup> *Factory at Chorzów (Germany v. Poland)*, 1927 P.C.I.J. (ser. A) No. 9 (Jurisdiction, May 24).

<sup>144</sup> *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (July 26).

<sup>145</sup> International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, *supra* note 63, Art 2, ¶ 9.

<sup>146</sup> International Law Commission, *Draft Articles on the Responsibility of States*, Art. 31.

<sup>147</sup> *Factory at Chorzów*, *supra* note 143, at 21.

109. In the alternative, should Argentina's actions be found justified under the customary international law doctrine of necessity, compensation may still not be appropriate. The ILC Draft Articles on the Responsibility of States provide that the invocation of the necessity defense is "without prejudice to...the question of compensation for any material loss caused by the act in question."<sup>148</sup> The Commentaries to the Draft Articles observe that "Article 27 is framed as a without prejudice clause... because it is not possible to specify in general terms when compensation is payable."<sup>149</sup> Hence, in the circumstances of this case, given the seriousness of Argentina's crisis and the fact that the measures affected every person and company in Argentina, it seems that no compensation should be required.

## **XII. CONCLUSION**

110. In truth, even if the essential security clause were non-self-judging, a tribunal could easily decide that the measures taken by Argentina were necessary to protect its national security interests. This is no ordinary debt crisis. As it is, however, Argentina and the United States negotiated and signed a BIT that allowed either party to take measures otherwise inconsistent with their obligations under the treaty if that party deemed it necessary to protect its national security interests. Both sides understood the importance of this clause. The U.S. in particular understood that it was buying political flexibility as a capital importer at the risk of reduced protections for its investors in its role as a capital exporter.

111. Over time the U.S. has been increasingly explicit about its self-judging interpretation of the essential security clause, making it clear that this clause is limited only by a good faith requirement but equally insisting on the arbitrability of that requirement. In all these subsequent statements, the U.S. has also been careful to insist that it is making explicit a position that has been implicit back to

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<sup>148</sup> International Law Commission, Draft Articles on the Responsibility of States, *supra* note 100, Art. 27.

<sup>149</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, *supra* note 63, Art 27, ¶ 1.

1984. That view accords precisely with its own description of the 1992 Model BIT.
112. Both the U.S. and Argentina have acted to protect the interests of investors to the maximum extent consistent with their needs as sovereigns to protect the interests of their people and the existence of the state. The self-judging nature of Article XI is completely consistent with this desire and with the underlying policy goal of encouraging foreign investment by offering protections and clarifying investor expectations.
  113. The Republic of Argentina acted in good faith in accordance with Article XI of the U.S.-Argentina BIT. Given the extraordinary facts of the crisis, the measures taken by Argentina were permitted under article XI and Argentina is, therefore, relieved of liability under the treaty. In the alternative, Argentina is fully justified in invoking the independent doctrine of necessity under customary international law.
  114. This tribunal has an opportunity both to interpret the U.S.-Argentina BIT consistent with its terms, its context, its object and purpose, its negotiating history, and the circumstances surrounding its conclusion, while at the same time adding substance to the good faith requirement. The result will be to take a significant step toward an investment protection regime that spurs host states to take the determination of a national security threat or threat to public order very seriously and be prepared to defend it by giving evidence of their good faith before a tribunal. Tribunals must interpret and apply these obligations, but in the context of determining whether or not a state has in fact acted in good faith in trying to juggle its competing policy interests within a specified legal framework.
  115. Governments today face an increasingly insecure world, in which they count rising threats facing their people from epidemics to global financial crises to terrorism. If required to enumerate precisely when and how they can exercise their traditional sovereign powers in the face of such threats, they will quickly institute a far more explicit but also more restrictive regime balancing these needs

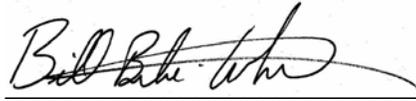
with the needs of their investors. The result is likely to diminish investor confidence and hence reduce the flow of foreign investment. A far better approach is a system of clear criteria for the invocation of extraordinary measures and strong norms of good faith in applying those criteria, subject to post-hoc external review. This tribunal has an opportunity to take a significant step toward realizing that regime, consistent with both the terms and the underlying intent of the U.S.-Argentine treaty.

We declare under penalty of perjury that the foregoing is true and correct.

Executed on 31 July 2006 in Princeton, New Jersey and The Hague, Netherlands, respectively.



Anne-Marie SLAUGHTER



William BURKE-WHITE