INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

EL PASO ENERGY INTERNATIONAL COMPANY Claimant, - against - THE REPUBLIC OF ARGENTINA, Respondent.	)	Case No. ARB/03/15 WITNESS STATEMENT OF ANNE-MARIE SLAUGHTER and WILLIAM BURKE-WHITE

WE, ANNE-MARIE SLAUGHTER and WILLIAM BURKE-WHITE, declare as follows:

1. On July 23, 2006 we opined on Argentina's liability for asserted contractual breaches under the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment [hereinafter U.S.-Argentina BIT] and, specifically, Argentina's invocation of the national security and public order exceptions of Article XI of that treaty.

2. Claimant in this case has submitted to the Tribunal three opinions in response to our initial statement by Sir Arthur Watts QC, Professor W. Michael Reisman and by Professor Abraham D. Sofaer. We have now been asked to provide a rejoinder to the three opinions submitted by Claimant's experts, specifically to their

arguments with respect to the applicability of Article XI of the U.S.-Argentina BIT.

I. SUMMARY OF ARGUMENTS

3. The summary of our argument as presented in our original opinion is as follows. First, Article XI of the U.S.-Argentina BIT and its underlying policy interests require a broad interpretation of the public order and national security exceptions 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 review by an arbitral Tribunal. Third, given the ambiguity of the text of Article XI, the negotiating history and the circumstances of the treaty's conclusion support this self-judging 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, Argentina has met the good-faith requirements of Article XI of the U.S.-Argentina BIT. 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 were 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.

4. We reaffirm these arguments as written in our initial opinion. This response to the opinions of Sir Arthur Watts, Professor Reisman and Professor Sofaer only addresses the arguments presented in our initial opinion to the degree they have been challenged by Claimant's experts. This opinion responds to the submissions of Claimant's experts collectively, addressing key areas in which we disagree

with them and raising factual, logical and legal problems with the arguments they present. In addition, this opinion addresses the award in the case of *LG&E Energy Corp, et. al v. The Argentine Republic*, which was handed down after our initial opinion was submitted and confirms many of the arguments presented in our initial opinion. Specifically, the LG&E Tribunal found that Article XI of the U.S.-Argentina BIT was applicable due to a state of necessity and relieved Argentina of liability for the period in which measures were necessary for the preservation of public order and the protection of essential security interests.

5. Our argument here proceeds in five parts. In Part I we highlight certain areas in which Claimant's experts actually support the conclusions presented in our initial opinion. In Part II we reaffirm the arguments in our initial opinion that Article XI should be interpreted as self-judging, but subject to a good faith review, and indicate certain factual inaccuracies and logical inconsistencies in the analyses offered by Claimant's experts. In Part III we opine that even if this Tribunal does not accept the self-judging nature of the U.S.-Argentina BIT, Argentina's invocation of the clause is still fully justified under international law. In Part IV we argue that, as Article XI relieves Argentina of liability under the U.S.-Argentina BIT, no internationally wrongful act has been committed and, hence, no compensation can be owed to Claimant. Finally, in Part V, we note that Claimant's experts have misconstrued our arguments with respect to Article IV of the U.S.-Argentina BIT.

6. Before proceeding, it is worth noting the limited reach of the arguments presented by Claimant's experts. In fact, none of Claimant's experts specifically opine on whether Argentina has properly invoked Article XI in this case due to, as the LG&E Tribunal found, a threat to its essential security interests and public order stemming from the crisis beginning in late 2000. Professor Sofaer expressly notes that he "has not been asked to form an opinion on whether the particular measures adopted by Argentina during its economic crisis of 2000-2002 met the

requirements of Article XI, both in principle and as applied."[1] Hence, Professor Sofaer does not conclude that Argentina's invocation of Article XI in this case is not proper. Nowhere in his witness statement does Professor Sofaer address the applicability of Article XI outside the context of a self-judging interpretation and nothing in his argument rebuts our opinion that, even absent a self-judging interpretation, Argentina was entitled to invoke Article XI. Similarly, Sir Arthur Watts' witness statement is limited to the question of "whether as a matter of international law Argentina's approach to the interpretation of Articles IV(3) and XI, and in particular its view that their applicability is a matter for self-judgment is correct."[2] Hence, he too does not conclude that Argentina was not entitled to invoke Article XI in the circumstances of this case.

II. CLAIMANT'S EXPERTS AGREE WITH OUR INITIAL OPINION ON A NUMBER OF KEY ISSUES

7. While our conclusions are distinct from those reached by Claimant's experts, on many points each of Claimant's experts agrees with our basic approach as well as certain specific conclusions in our initial opinion. We begin by considering a number of these points of agreement both to indicate the ways in which Claimant's experts support our arguments and to assist the Tribunal by limiting the scope of disagreement among experts in this case.

8. First, Claimant's experts agree with our mode of legal analysis and agree that, within the field of international law, the applicable legal standards in this case are, first and foremost, the particular treaty governing the relationship between the two parties, namely the U.S.-Argentina BIT.[3] However, Sir Arthur Watts emphasizes that the interpretation of the treaty must take into account "the general body of

[1] Opinion of Abraham D. Sofaer, *El Paso Energy International Company v. The Republic of Argentina*, ICSID Case No. Arb/03/15, November 14, 2006 ¶52.
[2] Opinion of Sir Arthur Watts, *El Paso Energy International Company v. The Republic of Argentina*, ICSID Case No. Arb/03/15, November 18, 2006 ¶13.
[3] *See* Opinion of Sir Arthur Watts, *supra* note 2, at ¶17-18.

rules constituting international law."[4] While we agree that general rules of international law and, particularly, those governing the interpretation of treaties in international law may be applicable in this case, our approach emphasizes the actual bargain struck by the United States and Argentina and memorialized in the treaty that gives rise to this dispute. It is the U.S.-Argentina BIT that this Tribunal is called on to interpret and apply.

9. Professor Sofaer also agrees with the position laid out in our original opinion that the U.S.-Argentina BIT establishes an absolute right to arbitration.[5] Nowhere in our opinion did we argue, as Professor Sofaer seems to suggest, that this case is not arbitrable. Similarly, we did not question the jurisdiction of this Tribunal. This misstated interpretation would indeed vitiate investor protections by allowing governments to invoke the essential security clause whenever necessary to justify their actions. Instead, as we argued in our opinion, the essential security clause strikes a balance between a government's desire to ensure maximum rights for its investors abroad and its need to protect its own economic, political, and military security. Under Article XI of the BIT, a state can take measures otherwise precluded by the treaty to protect its security interests when it deems them to be threatened, but must do so in good faith. When a government's invocation of the essential security clause is challenged by an investor, as in this case, the arbitral Tribunal must determine whether this good faith requirement has been satisfied.

10. With respect to the interpretation of Article XI, Professor Reisman agrees with the approach taken in our original opinion that Article XI is a critical element of the U.S.-Argentina BIT and must be given effect. In the words of Professor Reisman "Article XI should … be viewed … as an essential component of the BIT's framework for the protection of foreign investment."[6] The US Senate has also taken this view, seeking, through its comments in BIT ratification hearings to "clarify[] and highlight … the importance of" Article X of the 1988 model treaty,

[4] Id. at ¶18.
[5] Opinion of Abraham D. Sofaer, *supra* note 1, at ¶17.
[6] Opinion of W. Michael Reisman , *El Paso Energy International Company v. The Republic of Argentina*, ICSID Case No. Arb/03/15, November 5, 2006 ¶77.

again the NPM clause.[7] Article XI of the U.S.-Argentina BIT must, therefore, be given effect in the interpretation and application of the U.S.-Argentina BIT.

11. Perhaps the most significant point of agreement is that Claimant's experts concur with our view that the text of Article XI is on its face ambiguous and not amenable to an "ordinary meaning" interpretation. Sir Arthur Watts recognizes that "the text on which the Respondent relies is capable of a variety of meanings."[8] Likewise, Professor Sofaer admits that "it is theoretically possible to argue that the language of Article XI is ambiguous, in that it does not explicitly state who should determine whether the measures taken were required for the protection of the state's 'essential security interests.'"[9] Professor Reisman implicitly recognizes the ambiguity of the text when he notes that: "No state would (or could) surrender the right to take measures deemed necessary to its internal or external security."[10] To the degree the U.S.-Argentina BIT could be read to surrender such rights, the text of Article XI must be ambiguous from Professor Reisman's perspective.

12. Experts' agreement on the inherent ambiguity of Article XI is crucial because it shifts the interpretive framework from Article 31 of the Vienna Convention to Article 32. Article 31 calls for an "ordinary meaning" interpretation of the terms of the treaty, "in their context and in light of [the treaty's] object and purpose."[11] Article 32 requires recourse to supplementary materials to resolve ambiguity, specifically to "the preparatory work of the treaty and the circumstances of its conclusion"[12] That interpretive framework, in turn, leads directly to our conclusion that Article XI of the U.S.-Argentina BIT is self-judging, but subject to a good faith review.

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[7] Investment Treaties with Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada, 100th Cong. 2nd Sess. Exec. Rep 100-32, October 4, 1988, at 8.
[8] Opinion of Sir Arthur Watts, *supra* note 2, at ¶47.
[9] Opinion of Abraham D. Sofaer, *supra* note 1, at ¶15.
[10] Opinion of W. Michael Reisman, *supra* note 6, at ¶80-83.
[11] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Arts. 31.
[12] Id., art. 32.

13. Professor Sofaer also agrees with our initial opinion that good faith is a background norm of public international law relevant to the application of any treaty.[13] He opines: "A party invoking this Article would under international law be required to act in good faith."[14] It is precisely for this reason that, accepting our assertion that Article XI of the U.S.-Argentina BIT is self-judging, this Tribunal still retains the authority to review Argentina's invocation of Article XI based on a good faith standard.

14. Finally, Professor Sofaer agrees with our original opinion that any invocation of Article XI must have a proper basis,[15] namely that a State's invocation of the non-precluded measures provision of the U.S.-Argentina BIT must meet the prerequisite conditions specified in Article XI.[16] Nowhere in our original opinion do we suggest that Argentina is somehow relieved from establishing that its actions meet the requirements of Article XI. Rather, we agree with Sir Arthur Watts that "in practice a State has to have a first bite of the cherry in characterising the circumstances which have arisen, and it is accepted that States are permitted a 'margin of appreciation' in such circumstances, and that their assessment of the circumstances may be owed a considerable 'measure of deference.'"[17] The open question, then, is what standard this Tribunal should apply in assessing whether Argentina's characterization of its actions as "necessary for the maintenance of public order … or the protection of its own essential security interests" was justified. It is our opinion, that based on the text, context, object and purpose, preparatory work, and circumstances surrounding the treaty's conclusion, that standard should be one of good faith. The analysis presented in our initial opinion and reaffirmed here provides compelling evidence that whether this Tribunal applies a good faith standard or substitutes its own judgment for Argentina's, the measures taken by Argentina that give rise to the

[13] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶32.
[14] Id., at ¶32.
[15] *See* Id., at ¶35.
[16] *See* Id., at ¶48.
[17] Opinion of Sir Arthur Watts, *supra* note 2, at ¶72.

claims in this arbitration were fully justified under Article XI of the U.S.-Argentina BIT.

III. ARTICLE XI OF THE U.S.-ARGENTINA BIT SHOULD BE INTERPRETED AS SELF-JUDGING, SUBJECT TO GOOD FAITH REVIEW

15. In our initial opinion of July 2006, we advanced a self-judging interpretation of Article XI of the U.S.-Argentina BIT based on the text, context, object and purpose, preparatory work, and the circumstances surrounding the conclusion of the treaty. Our analysis began under Article 31 of the Vienna Convention of the Law of Treaties and proceeded to establish the inherent ambiguity in the terms of Article XI. Absent a plain meaning, we followed the rules of Article 32 of the Vienna Convention and utilized "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."[18] That material provided clear and compelling evidence that the U.S. understood Article XI of the treaty to be self-judging and that the U.S. had made that position clear to its treaty partners.

A. The Ambiguity in the Text of Article XI Allows Recourse to Supplemental Means of Interpretation, Which Strongly Indicate a Self-Judging Interpretation of Article XI, Subject to Good Faith Review

16. As noted above, Claimant's experts acknowledge that Article XI is inherently ambiguous and subject to a number of competing interpretations. The centrality of this ambiguity to the overall interpretative approach makes it worthy of repetition. Again, Sir Arthur Watts recognizes, "the text on which the Respondent relies is capable of a variety of meanings."[19] Professor Sofaer admits that "it is theoretically possible to argue that the language of Article XI is ambiguous, in that it does not explicitly state who should determine whether the measures taken

[18] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Arts. 32.
[19] Opinion of Sir Arthur Watts, *supra* note 2, at ¶47.

were required for the protection of the state's 'essential security interests.'"[20] In such circumstances, the rules of treaty interpretation in the Vienna Convention on the Law of Treaties provide for "[r]ecourse … to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to … determine the meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure."[21] This is the approach we took in our initial opinion. All available evidence from the background materials and circumstances surrounding the conclusion of the U.S.-Argentina BIT strongly point to a self-judging interpretation of Article XI, as does a statement by the US State Department at the time of Senate ratification that can be understood as an interpretive declaration that would constitute an essential part of the context surrounding Article XI.

17. Professor Sofaer seeks to escape the ambiguity of Article XI, which he himself acknowledges, through a consideration of the provision's "historical context."[22] With respect to that historical context, however, Professor Sofaer provides only a few brief paragraphs of explanation, in which he compares Article XI of the U.S.-Argentina BIT to the language of GATT and the U.S.-Nicaragua FCN treaty. Neither of these sources is directly relevant to the interpretation of the U.S.-Argentina BIT nor does either constitute the treaty's context for the purposes of Article 31 of the Vienna Convention.[23] In fact, what Professor Sofaer offers here is but a small piece of the circumstances surrounding the conclusion of Article XI, pursuant to Article 32 of the Vienna Convention. We provided a far more detailed account of the history and circumstances surrounding the treaty's conclusion in our original opinion. The more thorough treatment that we provided makes clear that the parties to the treaty understood Article XI as self-judging but subject to good-faith review.

[20] Opinion of Abraham D. Sofaer, *supra* note *supra* note 1, at ¶15.
[21] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 32.
[22] Opinion of Abraham D. Sofaer, *supra* note 1, at ¶15.
[23] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 31.

18. The circumstances surrounding the conclusion of the U.S.-Argentina BIT leave little doubt that the U.S. understood Article XI of the BIT as self-judging and communicated that interpretation to its treaty partners. As discussed in our original opinion, in August 1992—less than ten months after the signing of the U.S.-Argentina BIT and before the U.S.-Argentina BIT had been ratified by either party—the State Department submitted five BITs to the Senate for ratification. As part of the materials submitted with these five treaties, the State Department included a Model U.S. Bilateral Investment Treaty, accompanied by an official "description" of each article.[24] 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 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**.[25]

19. Hence, prior to the ratification of the U.S.-Argentina BIT, the US Senate understood the non-precluded measures provision of the treaty to be self-judging, precisely because the State Department, which had negotiated the treaty for the U.S., told the Senate, in sworn testimony, that the provision was self-judging and that it had communicated this interpretation to its treaty partners. The LG&E Tribunal looked to the signature date of Argentinean treaty, not the *ratification*

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

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

date to fix the meaning of the treaty's terms.[26] Given the retrospective nature of the State Department's testimony to the Senate, there is strong reason to believe that even at the time of signature of the U.S.-Argentina BIT, both the U.S. and Argentina understood Article XI as self-judging.

20. All U.S. BITs must be presumed to follow whatever Model BIT is operative at the time they are negotiated.[27] Deviations from the Model BIT are generally specified in the Letter of Submittal from the Secretary of State accompanying the treaty when it is submitted to the Senate or are included in a Protocol to the treaty.[28] The Letter of Submittal accompanying the U.S.-Argentina BIT is silent with respect to Article XI. The detailed Protocol to the U.S.-Argentina BIT makes reference only to the "international peace and security" component of Article XI and makes no mention of "essential security" or "public order." As a result, the "essential security" and "public order" elements of Article XI of the U.S.-Argentina BIT must be understood to have the same meaning as those in the model treaty. Given that in 1992 the State Department confirmed unequivocally that it regarded the essential security clause as self-judging, indicated that it routinely communicated that interpretation to its treaty partners, and stipulated

[26] *LG&E Energy Corp, et. al v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶ 213.

[27] Responses of the Administration to Questions Asked by Senator Pell, in August 4, 1992 Hearings, *supra* note 25, at Appendix, 31-32. The State Department informed the Senate that: "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." Id.

[28] In one set of Senate hearings, 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." Responses of the Administration to Questions Asked by Senator Pell, in August 4, 1992 Hearings, *supra* note 25, at Appendix, 32. The U.S. also routinely includes deviations from the Model BIT in the Letter of Submittal of the Treaty. The State Department has informed the Senate that letters of submittal "describe significant provisions which differ from some of the past BITs or which warrant special attention." Responses of U.S. Department of State to Questions Asked by Senator Pell, *included in* Bilateral Investment Treaties with: Argentina, Treaty doc. 103-2; Armenia, Treaty Doc. 103-11; Bulgaria, Treaty Doc. 103-3; Ecuador, Treaty Doc. 103-15; Kazakhstan, Treaty Doc. 103-12; Kyrgyzstan, Treaty Doc. 103-13; Moldova, Treaty Doc. 103-14; and Romania, Treaty Doc. 102-36, Hearing before the Committee on Foreign Relations, United States Senate, One Hundred Third Congress, First Session, September 10, 1993 [hereinafter September 10, 1993 Hearings, at 27.

that it was simply clarifying rather than changing its earlier position; and given that Argentina understands the clause to be self-judging, the silence of the Letter of Submittal and Protocol on this clause is strong support for our position.

21. It has been suggested that the clarification of the non-precluded measures provisions of other BITs implies that Article XI of the U.S.-Argentina BIT must be understood to be non-self-judging. For example, the Protocol of the U.S.-Russia BIT, concluded soon after the ratification of the U.S.-Argentina BIT, contains an explicit statement that the non-precluded measures provision is self-judging.[29] That argument, however, overlooks a key aspect of the U.S.-Russia BIT. As Professor Kenneth Vandevelde notes, that clarification of the self-judging nature of the non-precluded measures clause was included in the Protocol to the U.S.-Russia BIT at the request of the *Russian* negotiators, who wanted greater clarity on the point.[30] The U.S. acquiesced to this demand precisely because it already understood the non-precluded measures provision to be self-judging.

22. As discussed in our original opinion, the U.S. interpretation of the essential security clause in its BITs has become even more explicit over time, such that, by April 2000, Secretary Albright noted that the BIT then under consideration, "makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in nature, although each Party would expect the provisions to be applied by the other in good faith."[31] Similarly, in 2000, when the State Department submitted yet another batch of BITs to the Senate, Senator Jesse Helms commented on the essential security clause in the following terms: "the United States considers this language to be self-judging, though, in the words of the State Department, 'each Party would expect the

[29] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶26.
[30] *See* Kenneth J. Vandevelde, *Of Politics And Markets: The Shifting Ideology Of The BITs*, 11 INT'L TAX & BU.S. LAW 160, 174 (1993) (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").
[31] Letter of Submittal from the Secretary of State, April 24, 2000, *annexed to* U.S.-Bahrain Bilateral Investment Treaty.

provisions to be applied by the other in good faith'."[32] Each of these statements suggests a long-standing US policy of self-judging non-precluded measures clauses.

23. Our interpretation accords more closely with the 1992 policy of the US Government that such clauses were self-judging and that the subsequent changing language of the clause was simply a way of making that interpretation more explicit in the text. While Claimant's experts appear to suggest that our interpretation lacks a factual basis, we have presented this Tribunal with a statement by the US Executive branch submitting a treaty for ratification to another branch that explicitly addresses this issue and makes clear both the self-judging nature of the non-precluded measures provision and that the understanding was shared with treaty partners.

24. Claimant's experts further suggest that our reliance on these historical materials is misplaced because many of them arose after the U.S.-Argentina BIT was signed in 1991.[33] They misunderstand the purpose of our reliance on the overwhelming evidence from the US Government that it understood the non-precluded measures provisions to be self-judging and communicated that view to its treaty partners. While statements with respect to other BITs do not provide a legally binding interpretation of Article XI of the U.S.-Argentina BIT, they demonstrate a long-standing policy of the U.S., stretching back at least as far as the *Nicaragua Case* in 1984, that such clauses are self-judging. Claimant's experts agree that the US made clear its self-judging interpretation of similar language contained in the U.S.-Nicaragua Friendship, Commerce, and Navigation Treaty in its pleadings before the ICJ in 1984. As Professor Sofaer notes: "The US Government did

[32] Bilateral investment treaties with Azerbaijan, Bahrain, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Uzbekistan, and a protocol amending the bilateral investment treaty with Panama : report (to accompany treaty docs. 106-47; 106-25; 106-26; 106-29; 106-28; 106- 27; 106-30; 106-42; 106-31; 104-25; and 106-46). Available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:er023.106> (accessed October 29, 2003).
[33] *See* Opinion of Sir Arthur Watts, *supra* note 2, at ¶36.

argue in the Nicaragua case that the ICJ should treat similar language in the FCN Treaty at issue there as self-judging."[34]

B. Statements made by the US Government at the Time of Ratification Constitute Elements of the Travaux Preparatoires and Affirm our Interpretation of Article XI as Self-Judging

25. Statements made by parts of the US Government at the time of ratification are important elements of the *travaux preparatoires*, which are, in turn, essential to determining the appropriate interpretation of a particular provision under articles 31 and 32 of the Vienna Convention. Likewise, according to the International Law Commission (ILC), unilateral declarations "made by a party 'in connection with the conclusion of a treaty' can, under certain conditions, be considered for the purposes of interpreting the treaty to be part of the 'context', as expressly provided in article 31" of the Vienna Convention."[35]

26. Under US law, the ratification of the treaty by two-thirds of the Senate is necessary for the treaty to enter into force.[36] The U.S. is only able to undertake a legal obligation to the degree the US Senate agrees to be bound. Thus, the understandings between the Executive branch and the Senate have great weight as interpretive aids; they inform the Senate as to the nature of the obligation it is undertaking in the view of the Executive. The U.S.-Argentina BIT specifically recognizes the necessity of ratification, providing at Article XIV that "This Treaty shall enter into force thirty days after the date of exchange of instruments of ratification."[37] In giving its advice and consent on the treaty, the U.S. Senate relied on the Executive branch to provide the terms of the treaty and the

[34] Opinion of Abraham D. Sofaer, *supra* note 1, at ¶21.
[35] Draft Guidelines on Reservations to Treaties, Yearbook of the International Law Commission 1999, Part II, vol. ii,, UN Doc. A/CN.4/Ser.A/1999/Add.1 (Part II), at p. 101, ¶24.
[36] CONST. [U.S.] II §2. The U.S. Constitution provides: that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."
[37] U.S.-Argentina BIT, art. XIV. The Vienna Convention on the Law of Treaties confirms that a treaty may be subject to ratification when "the treaty provides for such consent to be expressed by means of ratification." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 14.

Executive's understanding of those terms. The Senate then confirmed this understanding of the treaty's terms and provided its own consent to be bound.

27. In international legal terms, as explained by the International Law Commission, such an understanding by the Senate may constitute a "unilateral statement made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions."[38] The ILC has expressly noted the propensity of the US Senate to make such unilateral declarations in the ratification process of bilateral treaties.[39] Unilateral statements or interpretive declarations are distinct from treaty reservations. As the ILC explains, "While reservations ultimately modify, if not the text of the treaty, at least the legal effect of its provisions, interpretative declarations are in principle limited to clarifying the meaning and the scope that the author State or international organization attributes to the treaty or to certain of its provisions."[40] That is precisely what the US Senate sought to do through its dialogue with the Department of State prior to the ratification of the U.S.-Argentina BIT with respect to the interpretation of Article XI. It did not seek to modify the treaty text or the legal effect of the treaty text, but only to clarify a potentially ambiguous term.

28. From at least the *Nicaragua Case* in 1984 onward, the U.S. has maintained a consistent position that non-precluded measures provisions are self-judging. Moreover, the U.S. has recognized that the self-judging nature of these provisions applies equally to US treaty partners and that, in some cases, treaty partners might utilize the self-judging nature of such provisions to take actions otherwise inconsistent with a treaty's terms. While, in the *Nicaragua Case* before the ICJ, the U.S. advanced an interpretation favorable to itself, in 1992 when the State Department told the Senate it routinely communicated this understanding to its treaty partners, it put the Senate on notice that our treaty partners could also

[38] Draft Guidelines on Reservations to Treaties, *supra* note 35, at p. 101, ¶24.
[39] Id., at p. 121, ¶9 (noting: "This is a practice which has been in existence for a long time, widely used by the United States…").
[40] Id., at p. 101, ¶20

invoke the self-judging nature of the provision to the detriment of US investors. The Senate accepted this as a necessary cost of preserving US freedom of action under the treaty, but overtime came to emphasize the good faith limits on the self-judging nature of the non-precluded measures provision.[41]

29. While the US interpretation of non-precluded measures provisions as self-judging reaches back at least to the *Nicaragua Case* in 1984, the position has become more explicit over time. In 1992, as noted above, before the ratification of the U.S.-Argentina BIT, the position was clearly enunciated by the US State Department and the Senate. It became explicit in treaty language beginning with the U.S.-Russia BIT in late 1992. Interpretive declarations of a treaty's terms, such as those made by the U.S. prior to the ratification of the U.S.-Argentina BIT need not be made at any particular moment in the process of a treaty's negotiation or ratification. Based on a long-standing state practice of such declarations being made both prior to and after the entry into force of a treaty, the ILC concluded: "it would hardly seem possible to include in a general definition of interpretative declarations a specification of the time at which such a declaration is to be made."[42] Hence, the greater clarity of the U.S. position during the period between the signature and ratification of the U.S-Argentina BIT remains probative of the interpretation of the treaty's terms.

30. This greater clarity of the US interpretation of non-precluded measures provisions as self-judging prior to Argentina's ratification of the treaty is of particular salience to the interpretation of the U.S.-Argentina BIT. Argentina did not give its

[41] 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 Party would expect the provisions to be applied by the other in good faith.'" *See* Bilateral investment treaties with Azerbaijan, Bahrain, Bolivia, Croatia, El Salvador, Honduras, Jordan, Lithuania, Mozambique, Uzbekistan, and a protocol amending the bilateral investment treaty with Panama : report (to accompany treaty docs. 106-47; 106-25; 106-26; 106-29; 106-28; 106- 27; 106-30; 106-42; 106-31; 104-25; and 106-46). Available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_reports&docid=f:er023.106, (accessed July 19, 2005). Similarly in 2000, Secretary Albright observed: "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." Letter of Submittal from the Secretary of State, April 24, 2000, *annexed to* 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.

[42] Draft Guidelines on Reservations to Treaties, *supra* note 35, at p. 102, ¶29.

final consent to be bound by the treaty until the exchange of instruments of ratification in Buenos Aires on September 20, 1994.[43] Hence, Argentina accepted the obligations of the U.S.-Argentina BIT in light of the clarification of the self-judging interpretation of Article XI by the US Government in 1992 and notwithstanding the US Senate's interpretive statements that non-precluded measures provisions are self-judging.

31. While states may formally accept a partner's unilateral declarations and interpretive statements, the International Law Commission notes that implicit or tacit acceptance is possible when the partner state ratifies the treaty subsequent to the interpretive statement. In its 1999 commentaries to the Draft Guidelines on Reservations to Treaties, on Commission observed: "there is no doubt that a reservation [or unilateral declaration] produces effects only if it is accepted, in one way or another, expressly or implicitly, by at least one of the other contracting States…"[44] Such implicit acceptance through ratification is sufficient for a interpretative statement to have probative value in the context of a bilateral treaty precisely because, if the partner state does not concur with the interpretation, it retains the option of not ratifying the treaty. Again, the ILC explains: "In the case of a bilateral treaty, the absence of acceptance by the co-contracting State or international organization prevents the entry into force of the treaty."[45]

32. Despite Argentina's implicit acceptance of the US interpretation of Article XI through its ratification after the U.S. clarified the self-judging nature of the clause in 1992, we do not argue, as a matter of law, that the Tribunal must accept this joint interpretation as a separate instrument concluded by the parties that would form part of the context of Article XI under article 31 of the Vienna Convention. That is a possible conclusion for the Tribunal to reach, but we emphasize the unilateral statements by the U.S. and Argentina's subsequent ratification of the

[43] Pursuant to Article XIV of the U.S.-Argentina BIT, the treaty only entered into force thirty days after the exchange of instruments of ratification.
[44] Draft Guidelines on Reservations to Treaties, *supra* note 35, at p. 123, ¶16.
[45] Id., at p. 123, ¶16(b).

BIT as a key element of the *travaux preparatoires* to the treaty. This element should have strong probative value in clarifying the ambiguity in the ordinary meaning of the actual text of Article XI by illuminating the meaning that the parties themselves attached to this provision.

C. The U.S. Has Maintained A Consistent Interpretation of Article XI as Self-Judging at Least Since the Nicaragua Case in 1984

33. Professor Sofaer suggests that because the U.S. did not advance a similar argument in proceedings against Iran, the self-judging interpretation of the clause by the U.S. has been inconsistent.[46] He provides no specifics as to which treaty or particular cases he has in mind, but references his recollection of a 1986 case before the U.S.-Iran Claims Tribunal. Cases before the U.S.-Iran Claims Tribunal largely arisen under the U.S.-Iran Treaty of Amity, Economic Relations and Consular Rights which includes, at Article XX, a non-precluded measures clause. That treaty entered into force June 16, 1957; hence the relevant date for establishing the meaning and understandings of the treaty's terms is 1957.[47] If, as Professor Sofaer apparently recollects, the U.S. did not advance a self-judging interpretation of that treaty's language in a 1986 case, that fact indicates only that the 1957 interpretation of the treaty's language, which would control even a 1986 submission, was not self-judging. It says nothing regarding US policy with respect to the self-judging nature of non-precluded measures provisions in new treaties entered into either in 1986 or 1992.

34. What appears from the historical record is that, as of the Nicaragua Case in 1984, the U.S. interpreted language nearly identical to that found in the U.S.-Argentina BIT as self-judging and has maintained that position ever since. As the U.S. has made the non-precluded measures language of its BIT agreements more clearly

[46] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶21.
[47] Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, *signed* August 15, 1955, *entered into force* June 16, 1957, T.I.A.S. No. 3853, 8 UST 900.

self-judging, it has been careful to note that it was making explicit a longstanding policy that "measures to protect a Party's essential security interests are self-judging in nature."[48]

35. In his opinion, Sir Arthur Watts suggests that the U.S. "changed its position [with respect to the self-judging nature of the non-precluded measures provision] subsequent [to the conclusion of the U.S.-Argentina BIT] in the context of the conclusion of the U.S.-Russia BIT in 1992."[49] The evidence we present instead makes clear that the interpretation of the non-precluded measures provision as self-judging was a long-standing one, dating back at least to the *Nicaragua Case* in 1984. Again in the words of Secretary Albright, the more explicitly self-judging language of the U.S.-Russia BIT and subsequent treaties was not representative of a new policy, but, "makes explicit the implicit understanding that measures to protect a Party's essential security interests are self-judging in nature." [50] It is for this reason Professor Kenneth Vandevelde, the chief U.S. BIT negotiator just prior to the drafting of the U.S.-Argentina BIT, concludes: "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."[51]

36. Claimant's experts further take issue with our interpretation of Article XI of the U.S.-Argentina BIT as self-judging because the US interpretation of the non-precluded measures provision was not memorialized in a legally binding form at

[48] Letter of Submittal from the Secretary of State, U.S.-Bahrain Bilateral Investment Treaty, April 24, 2000.
[49] Opinion of Sir Arthur Watts, *supra* note 2, at ¶40.
[50] Letter of Submittal from the Secretary of State, U.S.-Bahrain Bilateral Investment Treaty, April 24, 2000.
[51] Kenneth J. Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX AND BUS. LAW 159, 174 (1993) In 1986 the State Department made clear that it shared with its treaty partners an understanding that certain issues would be subject to only limited arbitration and that the essential security provision would be understood as self-judging. While the State Department indicated it would consider "whether any future procedural action is necessary to underscore our interpretation," it was the Senate itself that took further legislative action by attaching an understanding to each of these ten BITs, according to which "either party may take all measures necessary to deal with any unusual and extraordinary threat to its national security." S. Exec. Rep. No. 32, 100th Cong., 2nd Sess. (1988) at 9-11.

the time of the treaty negotiations.[52] As we explain above, however, this claim rests on a misunderstanding of our argument. Professor Sofaer suggests that we are seeking to establish a "special meaning" pursuant to Article 31(4) of the Vienna Convention, rather than interpreting the treaty's text through the drafting materials and circumstances of the treaty's conclusion under Article 32 of the Vienna Convention. We expressly take the latter approach; Professor Sofaer therefore applies the wrong rules of the Vienna Convention in his critique. Article 32 of the Vienna Convention does not require a showing of a legally binding instrument with respect to the *travaux preparatoires* and the circumstances of a treaty's conclusion. Such materials are, by their very nature, outside of the treaty itself and unlikely to take the form of a legally binding instrument. Moreover, as noted above, the International Law Commission has recognized that interpretive declarations, such as those made by the US Senate, may be made at any time.[53]

D. Attempts by Claimant's Experts to Establish an Ordinary Meaning Interpretation of Article XI as Non-Self-Judging are Unpersuasive

37. Claimant's experts base their interpretation of the non-precluded measures provision of the U.S.-Argentina BIT as non-self-judging on an "ordinary meaning" textual interpretation of Article XI.[54] While the ordinary meaning of a treaty's text is an appropriate starting point for interpretation pursuant to Article

[52] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶20-21. Even under Professor Sofaer's "special meaning" approach to interpretation under Article 31(4) of the Vienna Convention, the evidence suggests that the requirements for establishing such a "special meaning" have been met. The Vienna Convention stipulates that "a special meaning shall be given to a term if it is established that the parties so intended." Vienna Convention on the Law of Treaties, *supra* note 18, at art. 31(4). As noted above, in 1992, just months after the conclusion of the U.S.-Argentina BIT, the US State Department provided sworn testimony to the US Senate that "Whether these exceptions apply in a given situation is within each Party's discretion. We are careful to note, in each negotiation, the self-judging nature of the protection of a Party's essential security interests." 1992 Model BIT, *supra* note 24, at 65. It was not until two years later that Argentina ratified the treaty and instruments of ratification were formally exchanged in Buenos Aires on September 20, 1994. This sworn statement and the subsequent ratification of the treaty by Argentina might be sufficient to establish a "special meaning" pursuant to Article 31(4) of the Vienna Convention.

[53] Draft Guidelines on Reservations to Treaties, *supra* note 35, at p. 102, ¶29.

[54] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶12-14; Opinion of Sir Arthur Watts, *supra* note 2, at ¶43.

31 of the Vienna Convention on the Law of Treaties,[55] this approach is deeply problematic for Claimant's experts because both Sir Arthur Watts and Professor Sofaer acknowledge the inherent ambiguity in the text of Article XI of the U.S.-Argentina BIT.[56] Given this ambiguity, the Vienna Convention on the Law of Treaties calls for recourse to external evidence, including the drafting materials behind the BIT, which is exactly the process we undertook in our initial opinion in this case. It is these background materials that reveal the self-judging interpretation of the non-precluded measures clause shared by the parties.

38. Claimant's experts seek to avoid the textual ambiguity they themselves acknowledge by relying on a distorted understanding of the object and purpose of the U.S.-Argentina BIT.[57] Professor Sofaer concludes that the object and purpose of the treaty is solely one of investor protection.[58] While Professor Sofaer cites to particular language from the treaty's preamble and to the Calvo Doctrine to suggest that investor protection was the object and purpose of the treaty, his discussion only tells part of the story.[59] In reality, both the treaty itself and the circumstances of its conclusion suggest an object and purpose that seeks to balance the interests of investors with the preservation of freedom of action for states in exceptional circumstances, such as those in Argentina beginning in late 2000.

E. The Object and Purpose of the U.S.-Argentina BIT is Consistent with a Self-Judging Interpretation of Article XI

39. In accessing the object and purpose of the treaty, Professor Sofaer fails to mention that the US Senate has made unambiguous its understanding that the object and purpose of BITs is to protect investors within a background of state freedom of

[55] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 31.
[56] *See* Opinion of Sir Arthur Watts, *supra* note 2, at ¶47; Opinion of Abraham D. Sofaer, *supra* note1, at ¶15.
[57] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶21., at ¶17.
[58] Id.
[59] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶21., at ¶17.

action in exceptional circumstances. For example, in the 1988 ratification hearings of one batch of BITs, before the drafting of the U.S.-Argentina BIT, the Senate Foreign Relations Committee report on the treaties then under consideration affirms that the "principle purpose of the bilateral investment treaties is to encourage and protect U.S. investment in developing countries." The report, however, also makes implicit reference to the non-precluded measures provisions by "emphasiz[ing] to the other parties to the treaties that U.S. national security interests, as determined by the President, would take precedence over other provisions of the treaties, should that become necessary."[60] The Senate's comments on Article X of the 1988 model treaty [the non-precluded measures clause] sought to "clarify[] and highlight… the importance of this article" and enunciate "the rights this article accords to the United States, to take whatever steps deemed necessary by the President for national security reasons, notwithstanding any other provisions of the treaties."[61]

40. Similarly, as a representative of the first Bush administration explained in 1992, just after the U.S.-Argentina BIT was concluded, BITs must not "close off options that we may need to address security concerns that we cannot foresee today."[62] Each of these statements highlights the actual bargain that lies behind the U.S.-Argentina BIT and the desire of both states to balance the competing interests of investor protection and state freedom of action. Taken collectively, the statements indicate an object and purpose for the treaty of investor protection and the preservation of state freedom of action in extraordinary circumstances. The self-judging interpretation of the non-precluded measures provision of the treaty ensures that balance.

41. The object and purpose of the U.S.-Argentina BIT is further evidenced by the broader circumstances of the treaty's conclusion, an appropriate supplemental

[60] Investment Treaties with Senegal, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt, and Grenada, 100th Cong. 2nd Sess. Exec. Rep 100-32, October 4, 1988, at 2,3.
[61] Id. at 8.
[62] 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).

means of interpretation where the text itself is ambiguous, pursuant to Article 32 of the Vienna Convention on the Law of Treaties.[63] The negotiations of the U.S.-Argentina BIT must be set against the backdrop of two key events. First, the on-going debate in the United States between the supporters of liberalized investment flows and those who sought to protect state freedom of action in extreme circumstances and, second, the *Nicaragua Case* before the ICJ.

42. During the 1980s and early 1990s a debate raged in US corporate board rooms, the covers of US newspapers, and the halls of Congress between the supporters of liberalized international investment and the advocates of political protectionism. These debates became all the more heated in the wake of an attempted English take-over of Goodyear Tire and Rubber,[64] a Japanese acquisition of Fairchild Semiconductor,[65] and the Japanese purchase of Rockefeller Center.[66] Protectionists argued that the U.S. must limit foreign investment in particularly sensitive industries in order to safeguard US national security.[67] In contrast, promoters of free investment flows cited the logic of Adam Smith, that free trade and investment result in greater prosperity for all.[68]

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[63] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 32.
[64] *See* John Crudele, *Goldsmith in Bid For Goodyear*, N.Y.T., 7 Nov. 1986, at D1.
[65] In 1987 Fujitsu attempted to purchase Fairchild Semi-Conductor, a major producer of microchips used in the U.S. defense industry. *See* Andrew Pollack, *Japan's Growing Role in Chips Worrying U.S.*, N.Y.T., 5 Jan. 1987, at A1. The move was met with considerable controversy and promoted the U.S. adoption of the Exon-Florio Amendment to the 1988 Trade Act. *See,* Andrew Pollack, *US-Europe Technology Union Urged*, N.Y.T., 24 July 1989, at D1 (noting the "proposed sale of the Fairchild Semiconductor Corporation to Fujitsu Ltd. of Japan encountered a storm of protest about the loss of a valuable American asset"). 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, 56-57 (1989) (discussing the impact of the Fairchild purchase on the Exon-Florio Amendment).
[66] In 1989, a controlling stake in Rockefeller Center was bought by the Japanese company Mitsubishi Estate for $846 million in cash. *See,* Steve Dodson, *Week in Business*, N.Y.T., 5 Nov. 1989 at Sec. 3, p. 16. The move provoked considerable controversy. *See Japan Buys the Center of New York*, N.Y.T., 3 Nov. 1989, at A34 (asking "Is the transfer of American assets to Japanese ownership something to worry about?").
[67] *See* Alvarez, *supra* note 65, at 5 (noting "foreign direct investment is regarded as a threat to 'national security' because foreign ownership of a defense contractor may … threaten access to critical technology"). Se also, M. TOCHIN & S. TOLCHIN, BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION (1988).
[68] *See* Ellis, *United States Multinational Corporations: The Impact of Foreign Direct Investment on United States Foreign Relations*, 11 SAN DIEGO L. REV. 1, 6 (1973). This was a critical aspect of President Regan's international economic policy. *See* "Statement of Administration Policy on International Investment," 9 Sept, 1983, 19 WEEKLY COMP. PRES. Doc. 1214-1219 (Sept 9. 1983). *See* also, Alvarez, *supra* note 65, at 11-13.

43. Within the US Congress, a strong protectionist wing warned of the dangers of foreign takeovers and sought to preserve both the US defense industry and the freedom of the state to take any necessary actions in times of crisis.[69] The most pronounced result of these fears in Congress was the Exon-Florio Amendment, which gave the US President extraordinary power to "suspend or prohibit any acquisition, merger, or takeover of US corporations by or with foreign entities if foreign control would threaten national security."[70] In introducing his amendment, Senator Exon noted that foreign investment had "threatened national security" and efforts were needed to ensure that "America's national security industries [do not] fall under foreign control."[71] As Jose Alvarez explains, the Exon-Florio amendment is largely an act of political protectionism: "To the drafters of Exon-Florio, since national security is the essence of a country's political sovereignty, the definition of national security is necessarily political, left to the unreviewable discretion of the Executive who is accorded great deference on such matters by the courts and is constrained only by what is politically acceptable."[72]

44. The second key event that provides a backdrop for the negotiation of the US-Argentina BIT is the *Nicaragua Case* before the ICJ, which catalyzed greater specificity of the self-judging interpretation of non-precluded measures language. 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,[73] though the ICJ nevertheless granted

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[69] Jose Alvarez notes, for example, that at least three separate congressional hearings on this issue accompanied the 1988 Trade Act. See Alvarez, *supra* note 65, at 4. *See also* Foreign Investment in the United States, Hearing Before the Subcommittee on International Economic Policy and Trade of the House Committee on Foreign Affairs, 100th Cong. 2nd Sess. 54-111 (1988); Federal Collection of Information on Foreign Investment in the United States: Hearing Before the Senate Committee on Commerce, Science and Transportation, 100th Cong, 2nd Sess. (1988); Mergers and Acquisitions—Foreign Investments in the United States: Hearing Before the Subcommittee on Economic Stabilization of the House Committee on Banking, Finance and Urban Affairs, 100th Cong, 1st Sess. (1987).

[70] The Exon-Florio Amendment refers to the Omnibus Trade and Competitiveness Act of 1998, Pub. L. 100-418, 102 Stat. 1007 (1988), codified in pertinent part at 19 U.S.C. 2901.

[71] *See* Foreign Investment, National Security and Essential Commerce Act of 1987 (statement of Senator Exon).

[72] Alvarez, *supra* note 65, *at* 15.

[73] Vandevelde, *supra* note 51, at 171.

jurisdiction. 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."[74]

45. It is against this backdrop of earlier FCN treaties, the Nicaragua case, and a heated debate about the dangers of foreign takeovers that US negotiators decided to adopt a self-judging interpretation of the NPM provisions. Though the first US model BIT was prepared in 1982 with Panama, before the Nicaragua Case, the first treaty was not ratified until 1989, well after the Nicaragua case. The Senate ratification hearings of these first BITs in the late 1980s underscore the significance of the NPM clause to the actual bargain struck by the U.S. and its treaty partners.[75] In 1987, for example, the ratification of the first group of BITs was sidetracked over concerns that "the treaties might constrain future U.S. foreign policy measures."[76] The Letter of Submittal from Secretary of State George Shultz to President Regan accompanying the first U.S. BIT signed with Panama notes "that the treaty shall not preclude measures necessary for public order or essential security interests."[77]

[74] 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 Alvarez, *supra*, note 65, at 38 (1989).
[75] The final draft of the first model U.S. BIT is dated January 21, 1983 and is reprinted in KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE (1992) at A-2.
[76] *Washington Report A Push For Investment Treaties*, JOURNAL OF COMMERCE, 12 Jan, 1987, pg 15A.
[77] Letter of Transmittal from Secretary of State George Shultz to President Regan, accompanying U.S.-Panama BIT, February 20, 1986.

46. In ratification hearings on a set of ten BITs—including the first BIT with Panama—submitted to the Senate in 1986 soon after the Nicaragua decision, the State Department reaffirmed the importance of the NPM clause, noting "in light of the recent International Court of Justice treatment of our Friendship, Commerce, and Navigation Treaty with Nicaragua, we are considering whether any future procedural action is necessary to underscore our interpretation" of the NPM clause.[78] The State Department's reference to "our interpretation" is undoubtedly a reference to the self-judging interpretation of the non-precluded measures provision advanced by the U.S. in the *Nicaragua Case*. At that time, the Executive branch was considering whether further procedural action, for example a formal, conditional interpretive declaration, was necessary. No further procedural action was taken, presumably because the U.S. had reached agreements on this interpretation of the non-precluded measures clause in its negations with its treaty partners.[79]

47. This is the actual background, which Claimant's experts neglect to mention, in which the U.S. and Argentina negotiated their bilateral investment treaty. It is, therefore, fully understandable that the parties themselves would seek to draft a treaty that balances competing domestic interests by guaranteeing strong investor protection in ordinary circumstances, but maintaining state freedom of action through a self-judging non-precluded measures provision in the exceptional circumstances provided for in Article XI of the U.S.-Argentina BIT. This more accurate "object and purpose" for the U.S.-Argentina BIT does not help Claimant's experts avoid the ambiguity in the language of the Article XI that they themselves admit. Rather, it reaffirms our interpretation, pursuant to Articles 31 and 32 of the Vienna Convention, that Article XI of the BIT must be interpreted as self-judging.

[78] *See* Bilateral Investment Treaties with Panama, Senegal, Haiti, Zaire, Morocco, Turkey, Cameroon, Bangladesh, Egypt and Grenada, Hearings Before the Senate Committee on Foreign Relations, 99th Cong, 2nd Sess. (1986).
[79] 1992 Model BIT, *supra* note 24, at 65 (emphasis added).

F. A Self-Judging Interpretation Reflects the Intent of the Parties and Reinforces the Rule of Law

48. One of Claimant's experts takes issue with our interpretation of Article XI as self-judging on still another ground, suggesting that such an interpretation undermines the rule of law[80] and violates the supremacy of international law.[81] Both of these arguments are patently false. In fact, a self-judging interpretation of Article XI reaffirms the rule of law by binding states to the actual agreements they entered into and upholds the supremacy of international law by prioritizing actual treaty commitments. It is for this reason that the ICJ was willing to apply the U.S. optional clause declaration, notwithstanding the Connally Amendment, in the *Interhandel Case*, to which Sir Arthur Watts refers.[82]

49. Sir Arthur Watts suggests that allowing a self-judging interpretation, even if both parties are accorded that right, would vitiate the rule of law by allowing one party's interpretation of the text to prevail. His position does not take full account of the intent of states and their consent to treaty rules. States may choose to enter into any treaty relationship that furthers their interests, as long as that commitment is consistent with *jus cogens* norms.[83] In this case, as the text, context, object and purpose, preparatory work, and circumstances surrounding the conclusion of the U.S.-Argentina BIT indicate, the U.S. and Argentina chose to enter into a treaty with a self-judging non-precluded measures provision. Giving effect to that interpretation upholds the rule of law by requiring states to honor obligations they freely chose, yet, at the same time, not depriving them of the right to preserve their freedom of action in extraordinary circumstances.

50. Sir Arthur Watts further suggests that a self-judging interpretation of Article XI is based on a misplaced reliance on sovereignty. Yet, in the case of the U.S.-Argentina BIT, a self-judging interpretation of Article XI reaffirms the concept of

[80] *See* Opinion of Sir Arthur Watts, *supra* note 2, at ¶51 (suggesting that a self-judging interpretation would "subvert the rule of law in international affairs").
[81] Id., at ¶59.
[82] *Interhandel Case* (Interim Protection), (U.S. v. Switzerland), pp. 117-120.
[83] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 53.

sovereignty, not as a shield to international judicial oversight—as Sir Arthur Watts claims—but rather as the basis of state consent to the treaty obligations states themselves incur. In this case, those obligations undertaken by the states parties included a right to determine themselves, subject to good faith review, whether specific measures were a necessary response to exceptional threats to public order or essential security. Again, giving effect to that interpretation recognizes the right of states to choose the treaty commitments they decide to enter into and to design those commitments to further their common interests.

G. A Self- Judging Interpretation of Article XI is Fully Consistent with the Nemo Judex Principle

51. A final critique of the self-judging interpretation of Article XI raised by Sir Arthur Watts is that such an interpretation would violate the principle of *nemo judex in sua causa*.[84] He is correct that both international law and the domestic law of most states seek to avoid an individual serving as adjudicator in a case in which s/he has an interest. The purpose of such a rule, as Lord Hewart wrote for the British House of Lords in *R v. Sussex Justices, ex. P. McCarthy*, is to avoid bias such that "justice should not only be done but should manifestly and undoubtedly be seen to be done."[85] As a result, cases must be heard by "an impartial decision-maker listening to and evaluating competing claims."[86]

52. The *nemo judex* principle is not implicated by a self-judging interpretation of Article XI of the U.S.-Argentina BIT. The *nemo judex* rule is a principle of adjudication, not of treaty interpretation. It places limits on who can serve as the ultimate adjudicator in a legal dispute, not on what two parties can negotiate in a treaty. However Article XI of the U.S.-Argentina BIT is interpreted, the ICSID Tribunal seized of jurisdiction is the ultimate arbitrator of the case, not either of

[84] *See* Opinion of Sir Arthur Watts, *supra* note 2, at ¶50-53.
[85] *Rex v. Sussex Justices, Ex Parte McCarthy* [1924] 1 KB 256, [1923] All ER 233.
[86] R. A. Macdonald, *Judicial Review and Procedural Fairness in Administrative Law* 25 MCGILL LAW JOURNAL 520, 528 (1980).

the states parties to the dispute. This tribunal will serve as an impartial decision-maker to avoid bias and the perception of bias with which the *nemo judex* rule is concerned.

53. Most of the cases which Sir Arthur Watts uses in support of the *nemo judex* principle support our construction of the principle—they address the question of who should serve as the ultimate arbitrator of a case. That is not in question here. By allowing the U.S. or Argentina to determine whether the non-precluded measures provision of the treaty applies, this Tribunal would not relinquish its jurisdiction, nor would it make either state the ultimate arbiter of the case. Rather, the Tribunal would uphold the intent of the parties in their treaty commitments and would retain the authority to review either state's invocation of Article XI for good-faith.

54. The key question is not whether the *nemo judex* principle is violated, but rather the level of scrutiny and standard of review to be applied by the Tribunal in its review of Argentina's invocation of Article XI. In the case of the U.S.-Argentina BIT, the parties' mutual understanding of Article XI as self-judging, but subject to good faith, sets the applicable standard of review. Specifically, the Tribunal must ask if Argentina's invocation of Article XI was made in good faith. The ICSID Tribunal remains the final arbiter, preserving the *nemo judex* principle, ensuring that the state invoking Article XI has in fact made that determination in good faith, and, ultimately, upholding the actual bargain entered into by the states parties to the treaty.

H. Good Faith Is a Well-Established Principle of International Law Applicable to the Interpretation and Application of Article XI

55. As we argued previously, the evidence of looming economic and social chaos in Argentina between 2000 and 2002 is overwhelming. The economic and social conditions gave rise to a national emergency on a scale easily sufficient to warrant

the invocation of the public order and essential security clauses of Article XI. That is the factual predicate on which this Tribunal must determine whether Argentina has met the good faith standard in its invocation and application of Article XI.

56. Professor Sofaer takes a different line of attack. He suggests that in articulating a good faith standard we exercised our creativity rather than actually engaging in legal reasoning.[87] Yet he himself acknowledges that good faith is a background rule of customary international law. He recognizes "the general obligation of good faith that attaches to all treaty provisions."[88] This is, perhaps, the most basic rule of treaty interpretation and is embodied in the preamble to the Vienna Convention of the Law of Treaties, according to which "noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized."[89] The principle likewise appears in Article 26 of the Vienna Convention, which provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."[90] It would be extremely difficult to find more sound legal authority for such a principle.

57. In our initial opinion we drew on this well established background norm of international law and articulated a standard for the application of a good faith test based on the work of international organizations and the Harvard Research on the Law of Treaties. That standard, which derives from well-established sources, involves two basic questions: first, whether Argentina has engaged in honest and fair dealing and, second, whether there is a reasonable or rational basis for Argentina's assertion of the non-precluded measures provisions of Article XI. Both elements of this test are well grounded in international law. According to the Harvard Research on the Law of Treaties, "The 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

[87] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶34.
[88] *See* Id., at ¶32.
[89] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, prmbl.
[90] Id., art. 31.

evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise."[91] Likewise, the International Whaling Commission has observed in its evaluation of the good faith requirements of the UN Convention on the Law of the Sea[92] that good faith requires "fairness, reasonableness, integrity and honesty in international behaviour."[93] Argentina's general conduct, specifically the public invocation of a national emergency through Law 25.561 meets the honesty and fair dealing element of the good faith test. The severe economic crisis in Argentina between 2000 and 2002, as discussed below, provides a clear rational basis for Argentina's invocation of Article XI.

58. Professor Sofaer further suggests that a good faith standard would somehow deprive this Tribunal of jurisdiction.[94] That is simply false. Though states could draft language into a treaty that expressly limits the jurisdiction of a tribunal, even a self-judging non-precluded measures clause does not pose a jurisdictional limit on a Tribunal as the ICJ clearly held in the *Nicaragua Case*.[95] Far from questioning this Tribunal's jurisdiction, our approach reaffirms that jurisdiction, even in the face of a self-judging non-precluded measures provision, by recognizing the Tribunal's inherent authority to determine whether a state's invocation of the non-precluded measures provision was made in good faith.

59. As the U.S. has made its self-judging interpretation of the good-faith standard more explicit over time and as the number of investor-state arbitrations has grown dramatically, ICSID Tribunals will increasingly have to engage in precisely the kind of good faith review called for in this case. This Tribunal thus has the opportunity to articulate the precise standards for and scope of such a review. To guide the Tribunal in this effort, we have developed an approach to good faith

[91] *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].
[92] *See* United Nations Convention on the Law of the Sea, art. 300 (providing "States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right").
[93] International Whaling Commission, Resolution 2001-1 (2001).
[94] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶33.
[95] *See Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. U.S.) (Merits) Judgment of June 27, 1986 at ¶222.

review drawn both from customary international law and from general principles recognized by civilized nations.

60. This type of review is hardly unprecedented. The European Court of Human Rights, for instance, developed the doctrine of the margin of appreciation as a means to give effect to the intent of states parties to retain flexibility in exceptional circumstances while at the same time preserving the Court's right of ultimate review. This Tribunal has specific guidance from the parties in this case, as the U.S. has specifically referred to a good faith standard and Argentina has tacitly acquiesced in that standard. But it is up to this Tribunal to determine the scope and depth of a good faith review, a determination that will effectively determine the boundaries of the parties' zone of self-judgment in applying Article XI. This standard, in turn, will contribute to an arbitral jurisprudence that will serve to guide states and investors alike in structuring their responses to emergencies and their allocation of investment risk.

IV. WHATEVER STANDARD OF REVIEW IS APPLIED BY THIS TRIBUNAL, ARGENTINA'S INVOCATION OF ARTICLE XI IS FULLY JUSTIFIED

61. In our original opinion and in the preceding section, we argued that, based on its text, context, object and purpose, background materials, and circumstances of its conclusion, Article XI of the U.S.-Argentina BIT should be interpreted as self-judging. Yet even if this Tribunal does not accept that argument, Argentina's invocation of Article XI was fully justified by the events in Argentina beginning in late 2000. In Part VI of our initial opinion we drew on evidence presented by Argentina and its economic experts documenting the dimensions of the extraordinary economic crisis in Argentina. That crisis created an immediate and pressing threat to public order and essential security. We need not repeat that evidence here.

62. The ICSID Tribunal in *LG&E Energy Corp, et. al v. The Argentine Republic* has recently confirmed the applicability of Article XI of the U.S.-Argentina BIT to the

situation in Argentina beginning in late 2000. The LG&E Tribunal concluded that "Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests."[96] The situation in Argentina was no ordinary debt crisis. Rather, in the words of the *LG&E* Tribunal, Argentina was beset by a series of "devastating conditions– economic, political, social– [that,] in the aggregate[,] triggered the protections afforded under Article XI of the Treaty to maintain order and control the civil unrest."[97]

63. It is worth noting that neither Professor Sofaer nor Sir Arthur Watts expressly conclude that a non-self-judging version of Article XI would not be applicable in this case. As such, neither expert's opinion directly speaks to the applicability of Article XI if this Tribunal interprets the clause as non-self-judging. As a result, the arguments advanced in our initial opinion and reaffirmed here regarding the applicability of Article XI to the facts on the ground in Argentina are largely uncontested by Claimant's experts.

A. Article XI of the U.S.-Argentina BIT Constitutes a Treaty-Based Lex Specialis Exception to the Substantive Protections of the Treaty and is Separate From Defenses in Customary International Law

64. Professor Sofaer seeks to narrow the applicability of Article XI through reference to what he calls the "analogous international law principle" of necessity in customary international law.[98] He argues, for example, that customary defenses such as necessity and *force majure* indicate that "a State's part in causing the crisis on which the State is seeking to rely is a matter that must be taken into account" and that "it is appropriate to construe the concepts of 'public order' and 'essential security interests' carefully, not broadly…."[99] Professor Sofaer

[96] *LG&E Energy Corp, et. al v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶ 226.
[97] Id., at ¶ 237.
[98] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶39.
[99] Id., at ¶38-39.

correctly states the rules governing these defenses in customary international law, but his reliance on them as "analogous international law principles" to Article XI of the U.S.-Argentina BIT is misplaced.

65. As we indicated in our initial opinion, Article XI of the U.S.-Argentina BIT creates an explicit treaty-based exception to the substantive protections of the BIT in exceptional circumstances. That treaty-based defense is distinct from background principles of customary international law and constitutes the *lex specialis* rule applicable between the parties in this case pursuant to Article 55 of the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[100] Article 55 provides in unambiguous terms: "these 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."[101] The Commentaries to the Draft Articles make clear that particular treaty terms, such as Article XI of the U.S.-Argentina BIT can constitute such *lex specialis* rules: "Article 55 is designed to cover…specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution."[102] In this case, the U.S.-Argentina BIT provides the specific rules of responsibility and hence it is these treaty-based rules that apply separately and distinctly from any customary law rules.

66. While Professor Sofaer seeks to draw on the necessity defense in customary law by way of analogy, that defense is never referenced in the U.S.-Argentina BIT. Article XI uses the term "necessary" to establish the required nexus between state

[100] International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 56th Sess., Supp. 10, Ch. 4, U.N. Doc. A/56/10, Art 55 (2001). To clarify, it is worth noting the distinction between the U.S.-Argentina BIT constituting a *lex specialis* rule applicable between the two parties and the possibility of states assigning a special meaning to treaty terms. *Lex Specialis* rules, pursuant to Article 55 of the ILC Draft Articles are specific rules of international law that states create to govern their relationships with one another separate from customary international law. In contrast, the Vienna Convention on the Law of Treaties provides, at Article 31(4) for the possibility that states may attach special meanings, as distinct from ordinary meanings under Article 31(1), to the terms of a treaty.

[101] Id.

[102] International Law Commission, Draft Articles on the Responsibility of States, *supra* note 100, Commentaries, art. 55, ¶ 5.

actions and a set of permissible objectives—public order and essential security, for example. It does not use the term "state of necessity" nor does it make explicit or implicit reference to the state of necessity in customary law. Hence, in interpreting Article XI, the Tribunal must ask whether the acts taken by Argentina were necessary to achieve certain permissible objectives under the treaty and not whether a state of necessity in customary international law existed at the time.

67. Had the U.S. and Argentina sought merely to preserve the defense of necessity under customary international law, Article XI would have been unnecessary. The customary law defense of necessity would have already been available to Argentina. To equate non-precluded measures clauses with the customary defense of necessity would violate the canonical principle of effectiveness in treaty interpretation (*ut res magis valeat quam pereat*). The principle of effectiveness requires that treaty terms must be construed in such a way as to give them effect and not render them meaningless.[103] Hence, the non-precluded measures provision of the U.S.-Argentina BIT must be understood as separate from the necessity defense in customary law. Nor is it permissible to acknowledge the separation in form but then destroy it in substance by simply analogizing Article XI to the necessity defense in such a way as to endow it with the same meaning and scope as the necessity defense.

B. Even Under a Non-Self-Judging Interpretation, the Terms of Article XI Should be Construed Broadly to Account for their Inherent Subjectivity

68. In contrast with Professor Sofaer, who suggests that the permissible objectives provided for in Article XI must be read narrowly, Sir Arthur Watts recognizes the relative breadth of the concepts of "public order" and "essential security." Supporting our arguments, he observes: "it is accepted that States are permitted a

[103] *See* World Trade Organization, U.S.-Gasoline Case, *I.3.7.1 p. 23*, DSR 1996:I, p. 3 at 21 (WT/DS2/AB/R).

'margin of appreciation' in such circumstances and that their assessment of the circumstances may be owed a considerable 'measure of deference.'"[104] We agree. Even under a non-self-judging interpretation of Article XI, this Tribunal should give some deference to Argentina's determination that the actions it took were necessary to maintain public order and protect its essential security.

69. The broad interpretation of the non-precluded measures provision is also reflected in the US Department of State's own internal study of similar language contained in Friendship, Commerce, and Navigation (FCN) Treaties. In the mid-1960s, the US Department of State commissioned a study of FCN treaties by Charles H. Sullivan, which summarized the key points of FCN treaties; provided guidance as to the interpretation of such treaties; and catalogued disputes that had arisen over particular provisions. The internal State Department document remained classified for a number of years but is now available publicly in redacted version.

70. The "Sullivan Study" emphasizes the breadth of the non-precluded measures provision of FCN treaties, noting that "the national security reservation is broader than the comparable reservations in the proposed ITO Charter and GATT, which are limited by their terms to times of war or of emergency in international relations."[105] Though parts of the declassified version of the Sullivan Study have been redacted, the discussion of the non-precluded measures provision highlights the intent to ensure "broad freedom of action" for "each treaty partner."[106] The study further indicates that the non-precluded measures provision was discussed with treaty partners and that, at least through 1962, was "explicitly questioned in only one negotiation."[107] Even in that negotiation, however, the disagreement was resolved through "an unwritten understanding to the effect that each treaty partner recognized the potential for discriminatory actions running counter to the treaty objectives, but would apply the reservation in such a manner as to avoid

[104] Opinion of Sir Arthur Watts, *supra* note 2, at ¶72.
[105] The Charles H. Sullivan Report on the Standard Provisions of the Treaty of Friendship Commerce and Navigation as They Evolved through January 1, 1962, at page 308 ¶10.
[106] Id., at 307 ¶13.
[107] Id.

impairment of the treaty partner's interests to the maximum degree possible."[108] Though this interpretation of the standard Friendship, Commerce and Navigation Treaty language predates the U.S.-Argentina BIT, it evidences that the broad interpretation of non-precluded measures has been a long-standing policy of the U.S.

71. Sir Arthur Watt's reference to the margin of appreciation doctrine of the European Court of Human Rights is apt.[109] The text of the European Convention on Human Rights includes language similar in important respects to Article XI of the U.S.-Argentina BIT. Article 15 of the Convention allows states to take actions that would otherwise violate the Convention if those actions are "strictly required by the exigencies of the situation" and Articles 8-11 allow restrictions as "necessary in a democratic society." In interpreting those provisions, the European Court of Human Rights has recognized that states must be given some latitude to make an initial determination of whether measures were in fact "required by the exigencies of the situation" or were "necessary in a democratic society."[110] Moreover, the Court realized that certain terms of the Convention such as public order are inherently subjective and that the state itself is in the best place to determine if such values are implicated in a given case. The European Court then examines the state's own determination in a supervisory capacity, looking to the "reasons given by the national authorities to justify the actual measures of "interference"[111] and examining whether the "restriction imposed" was "proportionate to the legitimate aim pursued."[112]

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[108] Id.
[109] For a broader discussion of the margin of appreciation, see Thomas O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474, 478 (Fall 1982); Jeffrey Brauch, *The Margin of Appreciation and the European Court of Human Rights: A Threat to the Rule of Law*, 11 COLUM. J. INT'L L. 113 (2005); Steven Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* 5 (Council of Eur., Human Rights Files No. 17, 2000); Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, 3 CONN. J. INT'L L. 111, 118 (1987).
[110] *See Norris v. Ireland*, ECtHR, Ser An No. 142, 13 EHRR 186 (1989) at ¶ 44.
[111] Id.
[112] *Norris v. Ireland*, ECtHR, Ser An No. 142, 13 EHRR 186 (1989) at ¶ 44.

72. The margin of appreciation itself could provide a valuable template for defining the contours of the deference to be accorded to a state's invocation of Article XI. Applying even a non-self-judging version of Article XI, this Tribunal ought to accord either state party to the treaty some latitude to make an initial determination of the applicability of inherently subjective concepts such as public order and essential security. The Tribunal should, then, examine, in a supervisory capacity "both the aim of the measure challenged and its 'necessity.'"[113] Given the facts on the ground in Argentina beginning in late 2000, the extraordinary economic crisis, the collapse of numerous presidential regimes and active riots on the streets, such an analysis leads to the conclusion that Argentina's invocation of Article XI was justified.

73. This is, in fact, the approach taken and conclusion reached by the ICSID Tribunal in the case of *LG&E Energy Corp, et. al v. The Argentine Republic.* The LG&E Tribunal suggested that were it "to conclude that the provision is self-judging, Argentina's determination would be subject to a good faith review anyway, which does not significantly differ from the substantive analysis presented here."[114] In essence, even based on an interpretation of Article XI as non-self-judging, the LG&E Tribunal engaged in a supervisory scrutiny of Argentina's invocation of Article XI not substantively distinct from the good faith review we advocate. The LG&E Tribunal afforded Argentina a margin of appreciation, similar to that suggested by Sir Arthur Watts and developed by the European Court of Human Rights, in which Argentina could make its own determinations of the appropriate responses to the crisis.

74. Rather than second guessing complex national policy choices, the LG&E Tribunal performed a supervisory function, asking merely whether Argentina's policy choices exceeded the margin of appreciation envisioned in the very language of "public order" and "essential security" in Article XI. The Tribunal found that "[t]o

[113] *Handyside v. United Kingdom*, 24 Eur. Ct. H. R. (ser. A) ¶ 48 (1979); *see also Müller and Others v. Switzerland*, 133 Eur. Ct. H. R. (ser. A) ¶ 49 (1988).
[114] *LG&E Energy Corp, et. al v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶ 214.

conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[115] It continued: "Certainly, the conditions in Argentina in December 2001 called for immediate, decisive action to restore civil order and stop the economic decline …. Article XI refers to situations in which a State has no choice but to act. A State may have several responses at its disposal to maintain public order or protect its essential security interests."[116]

75. The approach of the LG&E Tribunal acknowledged the subjective nature of essential security and public order and recognized that states themselves are often in the best position to craft appropriate responses to emergency situations. Argentina chose the best available set of policy responses from an admittedly poor menu of options. The LG&E Tribunal appropriately interpreted both the permissible objectives under Article XI and the choice of policy responses broadly, concluding that even under a non-self-judging interpretation of Article XI, Argentina's invocation of the non-precluded measures provision was proper. This Tribunal has the opportunity to develop a similar approach and to make the inherent logic behind the LG&E approach far more explicit.

V. ARGENTINA'S TREATMENT OF EL PASO ENERGY INTERNATIONAL AND ITS INVESTMENTS IS CONSISTENT WITH ARTICLE IV(3) OF THE BILATERAL INVESTMENT TREATY

76. One of Claimant's experts misconstrues our arguments with respect to Article IV(3) of the U.S.-Argentina BIT. In our original opinion we merely stated that "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

[115] Id., ¶ 236.
[116] Id., ¶ 239-240.

in the case of war or national emergency."[117] Sir Arthur Watts suggests that we have sought to justify Argentina's actions under Article IV(3) of the BIT.[118] That is not an argument we have advanced.

77. We have put forth and continue to take the position that Argentina's actions did not violate the standards of Article IV(3) of the BIT. 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."[119] 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. That is exactly what Argentina has done in this case. Argentina's actions were of a general nature and impacted the Argentine economy as a whole. 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.

VI. ARTICLE XI RELIEVES ARGENTINA OF LIABILITY UNDER THE BIT UNTIL SUCH TIME AS THE MEASURES TAKEN TO RESPOND TO THE CRISIS ARE NO LONGER REQUIRED

78. In Part XI of our original opinion of July 2006, we opined that no compensation is available to Claimant under the U.S.-Argentina BIT. Our position was based on

[117] Opinion of Anne-Marie Slaughter & William Burke-White, *El Paso Energy International Company v. The Republic of Argentina*, ICSID Case No. Arb/03/15, July 23, 2006 ¶100.
[118] *See* Opinion of Sir Arthur Watts, *supra* note 2, at ¶22-23.
[119] *Asian Agricultural Products Ltd. (Aapl) v. Republic Of Sri Lanka*, ICSID Case No. ARB/87/3, Award of June 27, 1990, ¶ 66.

well established rules of state responsibility in international law.[120] Article XI of the U.S.-Argentina BIT provides that the treaty "shall not preclude the application" of measures "necessary for the maintenance of public order or the protection of its own essential security interests." The language "shall not preclude" on its face clearly stipulates that the treaty shall not prohibit or otherwise prevent the measures in question. Any other reading is implausible as it would render Article XI itself a nullity and its inclusion in the treaty irrelevant.

A. Article XI Prevents Actions Taken Consistent with it From Being Internationally Wrongful and Thereby Precludes Liability and any Duty Compensate Claimant

79. Both international and domestic courts have followed this ordinary meaning interpretation of "shall not preclude." In interpreting similar non-precluded measures provisions of other treaties, courts have indicated that the "shall not preclude" language serves as a bar to the international wrongfulness of actions taken in conformity with the non-precluded measures provision. As a result, the clause prevents liability and the duty to pay compensation. The ICJ did not find the non-precluded measures provision of the U.S.-Nicaragua FCN treaty applicable in the *Nicaragua Case.* Yet, the Court nevertheless suggested that if the clause had been applicable, it would have provided a defense to the otherwise wrongful actions of the U.S. The ICJ noted that the non-precluded measures clause does not bar the Court's jurisdiction, but that it: "defines instances in which the Treaty itself provides for exceptions to the generality of its other provisions…"[121] As a result, actions taken in accordance with the non-precluded measures provision would not be subject to the substantive protections of the other provisions of the treaty.

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[120] *See generally* International Law Commission, Draft Articles on the Responsibility of States, *supra* note 100, at art. 55.

[121] Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. U.S.) (Merits) Judgment of June 27, 1986 at ¶222.

80. Similarly, in the Preliminary Objections phase of the *Oil Platforms Case*, the ICJ noted that Article XX of the Iran-US treaty, again the non-precluded measures provision, would "afford[] the parties a possible defence on the merits to be used should the occasion arise."[122] Given that the clause provides a defense on the merits, its successful invocation would prevent actions taken in conformity with the clause from constituting internationally wrongful acts and hence providing a legal basis for liability.

81. This approach is confirmed by the interpretation of the 1953 Treaty of Friendship, Commerce, and Navigation between the United States and Japan by the United States Court of Appeals for the Fifth Circuit. In the case of *Spiess et. al v. C. Itoh & Co*. Judge Reavley analyzed equivalent "shall not preclude" language in his dissent. The majority did not consider the language as the case was decided on other grounds. Article XXI(1)(e) of that treaty begins: "The present treaty shall not preclude the application of measures…denying to any company" certain benefits under the treaty. Interpreting that language, Judge Reavley observed: "I read this to mean that, although a company incorporated in Japan may normally claim all the privileges of a 'company of Japan' while doing business in the United States, if the United Sates discovers that nationals of a third country own the Japanese company, the United States may deny the benefits of the Treaty to such a company, with the listed exceptions.[123] The denial of benefits interpretation again indicates that the result of a successful invocation of the clause would be to prevent the other substantive protections of the treaty from applying to actions taken in conformity with the exceptions clause.

82. An interpretation of the "shall not preclude language" as preventing the international wrongfulness of actions taken under the clause is also fully consistent with the US Department of State's internal study of similar clauses contained in earlier Friendship, Commerce, and Navigation Treaties. According to the "Sullivan Study" noted above, the non-precluded measures provision "is

[122] Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America) (Preliminary Objections), December 16, 1993, ¶20.
[123] Michael E. Spiess, et.al, v. C. Itoh & Co., 643 F2d 353, 366 (1981).

essentially a convenient device within the overall scheme of the treaty for grouping in one place exceptions from the provisions of the treaty generally…"[124] Again, the State Department's own analysis of the "shall not preclude" language terms the provision as a general exception from the protections of the treaty. Such a general exception would remove actions that fall within its scope from the substantive protections of the rest of the treaty.

83. In international law, prohibitive consequences attach to a state's actions if those actions are violations of international law.[125] It is a well established principle of international law, codified in Article 2 of the International Law Commission Draft Articles on the Responsibility of States, that for an action to give rise to an "internationally wrongful act of a State," such an "action" must "constitute[] a breach of an international obligation of the State."[126] Hence, for Article XI of the U.S.-Argentina BIT to ensure that the treaty does not preclude necessary acts, it must prevent such acts from constituting violations of the treaty.

84. If Argentina's actions are not violations of the treaty, they can not be internationally wrongful. 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."[127] The plain language of Article XI makes clear that acts properly taken under that article are not internationally wrongful at least so long as they remain necessary to achieve one of the permissible objectives specified in Article XI.

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[124] The Charles H. Sullivan Report on the Standard Provisions of the Treaty of Friendship Commerce and Navigation as They Evolved through January 1, 1962, at p. 302.
[125] *See* International Law Commission, Draft Articles on the Responsibility of States *supra* note 100, at art. 1, 2.
[126] Id., at art. 2. *See also Phosphates in Morocco* (Italy v. France), 1938 P.C.I.J. (ser. A/B) No. 74 (Preliminary Objections, June 14).
[127] International Law Commission, Draft Articles on the Responsibility of States, *supra* note 100, Commentaries, Art 2, ¶ 9. *See also Factory at Chorzów* (Germany v. Polland), 1927 P.C.I.J. (ser. A) No. 9 (Jurisdiction, May 24); *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (July 26).

85. As long as the acts taken by Argentina were not internationally wrongful, no compensation can be due to Claimant. Pursuant to Article 31 of the ILC Draft Articles on the Responsibility of States, compensation is only due for "injury caused by the internationally wrongful act."[128] Absent such an internationally wrongful act, state responsibility is not engaged and no compensation is due Claimant. This position, advanced in our initial opinion, was confirmed by the ICSID Tribunal in *LG&E Energy Corp, et. al v. The Argentine Republic*, which found: "Article XI establishes the state of necessity as a ground for exclusion from wrongfulness of an act of the State, and therefore, the State is exempted from liability."[129]

B. Professor Resisman's Approach to Liability Would Violate the Principle of Effectiveness in Treaty Interpretation and Reduce Article XI to a Legal Nullity

86. Surprisingly, each of Claimant's experts disagrees with what has heretofore been an uncontroversial position, and indeed the position taken by the *LG&E Tribunal.*[130] Professor Reisman offers the most radical version of this argument, claiming: "The BIT confirms that Argentina maintains the right to take the measures it deems 'necessary' for these purposes but in so far as these measures violated rights secured elsewhere in the BIT, Argentina must compensate El Paso for the losses they caused."[131] This position is implausible and renders Article XI a legal nullity. In essence, Professor Resiman argues that whether or not a treaty includes a non-precluded measures provision, a state will have to compensate for any actions taken in breach of the treaty. On this view, Article XI has no function whatsoever except to confirm the practical ability of a state to protect itself. Yet

[128] International Law Commission, Draft Articles on the Responsibility of States, *supra* note 100, at Art. 31.
[129] *LG&E Energy Corp, et. al v. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶ 261.
[130] *See* Opinion of Abraham D. Sofaer, *supra* note 1, at ¶46-47. Opinion of Sir Arthur Watts, *supra* note 2, at ¶76-78. Opinion of W. Michael Reisman, *supra* note 6, at ¶80-83.
[131] Id., at ¶83.

this ability needs no confirmation; a state can obviously take measures that breach the BIT if its national security is threatened. The question is not whether a state *can* take measures that would otherwise breach the treaty, but whether those measures will give rise to liability under the treaty if they are necessary "for the maintenance of public order…or the protection of its own essential security interests." The only possible consequence that does not reduce Article XI to a nullity is that the incorporation of the clause in the treaty precludes the international wrongfulness of actions taken under it and, thereby, prevents any duty to compensate.

87. Professor Reisman's interpretation of Article XI as not precluding liability is fundamentally inconsistent with three basic rules of international law: first, the text of the U.S.-Argentina BIT; second, established legal principles on the responsibility of states for internationally wrongful acts; and, third, the doctrine of effectiveness in treaty interpretation.

88. First, Professor Reisman's argument fails to recognize the ordinary meaning of "shall not preclude" in Article XI. Preclude is synonymous with terms such as "prevent," "make impossible" or "make wrongful." Requiring Respondent to pay compensation to Claimant in this case would require a characterization of Respondent's actions as internationally wrongful, thereby, precluding such actions from a legal perspective. Moreover, attaching financial liability to Respondent's actions would effectively prevent such actions by making them so costly so as to render them impossible in certain circumstances. For example, the pesoization of the Argentine economy may have caused significant damage to foreign investors. Should Argentina be forced to compensate all such investors, some have calculated its potential liability at more than US$80 billion.[132] Whatever figure is used, however, the extraordinary sums involved would effectively preclude Argentina from choosing that policy option to respond to the

[132] Wailin Wong, *Argentina Treasury Attorney: World Bank Claims Could Reach $80 Billion*, Dow Jones Newswire, (Jan. 21, 2005)

economic crisis. Such a result would be patently incompatible with the "shall not preclude" language of Article XI.

89. Second, Professor Reisman's argument violates the customary rules on state responsibility as codified in the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts. Professor Reisman claims that Article XI of the U.S.-Argentina BIT gives Argentina a "right" to take actions necessary for the maintenance of public order or the protection of essential security. Yet, he simultaneously seeks to establish liability for those acts. If Argentina has a right to take such actions, it follows that such actions can not be internationally wrongful. As noted above, 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."[133] By seeking to impose liability while admitting Argentina has a right to act, Professor Reisman's argument contradicts basic rules of state responsibility.

90. Third, Professor Reisman's approach violates the legal principle of effectiveness in treaty interpretation (*ut res magis valeat quam pereat*). The principle of effectiveness means that, in the interpretation of a treaty, its terms must be construed in such a way as to give each of them effect and not render them meaningless. As the WTO Appellate body found in the U.S.-Gasoline case, "One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[134]

91. Similarly, Professor Fitzmaurice observes, "texts are presumed to have been intended to have a definite force and effect, and should be interpreted so as to have such force and effect rather than so as not to have it and so as to have the

[133] International Law Commission, Draft Articles on the Responsibility of States *supra* note 100, at Art. 2.
[134] *I.3.7.1 U.S.-Gasoline, p. 23,* DSR 1996:I, p. 3 at 21 (WT/DS2/AB/R).

fullest value and effect consistent with their wording…."[135] Professor Reisman's approach denies any meaning or effect to the language "shall not preclude," rendering it a legal nullity and nothing more than wasted words. The principle of effectiveness embodies the doctrine that states do not waste words, that treaties are carefully drafted instruments in which states negotiate a text and include each word for a particular purpose. Professor Reisman's approach ignores that principle and suggests that the tightly drafted treaty has an extra, purposeless article. That position simply can not be maintained.

92. In light of the apparent untenability of Professor Reisman's position, it is worth noting that he is one of the few international legal scholars to have taken issue with the ICJ's interpretation of the U.S.-Nicaragua Friendship, Commerce and Navigation Treaty. Writing about the *Nicaragua Case*, and, particularly, the non-precluded measures provision of the U.S.-Nicaragua FCN Treaty (which was not explicitly self-judging), Professor Reisman 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."[136] If indeed he would find the identical language in the U.S.-Argentina BIT to be self-judging, as we maintain, then the only way for him to hold Argentina liable for the measures it has taken under Article XI is to argue that Article XI has no effect on Argentina's obligations under the BIT.

93. In addition to being legally untenable, Professor Reisman's approach to Article XI violates the object and purpose of the U.S.-Argentina BIT. Like Professor Sofaer, he assumes that the purpose of the BIT is exclusively one of investor protection.[137] He observes that the treaty is intended "to stimulate the flow of foreign investment … by establishing a stable normative framework …by offering investors compensation in the event of a breach" of the treatment standards in the

[135] G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1, 8 (1951). *See also* H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties , 2*6 BRIT. Y.B. INT'L L. 148 (1949).
[136] W. Michael Reisman, *Comment: Has The International Court Exceeded its Jurisdiction?*, 80 AM. J. INT'L L. 128, 130-131 (1986).
[137] Opinion of W. Michael Reisman, *supra* note 6, at ¶79.

BIT.[138] Again, Professor Reisman ignores the history of the US BIT program, which we discuss above. This history offers repeated examples of the ways in which US BITs seek to balance investor protections against the preservation of sufficient latitude for a state to protect itself in the face of severe threats.

94. To apply Article XI in conformity with the actual text of the treaty, established rules for the responsibility of states, and the principle of effectiveness, Article XI must be interpreted to do exactly what its plain language suggests: to prevent actions taken in conformity with Article XI from constituting internationally wrongful acts in violation of the treaty. Based on well-established doctrines of international law, as long as such actions are not internationally wrongful, no liability can attach and no compensation can be due Claimant.

95. Upon close reading, Professor Sofaer's opinion does not advance the extreme view with respect to compensation advocated by Professor Reisman. Instead, Professor Sofaer argues that, in determining whether "damages may still be appropriate even if the measures are found 'necessary,' … [t]his Tribunal should … determine not only whether a measure was not precluded in principle in the circumstances, but also whether a non-precluded measure was applied in a manner that met the prerequisites of Article XI."[139] This position is distinct from that of Professor Reisman in that Professor Sofaer appears to acknowledge that, as long as the actions taken by Argentina are not precluded and applied in a manner consistent with Article XI, no liability will attach and no compensation will be due Claimant. He leaves open the possibility that Argentina might remain liable if its actions were not applied in accordance with Article XI or if they ceased to be necessary under that article, but appears to agree with us that, if Argentina acted in good faith and its actions were in fact necessary to further one of the permissible objectives under Article XI, then Argentina should not be liable to compensate Claimant.

[138] Id.
[139] Opinion of Abraham D. Sofaer, *supra* note 1, at ¶48.

C. The Protections of Article XI Continue to Apply Until They are No Longer Necessary to Prevent a Return to the Crisis

96. Professor Sofaer's concern with the application of Article XI, beyond the initial determination that a measure was not precluded under the article, relates to "the duration of necessary measures that excuse wrongfulness."[140] We agree that, should this Tribunal determine that Argentina's invocation of the non-precluded measures provisions of Article XI is appropriate—either under the U.S.-Argentina BIT or under customary international law—the period during which such measures are permitted (and liability thus avoided) must be established. The text of Article XI provides the starting point for such an inquiry.[141] Article XI reads: "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order … or the protection of its own essential security interests." The text makes clear that it is the *measures* necessary to respond to threats to public order or national security that are not precluded by the treaty. Hence, liability can not attach to acts that would otherwise violate the treaty from the moment the state takes such measures until the time such measures cease or are no longer necessary for the maintenance of public order or the protection of national security interests.

97. As used in Article XI, *measure* can be defined as "an action taken as a means to an end" or a "legislative bill or enactment."[142] A plain language interpretation of Article XI indicates that it is the legislative act or acts taken in response to the public order or national security threat that is not precluded by the BIT. In response to the crisis which began in late 2000, Argentina undertook a package of measures to avert economic catastrophe, protect its security interests and maintain public order. Given that the bulk of the package of legislative measures taken to respond to the crisis is still in effect, the establishment of an end point for the

[140] Id., at ¶47.
[141] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Art. 31.
[142] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (4th ed. 2000). *See also* WEBSTER'S ENGLISH LANGUAGE DICTIONARY (defining *measure* as "step planned or taken as a means to an end; *specifically* **:** a proposed legislative act").

period during which measures are not precluded by Article XI (and hence the period during which there is no liability), must be based on a determination of whether and at what date such measures ceased to be necessary to protect essential security interests or maintain public order. That is a question best addressed by the economists who, we understand, also serve as experts in this case.

98. In terms of standards to guide the Tribunal in that inquiry, the question must be what the effects would likely be of, for example, an Argentinean decision to return to a currency board, to eliminate export duties on oil and gas increasing fiscal deficit, to abrogate all restrictions on oil and gas exports allowing domestic supply shortages and to calculate public utility rates in US dollars. The government cannot be required to take decisions that would reignite the very same threats to essential security and public order that existed at the time such measures were initially adopted. Thus the duration of the period in which otherwise precluded measures are permitted under Article XI should depend on the likely impact of the reversal or removal of those measures.

99. The determination of an endpoint for the period during which acts are not precluded under Article XI cannot be based merely on an inspection of the situation on the ground in the country at any particular point in time. Cause and effect must also be factored into account. Thus, for instance, a state facing massive riots on the streets might take long-term measures that ended the riots but only by dint of engineering a period of financial adjustment necessary to create the long-term conditions necessary to prevent a re-occurrence of the crisis. If the end period for the applicability of Article XI were to be fixed at the moment the riots cease, the state would again become liable from that time forward, despite the continuation of the emergency measures and the necessity for longer term economic adjustment to prevent a resumption of the riots or other security threats.

100. In the *LG&E Case*, the Tribunal selected an arbitrary end date of April 26, 2003 for the period during which measures were permissible under Article XI of the BIT. According to the Tribunal, this date was intended to correspond “with

the election of President Kirchner."[143] While the election of President Kirchner is significant in that it attests to the functioning of Argentina's democratic electoral system, it does not provide the kind of evidence necessary to determine whether the measures adopted by Argentina in 2001 and 2002 remained necessary to avert a return to the crisis. While the majority of the "notorious events" referred to by the *LG&E* Tribunal occurred prior to the election of President Kirchner, critical issues of Argentina's sovereign debt, currency stabilization, and access to international financial markets still remained unresolved in April 2003 and even as late as mid-2005.[144]

101. The end point for the applicability of Article XI should not be triggered by elections or the secession of "notorious events" on the ground, which can be deceiving. Rather, it should be based either on the state's own termination of the measures or on economic and social evidence and analysis demonstrating that such measures have become unnecessary to prevent a return to the crisis.

VII. CONCLUSION

102. The text, context, object and purpose, background materials and circumstances of conclusion of the U.S.-Argentina BIT provide compelling evidence that Article XI should be interpreted as self-judging and subject only to a good faith review. Under such a review, Argentina's invocation of Article XI was entirely appropriate and clearly within the confines of good faith, absolving Argentina of liability under the BIT. Argentina and the U.S. negotiated and signed a BIT that allowed either party to take measures otherwise inconsistent with their obligations under the treaty if that party deemed the measures necessary to protect its national security interests. Both sides understood the importance of this clause.

[143] *LG&E Energy Corp, et. al v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, ¶ 230.
[144] *See* Damill, Mario; Frenkel, Roberto and Rapetti, Martín (2005): "The Argentinean Debt: History, Default and Restructuring," Initiative for Policy Dialogue, Working Paper Series, Columbia Univ., N. York, 2005. Available at: http://www0.gsb.columbia.edu/ipd/pub/SDR_Argentina_English_Revised_9_5_05.pdf.

103. Both the self-judging nature of Article XI of the U.S.-Argentina BIT and the standard of good-faith review we advocate are strongly grounded in international law. The U.S. has had a long standing position, dating back at least to 1984, that the language of non-precluded measures provisions are self-judging. Further as the US Department of State testified to the US Senate in 1992, the U.S. communicated that position to its treaty partners. The Tribunal must still determine whether Argentina invoked Article XI in good faith, a test that flows from perhaps the most fundamental background norm of customary international law and the Vienna Convention itself: that states must honor their treaty obligations in good faith.

104. The application of a good faith standard of review provides this Tribunal with the opportunity to articulate the exact contours of good faith in the context of a non-precluded measures clause. Such a standard will become increasingly important in light of the more explicitly self-judging non-precluded measures provisions of more recent US BITs and the growing number of financial, political, and security crises in an evermore interconnected world. Specifying the nature of a good faith review as a supervisory function akin to the margin of appreciation of the European Court of Human Rights can enhance the stability of the international financial infrastructure by ensuring the protection of investment in ordinary circumstances, but also preserving for states the freedom of action so urgently needed to respond to extraordinary crises.

105. The opinions submitted by Claimant's experts are largely limited to the question of whether Article XI of the U.S.-Argentina BIT is self-judging. These opinions do not address many of the broader arguments we made in our opinion of July 2006. In that opinion, in addition to our argument that Article XI of the U.S.-Argentina BIT is self-judging, we argued that the Argentina had appropriately invoked the non-precluded measures provision even if that provision was not deemed self-judging and that the article applied to Argentina's economic crisis. In the alternative, we argued that Argentina's peril rose to the level sufficient to justify the necessity defense in customary international law. We

concluded that no compensation was available to Claimant under the U.S.-Argentina BIT.

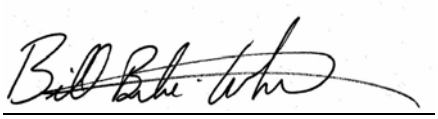
106. Even if this Tribunal finds Article XI of the U.S.-Argentina BIT is not self-judging, the other arguments presented in our original opinion provide sufficient grounds to find in Argentina's favor. Under a substantive review of Argentina's invocation of Article XI in this case, the economic crisis beginning in late 2000 endangered Argentina's essential security and public order. It is precisely on these grounds that the ICSID Tribunal in *LG&E Energy Corp. et. al v. The Republic of Argentina*, found on October 3, 2006 that "[b]etween 1 December 2001 and 26 April 2003, Argentina was in a state of necessity, for which reason it shall be exempted from the payment of compensation for damages incurred during that period."[145] The Tribunal observed first that "Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and protect its essential security interests" and, therefore, Argentina is excused under Article XI from liability for any breaches of the Treaty between December 1, 2001 and April 26, 2003.[146] Second, the Tribunal confirmed that the requirements of a state of necessity in customary international law were also met.[147] While this second finding under customary international law was not necessary to a judgment in Argentina's favor, such a finding "supports the Tribunal's analysis with regard to the meaning of Article XI's requirements…."[148]

107. Argentina is finally lifting itself out of the depths of an economic crisis almost as profound as any country has ever experienced. At a time of political turmoil and burgeoning violence, the Argentinean government took the measures it deemed necessary to preserve the stability and security of the country itself. In agreeing to protect US investors almost a decade earlier, it had negotiated precisely such leeway, to ensure that measures necessary for essential security or public order but injurious to both domestic and foreign investment would not add

[145] *LG&E Energy Corp, et. al v. The Argentine Republic,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 267.
[146] Id., at ¶¶ 226, 229.
[147] Id., at ¶¶ 245-258.
[148] Id., at ¶258.

insult to injury by then incurring liability. Today it invokes the clause it negotiated. We urge this Tribunal to find that its invocation is in good faith, and to excuse it from liability under the Treaty.

We declare under penalty of perjury that the foregoing is true and correct. Executed on March 4, 2007 in Princeton, New Jersey and Providenciales, Turks and Caicos, respectively.



Anne-Marie SLAUGHTER

William BURKE-WHITE