SEPARATE OPINION OF PROFESSOR ANTONIO REMIRO BROTONS, ARBITRATOR

In order to proceed in logical order, I will explain my opinion in accordance with the following structure:

A. Overview (paras. 1-10)

B. The *Emergency Law* and its Consequences Concerning the Natural Gas Free Market (paras. 11-122)

I. Article XI of the Bilateral Investment Treaty (paras. 11-75)

II. Fair and Equitable Treatment (paras. 76-99)

III. State of Necessity (paras. 100-122)

C. Measures Concerning Export Restrictions, Export Withholdings and Royalties (paras. 123-126)

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A. Overview

1. I agree with the Tribunal's decision that it has jurisdiction over the dispute "taking into account the conclusions under paragraphs 284, 285 and 864" (para. 1132(*a*)), as well as its determination that the Argentine Republic is liable for breaching its obligations under Article II.2(a) of the Treaty between the Argentine Republic and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment, by failing to provide fair and equitable treatment to the Claimants' investment, and Article II.2(c), "to the extent the obligations pertinent to the investment to which Argentina has specifically entered into with the Claimants have been breached and have resulted in the violation of the standards of protection under the BIT" (paras. 1132(b) and (c)).

2. I disagree, however, with respect to the reasoning of certain parts of the Decision. Therefore, despite my respect for the majority's view, I feel obliged to express my opinion.

3. My disagreement with the Tribunal's line of reasoning concerns, most of all, the interpretation of Article XI of the Treaty, under which the obligations undertaken by one Party shall not impede the application of measures necessary for the maintenance of public order or the protection of its own essential security interests, and its relation with the "state of necessity" under rules of general or customary international law, as put forward especially in paragraphs 1015, 1024-1029, 1057-1071, 1105-1124, 1126, and 1128.

4. The Tribunal (paras. 1024, 1060) claims to acknowledge and deems appropriate to emphasize the differences between, on the one hand, the provisions of Article XI of the Treaty and, on the other, the "state of necessity" as a circumstance that excludes the wrongfulness of

an act attributable to the State, as set out in Article 25 of the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001). The Tribunal, however, holds (para. 1015) that Article XI of the Treaty is *lex specialis* and Article 25 of the ILC Draft Articles is *lex generalis* and, less acceptable to me, uses the conditions for the application of "necessity" under Article 25 of the ILC Draft Articles (par. 1028, 1060) as the interpretative canon for Article XI of the Treaty.

5. Not only that. For the Tribunal, which largely follows the *El Paso* award (paras. 1024, 1060, 1062, 1123, 1124), the question of whether Argentina substantially contributed to the situation it attempted to mitigate with its measures (a requirement it takes from the "state of necessity") comes before the consideration of whether such measures are "necessary" to address threats to the "public order" or "essential security interests;" thus, if the answer to the first question is affirmative, it is no longer necessary to answer the second one as Article XI would not apply, given that no one can benefit from their own mistakes (paras. 1026, 1060, 1063, 1070, 1126). In the Tribunal's view, again following *El Paso*, the object and purpose of the Treaty requires the State be held liable if it has contributed, intentionally or by omission, to the state of emergency (para. 1062).

6. The Tribunal comes to the conclusion that Argentina's failure to control several internal factors, in particular the fiscal deficit, debt accumulation and labor market rigidity, substantially contributed to the crisis, while their progressive worsening, diminished the government's ability to face concurring external factors; consequently, the Tribunal rules out the application of Article XI of the Treaty (paras. 1113, 1124).

7. In my opinion, the Tribunal does not take into account the theoretical and operational differences between Article XI of the Treaty, the safeguard clause, and the "state of necessity", a circumstance that excludes the wrongfulness of an act pursuant to general rules of international law. The interpretation of Article XI cannot be supplemented by more rigorous requirements than those for the "state of necessity". That cannot be the reason to rule out the application of Article XI of the Treaty.

8. The reason why, in my opinion, Article XI of the Treaty fails to cover Argentina's measures concerning pesification and its consequences in the natural gas market, which are at issue in this case, is that Article XI was not designed to support a change of paradigm but only to suspend a paradigm in a state of emergency. Not only does Article XI have temporal limitations, but also structural ones. It cannot uphold measures that are not temporary but virtually permanent, although they may be formally disguised as temporary. Under a *bona fide* interpretation of Article XI, it is just not possible to use a state of emergency as an excuse to substantially alter the foundations of the neoliberal model underlying the obligations assumed under the Treaty. In order to achieve that goal, it is necessary to renegotiate or terminate the treaty.

9. Moreover, leaving Article XI aside, I do not believe that in a situation of crisis like the one experienced by Argentina the "fair and equitable treatment" standard provides for absolute protection of the legal stability commitments assumed by the host State towards the investor. It is fair and equitable for the foreign investor to share the burden placed on the shoulders of society as a whole, provided there is no arbitrariness or discrimination, and provided further

that the situation is not used to pave the way for a permanent change in the economic model underlying the protection system agreed on. In the case at hand, the latter requirement is not met. That is where the breach of the standard lies.

10. Finally, considering that the Tribunal determined in the Decision that Argentina has breached the "fair and equitable treatment" standard *vis-à-vis* the Claimants, the Decision was supposed to devote some paragraphs to rebutting the appropriateness of the "state of necessity," which was relied on by the Respondent to exclude the wrongfulness of its acts.

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B. The *Emergency Law* and its Consequences Concerning the Natural Gas Free Market

I. Article XI of the Bilateral Investment Treaty

11. Article XI of the Treaty between the Argentine Republic and the United States of America Concerning the Reciprocal Encouragement and Protection of Investment provides that the obligations undertaken by one of the Parties in relation to the treatment of the other Party's investments and investors "shall not preclude the application…of measures necessary for the maintenance of public order…or the protection of its own essential security interests."

12. Since the Treaty *shall not preclude the application* of these measures (those necessary for the maintenance of public order or the protection of the State's essential security interests), Article XI becomes a safeguard clause that excludes the application of the Treaty's substantive provisions when such measures are taken. Thus, Article XI defines the operational scope of the Treaty's material obligations.

13. In view of its own terms, this provision's analysis should come before any other on Argentina's violation – or not – of the rules on the treatment afforded to U.S. investments and investors. If the provision is applicable, any violation of the treatment standards under the Treaty would be irrelevant for the Tribunal to decide. If one concludes that the measures adopted, in this case the Emergency Law and the acts performed under such law, were necessary for the purposes mentioned above, it is unnecessary to further develop any arguments as to whether there was a violation of the treaty, or alternatively, no violation due to the exercise of the regulatory power.[1]

14. Moreover, the role played by Article XI, in the context of the Treaty and its logical order in Tribunal's reasoning, reveals its absolute theoretical independence from the "state of necessity" as a circumstance that excludes the *prima facie* wrongfulness of an act, something that can only be analyzed once the wrongful act – in this case, the violation of one or more treatment standards under the Treaty – has been verified.[2]

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[1] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT) Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, § 187.

[2] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, § 162; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT) Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, § 204; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 Award, 31 October 2011, § 552.

15. The conceptual – and operational – independence of Article XI of the Treaty from the "state of necessity" has not always been duly noted in the past, even Argentina itself as Respondent was not a stranger to the confusion in some of its less recent arguments, amidst the high number of lawsuits filed in connection with foreign investments in its territory arising from the government measures taken in the first decade of this century.[3] Article XI is not the tabernacle of the customary "state of necessity".

16. Therefore, it is useful to insist that Article XI, on the one hand, and the "state of necessity" as a general rule of customary international law, on the other, are inherently different and operate in different and separate stages of the process of application of the law to the facts.

17. This conclusion has been increasingly supported by case law, as evidenced by the reasoning of the tribunal in *Continental,*[4] as well as that of the Annulment Committees in *CMS,*[5] *Sempra*[6] and *Enron,*[7] and the tribunal in *El Paso.*[8]

18. However, the proper conclusions of this line of reasoning are not always drawn, not only with regard to the logical order of the reasoning underlying the decision (as can be noted in our Decision, para. 1025), but also in connection with the interpretation of the provisions at stake where – as in our case, following *El Paso* – the tribunal resorts to the elements that characterize the "state of necessity" – required under Article 25 of the ILC Draft Articles – to sustain the explanation of Article XI of the Treaty.

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19. In *El Paso,* the tribunal states that "[o]f course, Article XI has to be interpreted taking into account general principles of international law, some of those being embodied in Article 25."[9] Article XI, the tribunal adds, "is the *lex specialis*, Article 25, the *lex generalis*."

20. This last remark could be accurate if it were simply construed to mean that Article XI, incorporated in a treaty, is a particular rule while Article 25 of the ILC Draft Articles aims at codifying a general rule. It would not be accurate, however, if it were meant to suggest that

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[3] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT) Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010*,* § 176.

[4] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, § 163-167

[5] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT) Argentine Republic's Application for Annulment, 8 September 2005, § 129-135.

[6] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT) Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010*,* § 159, 165, 185-189 195-209, 218, 219.

[7] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* 12 ICSID Case No. ARB/01/3 (United States/Argentina BIT) Decision on the Application for Annulment of the Argentine Republic, 30 July 2010*,* § 405.

[8] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 Award, 31 October 2011, § 553 and 554.

[9] See § 552.

Article XI of the Treaty embodies, for the bilateral relations between Argentina and the United States, the general rule of Article 25 of the ILC Draft Articles.

21. In *El Paso*, the tribunal still finds that "the requirement under Article XI that the measures must be 'necessary' presupposes that the State has not contributed, by acts or omissions, to creating the situation which it relies on when claiming the lawfulness of its measures."[10]

22. The tribunal justifies this first by referring to the object and purpose of the Treaty ("to promote and improve the investment climate between the Contracting Parties, notably by establishing some stability regarding the status of investments") which, as inferred from the Treaty's Preamble, would call for liability of the host State for the consequences resulting from a state of emergency if such State has substantially contributed to it because, if this were so, the Treaty cannot allow the host State to avoid its obligations by resorting to Article XI.[11]

23. Second, the Tribunal adds, if Article 31.3(c) of the Vienna Convention on the Law of Treaties, dated May 23, 1969, provides that the interpretation of treaty rules should take into account, *inter alia*, "any relevant rules of international law applicable in the relations between the Parties,"[12] one of such rules would be that embodied in Article 25.2(b) of the ILC Draft Articles, pursuant to which "necessity may not be invoked by a State as a ground for precluding wrongfulness if...[t]he State has contributed (in a sufficiently substantial fashion and not merely incidental or peripheral, as noted in the commentary) to the situation of necessity."[13]

24. As already noted, the Decision in this case assumes almost literally the same rationale and its consequences.

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25. From my point of view, there is no objective ground that justifies this inference. When Article 31 of the Vienna Convention sets out what has been considered a "golden rule" or general rule of interpretation, it simply provides, in subsection 1, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*" (emphasis added).

26. Relying on Article 31.3(c) of the Vienna Convention to justify the incorporation into Article XI of the rigorous rule of "state of necessity" is ignoring the *raison d'être* of a legal provision that, when requiring that interpretation takes into account, together with the context, "any relevant rules of international law applicable in the relations between the parties," attempts to save the unity of international law, ensure the observance of its imperative rules and consistency amongst different international obligations, without interfering with the interpretation of particular rules in accordance with the interpretative canon already established. The "state of necessity" rule is certainly not *pertinent* to the interpretation of a rule such as Article XI of the Treaty, which is very different conceptually. By way of example, the benefit intended to be achieved from the "state of necessity" rule could

[10] See § 613.
[11] See § 614 and 615.
[12] See § 616.
[13] See § 617 and 618.

also be achieved in opposite direction through reliance on the fundamental principle of a State's permanent sovereignty over its natural resources.

27. . The award rendered in *Continental* was also relied on, arguing that such award expressly verifies the link between Article XI of the Treaty and Article 25 of the ILC Draft Articles, because both attempt to render the application of international obligations more flexible and end up forgiving conducts that would otherwise be illegal; there lies the importance that the customary concept of "necessity" might have when it comes to interpreting Article XI.[14]

28. The tribunal in *Continental*, however, did not follow this path. Quite the opposite. Faced with the task of defining the content of the "necessity" concept in Article XI to determine whether the measures challenged by the claimant were necessary, the tribunal rejects the idea – given the different roles played by Article XI and "state of necessity" – that the interpretation of Article XI goes hand in hand with the requirements set by customary international law on the application of necessity. Considering that the wording of Article XI is rooted in the model clause included in U.S. friendship, commerce and navigations treaties – which, in turn, reflect the wording of Article XX of the 1947 GATT, – the tribunal deemed more appropriate to refer to GATT and WTO case law, which has largely addressed this concept within the context of economic measures that abrogate GATT obligations.[15] And faced with the argument that Argentina could not benefit from a "necessity" to which it had contributed, the tribunal concluded that Article 25 of the ILC Draft Articles could not be the yardstick as to the application of Article XI of the Treaty.[16]

29. As correctly pointed out in our case by the Respondent, it is one thing to interpret a phrase ("measures necessary") taking into account " any relevant rules of international law applicable in the relations between the parties" and a very different one to add requirements or demands to that expression that are not included in it.

30. On the other hand, Article 31.4 of the Vienna Convention provides that a "special" meaning will be given to a term if it is established that the parties so intended but, in the case at hand, there is no evidence that the parties intended to have Article XI interpreted on the basis of the requirements of "state of necessity" imposed by Article 25 of the ILC Draft Articles.

31. The Committee that annulled the award rendered in *Sempra* found that the tribunal exercised a manifest excess of powers by failing to correctly apply Article XI of the Treaty and concluded that Article 25 of the ILC Draft Articles was not an interpretative guide of the terms used in Article XI, but rather "[t]he most that can be said is that certain words or expressions are the same or similar."[17] The application of Article XI only requires that the measures be "necessary" to protect the objectives mentioned in the Article, not that they be necessary in accordance with the requirements of the "state of necessity".

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[14] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, § 168.
[15] § 192 *et seq*.
[16] § 234. Therefore, I believe the quote of this subsection included in the decision is out of place in the case at hand (par. 1069).
[17] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT) Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, § 199.

32. Certainly, Article XI of the Treaty is not meant to *replace* as *lex specialis* or *incorporate* the “state of necessity” as an interpretative rule. By introducing the “state of necessity” conditions into Article XI of the Treaty by way of “interpretation”, any operational exegesis of such provision based on its language and the intention of the parties therein reflected is neutralized; that is, any useful effect of Article XI of the Treaty is destroyed, which goes against the most basic rules of text interpretation.

33. Another thing is for the members of a tribunal to apply a more severe and restrictive interpretation of the terms of Article XI in view of its *object and purpose* if they consider such Article is restricted to protecting investments and investors.[18] This, however, would be a mistake because the object and purpose of these treaties also include the development of host countries (“greater economic cooperation,” “the economic development of the Parties…,”) they may not disregard the public interest to be safeguarded by the host State and, thus, they are to balance the interests of the State and those of investors.[19]

34. In the *El Paso* award, the tribunal recalls that “an interpretation of the fair and equitable treatment standard in the light of the object and purpose of the BIT may not exclusively rely on the interests of foreign investors,” referring to and expressly citing the “father of the ICSID Convention” (Aron Broches), who in a lectures held at the Hague Academy of International Law in 1972 stated as follows: “The purpose of the Convention is to promote private foreign investment by improving the investment climate for investors and States alike. The drafters have taken great care to make it a balanced instrument *serving the interests of the host States as well as investors.*”[20]

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35. Once the true nature of the rule embodied in Article XI of the Treaty is established and the initiatives to disguise it as the “state of necessity” are ruled out, Article XI should be interpreted within its own context in accordance with the general rule of Article 31.1 of the Vienna Convention.

36. Article XI should not be interpreted restrictively or broadly, but according to its own terms, in accordance with its ordinary meaning within the context in which it was drafted and considering its object and purpose.

37. As correctly noted by the tribunal in *El Paso*, pursuant to this rule "any interpretation has to begin with an examination of the *terms* of the treaty taken in the ordinary meaning. The wording of the treaty is deemed to express the intention common to the Parties, and what the Parties effectively agreed to, even though a Party might have wished otherwise on one or

[18] *Enron Corporation and Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3 (US/Argentina BIT) Award, 22 May 2007, § 331; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT) Award, 28 September 2007, § 373.

[19] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT) Award, 12 May 2005, § 359-360.

[20] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 Award, 31 October 2011, [Aron Broches, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States”, 136 Collected Courses, Hague Academy of International Law, (1972-II) p. 335 and p. 348. Emphasis added.]

another point. As long as such wishes are not expressed, the content of the treaty's provisions is paramount, and what is not there cannot be read into them...." [21]

38. Therefore, the application of Article XI of the Treaty depends on the measures adopted and implemented by Argentina being measures "necessary" for the maintenance of "public order" or for the protection of its "essential security interests". No more, no less. In this regard, let us recall that the parties' intention to provide an evolving meaning to terms of general nature, whose ability to evolve could not have been ignored by them and which are used in treaties executed for an indefinite or long period of time, should be presumed.[22]

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39. This is the sense in which the terms "public order" and "security" ought to be understood in a treaty – like the one at hand – executed for ten years and automatically renewable for an indefinite term unless one of the parties terminates it (Article XIV).

40. I believe we may share the criterion expressed in *Continental*, under which "public order" is a synonym for "public peace" which can be threatened by actual or potential insurrections, riots and violent disturbances; thus, the acts required to preserve or restore civil peace and ordinary social life, or to prevent and suppress events which might affect it – even if they are caused by serious economic and social difficulties – fall within the scope of application of Article XI of the Treaty.[23]

41. As to the concept of "essential security interests," it is undeniable that, particularly since the end of the *Cold War*, the concept has featured additional aspects other than the traditional military and defense against external threats dimension. Nowadays, we come across terms such as *economic* security, *energy* security, *ecological* security, *human* security…In *Continental*, the tribunal believes that the core of security interests includes not only political and military interests but also the economic security of States and of their population, concluding that a severe economic crisis may qualify under Article XI as affecting an "essential security interest."[24]

42. *CMS* and *LG&E* had already reached similar conclusions. In *CMS*, the tribunal noted that nothing in the object and purpose of the treaty could itself exclude economic crises from the scope of Article XI; what needed to be determined was how serious a crisis was supposed to be to qualify as an essential security interest.[25]

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[21] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 Award, 31 October 2011, § 590

[22] *ICJ, Costa Rica v. Nicaragua*, *Dispute regarding navigational and related rights*, Judgment of 13 July 2009.§ 66: "... where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is "of continuing duration," the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning."

[23] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, § 174.

[24] § 175, 178

[25] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT) Award, 12 May 2005, § 359-361.

43. In *LG&E*, the tribunal rejected the interpretation under which Article XI is only applicable to circumstances related to military action or war; concluding that a severe economic crisis does not threaten a State's essential security interest would minimize the chaos economy can create in the lives of the population and a government's capacity: "When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[26]

44. Likewise, in *Sempra*, the tribunal finds that nothing prevents it from interpreting that an economic emergency is included within the context of Article XI. Essential security interests may ultimately include events other than traditional military threats, which are the root of that legal concept in customary law.[27]

45. In *El Paso*, the tribunal "wishes to emphasize that a state of emergency can be of an economic nature, as stated by other ICSID tribunals in the Argentinian cases."[28]

46. Thus, there is no basis to hold that Article XI is not applicable to economic states of emergency. The threat to public order and the State's security posed by its failure to meet the basic services and needs of the population is not less serious than the threat of armed conflict or a chain of terrorist attacks.

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47. Based on the above premises, it can be easily deduced that the measures taken by Argentine authorities during the greatest economic and social crisis in its history were related, at their inception, to the maintenance of public order and the protection of essential security interests.

48. As summarized in *LG&E*, Argentina's essential security interests were threatened in December 2001. The State was faced with an extremely serious threat to its existence, its political and economic survival, the possibility to keep its basic public services running and the preservation of internal peace.[29]

49. In *Continental*, the tribunal provided a very accurate description of the crisis to conclude that it was covered by Article XI of the Treaty. The tribunal, after listing the series of political, economic and social calamities, noted that the fact that the Argentine Congress had declared a "public emergency" and enacted a specific law to face the crisis was powerful evidence of its seriousness – impossible to address through ordinary measures. The protection of essential security interests recognized by Article XI, the tribunal adds, does not require that "total collapse" of the country or that a "catastrophic situation" has already occurred or that the

[26] *LG&E v. Argentina,* ICSID Case No. ARB/02/1 (United States/Argentina BIT) Decision on Liability, 3 October 2006, § 238, 251-253.

[27] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT) Award, 28 September 2007, § 374.

[28] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 Award, 31 October 2011, § 611.

[29] *LG&E v. Argentina,* ICSID Case No. ARB/02/1 (United States/Argentina BIT) Decision on Liability, 3 October 2006, § 231-238, 257;

situation has already degenerated into one that calls for the suspension of constitutional guarantees. There is no point in having such protection if there is nothing left to protect.[30]

50. If what happened in Argentina was not a national emergency, it is hard to think of another situation that would be. It was precisely to address a situation like the one experienced by Argentina at the end of 2001 that a provision such as Article XI was stipulated.

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51. Were these measures "necessary"? As already stated – but it bears repeating – the standard to assess whether a measure is "necessary" under Article XI of the Treaty, which is a safeguard clause for such measures against the application of the other rules of the Treaty, does not have to match the standard of "state of necessity" as a state that excludes the wrongfulness of an act, pursuant to rules of general or customary international law, irrespective of the relation between such rules and Article 25 of the ILC Draft Articles.

52. Thus, by relying on the application of Article XI of the Treaty, Argentina is not supposed to prove that the measures taken were the "only way" to address a situation to which it had not substantially contributed with its own acts, as it would otherwise have to do if it relied on "state of necessity". Article XI does not contain these requirements.

53. For the *Continental* tribunal, the measures under Article XI are "necessary" when the State has no other reasonable, less restrictive and equally effective alternative to pursue the permitted regulatory objective. The tribunal is of the view that not every sacrifice can properly be imposed on a country's people in order to safeguard a policy that would ensure full respect towards the State's international financial obligations before a breach of those obligations can be considered justified as being "necessary" under Article XI of the Treaty. The standard of "reasonableness and proportionality" does not require as much.[31]

54. Moreover, while in view of the language used in Article XI it is inadmissible – as held unanimously by ICSID tribunals[32] and endorsed by the Decision (paras. 1030-1056) – to state that the Parties to the Treaty may unilaterally judge for themselves whether a measure is necessary or not to safeguard their public order or protect their essential security interests, it is only logical to expect that arbitrators, as an expression of self-control, behave prudently so as to recognize a certain margin of appreciation to States to take the measures they deem reasonable in good faith within the context in which they were adopted.

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[30] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, § 179-180

[31] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, § 227.

[32] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT) Award, 12 May 2005, § 359, 370, 373; *LG&E v. Argentina,* ICSID Case No. ARB/02/1 (United States/Argentina BIT) Decision on Liability, 3 October 2006, § 212-214; *Enron Corporation and Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3 (US/Argentina BIT) Award, 22 May 2007, § 332,337, 339; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (US/Argentina BIT) Award, 28 September 2007, § 374, 388; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, §187; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 Award, 31 October 2011, § 588-610.

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55. Argentina was faced with an acute systemic crisis, "tragic and unprecedented" in the world, as described by Kenneth Rogoff, IMF Chief Economist. The recession, of an economic nature at the outset, led to a critical state of national emergency when it resulted in an institutional and social collapse without precedent in Argentine history, fueled by the absolute absence of external support, high foreign debt, depression, deflation, high unemployment rates, outrageous indigence levels and extreme poverty, social disintegration, lootings and urban violence, power vacuum, and a perspective of chaos in late 2001. The prospects were of the worst kind in 2002, with the media publishing catastrophic headlines every day.

56. Based on these premises, it is my understanding that the measures taken by Argentine authorities to address the crisis were reasonable and proportional to the crisis. They were the measures that a good family father would have taken, pursuant to the traditional standard set out in the Civil Code to assess due diligence. They were measures even more reasonable than those proposed in the alternative, despite not being the “only” measures available – a matter I believe to be insoluble considering that renowned economists have conflicting opinions about the issue which, while not substitutes for arbitrators’ legal analysis, are part of the background information of such analysis.

57. Undoubtedly, those measures were taken essentially for the sake of maintaining public order, conceived as social order, and defending Argentina’s institutional, economic and human security. Those measures required significant sacrifices from the population in general and from investors as well, both local and foreign, who could not expect to be protected in an ivory tower while the State was burning in flames. Ultimately, they were effective, because they eliminated the threats.

58. Indeed, the measures proved to be adequate means, a reasonable and effective response, to preserve the financial and economic system, escape from the chaos, pave the way for rapid economic growth and avoid hyperinflation. The measures were advantageous, not only for the people but also for local and foreign investors. The State’s authority needed to be rebuilt, the social weave, severely injured, needed to be restored, and greater damage to the business activity had to be prevented. The measures allowed for the maintenance of public order, seriously threatened, without resorting to solutions outside the scope of the Constitution; the protection of essential security interests, amidst popular discontent, without resorting to repression; and the preservation of the financial and economic system, which was heading for collapse.

59. Even in the *El Paso* award, the tribunal notes that “the measures adopted in the context of the crisis were not arbitrary but reasonable and consistent with the aim pursued. They were intended to face the extremely serious crisis that Argentina was going through and emanated from the police power regularly exercised by governments”[33] and acknowledges that “the subsequent evolution of the Argentinian economy might give some confirmation of the adequacy of the policy followed,”[34] although eventually, by majority vote, the tribunal decided

[33] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 Award, 31 October 2011, § 322.
[34] § 324.

not to grant the benefit under Article XI of the Treaty because "Argentina's failure to control several internal factors, in particular the fiscal deficit, debt accumulation and labor market rigidity, substantially contributed to the crisis," while their progressive worsening affected Argentina's ability to "respond adequately to external shocks."[35]

60. In line with this, in the case at hand, somewhere in the Decision (e.g., para. 878) the Tribunal notes that the Argentine Government tried to take the best measures to address the crisis and pointed out that whether such measures were indeed the best was difficult to assess, given the different opinions put forward by those who have analyzed the situation. The Tribunal acknowledges, based on the documents presented and the oral hearings, that the measures taken were seemingly the result of reasoned judgment, which did not prevent the Tribunal from depriving them of the benefit under Article XI of the Treaty because the majority considered that Argentina's failure to control several internal factors, in particular the fiscal deficit and debt accumulation and labor market rigidity, substantially contributed to the crisis. The progressive worsening of internal factors diminished Argentina's ability to respond adequately to external shocks (paras. 1113, 1124).

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61. The Claimants presented their case as though it were an ordinary dispute in an ordinary scenario, alien to the circumstances surrounding the situation described above and, therefore, taking the measures adopted out of context. As noted by the Respondent, which accused the Claimants of placing their claims in an inert space, the Claimants seek to present each measure separately, as if we were dealing with an abstract academic exercise instead of public policies aimed at addressing the country's problems in the face of the most dramatic situation in its history. Rebuilding the system after the convertibility regime, whose abrogation was an inevitable result of economic reality, called for the adjustment of a high number of rules and agreements that were linked to a fixed currency exchange system strongly supported by the international financial community. Thus, the measures are to be construed as a set of measures where the rearrangement of the natural gas prices needed to be understood in the context of the adjustment of all contracts in the domestic sphere.

62. If no measure had been taken after pesification, with thousands of contracts affected by it, serious damage would have been caused to both citizens and companies. In particular, it is untenable to argue that by isolating the core energy sector things might have worked out fine on their own. There lies the appropriateness of bringing Article XI of the Treaty into play to justify the authoritative intervention of public power and exclude the application of the substantive provisions of the Treaty whose operational scope is limited by the safeguard clause.

63. In *LG&E*, the tribunal noted that "[a] State may have several responses at its disposal to maintain public order or protect its essential security interests. In this sense,…Argentina's enactment of the Emergency Law was a necessary and legitimate measure on the part of the Argentine Government. Under the conditions the Government faced in December 2001, time was of the essence in crafting a response. Drafted in just six days, the Emergency Law took the swift, unilateral action against the economic crisis that was necessary at the time...; the

[35] § 656, 665.

provisions of the Emergency Law that abrogated calculation of the tariffs in U.S. dollars and PPI adjustments, as well as freezing tariffs, were necessary measures to deal with the extremely serious economic crisis."[36]

64. Likewise, in *Continental,* after analyzing the alternative measures available when the challenged measures were taken, the tribunal concludes that devaluating the peso and pesifying contracts was "inevitable" in the situation Argentina was facing in view of the unsustainability of the parity with the U.S. Dollar and in order to achieve a balanced distribution of the costs deriving from devaluation and the abandonment of convertibility once the fiction of the peso-dollar peg had been proved wrong by markets. The measures were sufficient to face the crisis and were reasonably and proportionally applied.[37]

65. In sum, based on the evidence available, Argentina's conduct generally met the requirements under Article XI to safeguard its hypothetical inconsistency with Argentina's substantial obligations.

66. The Tribunal, however, considers that the application of Article XI depends on verifying first that the State has not substantially contributed to the state of emergency that required the adoption of measures under Article XI. The Tribunal reaches this decision following *El Paso,* by way of interpretation, on the basis of Article 25.2(b) of the ILC Draft Articles which governs the "state of necessity", a concept that, as I have tried to prove, is quite different. Based on that interpretation, the Tribunal concluded that Article XI is not applicable because, in its opinion, Argentina substantially contributed to the crisis that it later attempted to mitigate with the challenged measures.

67. This requirement is not expressly nor impliedly set out in Article XI, nor can it be inferred from the general rule of interpretation embodied in Article 31 of the Vienna Convention, which has already been discussed. I must add that, even if I agreed with the Tribunal's premise – which I do not, – I would still be in disagreement with the Tribunal's conclusion. As will be noted further below, I believe Argentina's behavior was not a substantial cause for the systemic crisis that broke out in early 2001.

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68. Now, *temporary* restrictions are inherent in Article XI of the Treaty. The tribunals that have upheld the application of Article XI to Argentina's situation addressed by the Emergency Law share this view: "This exception is appropriate only in emergency situations; and once the situation has been overcome, i.e. certain degree of stability has been recovered, the State is no longer exempted from responsibility for any violation of its obligations under the international law and shall reassume them immediately."[38]

69. *LG&E*'s tribunal was more analytical when considering these restrictions. In the judgment of the tribunal, "from 1 December 2011 until 26 April 2003, Argentina was in a period of crisis during which it was necessary to enact measures to maintain public order and

[36] *LG&E v. Argentina,* ICSID Case No. ARB/02/1 Decision on Liability, 3 October 2006, § 239-242.
[37] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, § 200, 206-214, 223-233.
[38] *LG&E v. Argentina,* ICSID Case No. ARB/02/1 Decision on Liability, 3 October 2006, § 261.

protect its essential security interests."[39] These dates coincide, "on the one hand, with the… measure freezing funds, which prohibited bank account owners from withdrawing more than one thousand pesos monthly and, on the other hand, with the election of President Kirchner," and were chosen in view of the "notorious events that occurred."[40]

70. According to the *LG&E* tribunal, the outbreak of the crisis is to be set on December 1, 2001, a month before the enactment of the Emergency Law, because the state of emergency had already begun when the Law was approved (January 6, 2002), as successively extended.[41] The tribunal draws a distinction between "factual emergency," which would allow for Article XI of the Treaty to cover the measures taken until April 26, 2003, and "legislative emergency," which it attempts to discard in order to avoid the logical consequence that might imply the coverage of the measures taken during the Law operation, which is still in place.[42] The tribunal rightly notes that emergency periods should be "strictly exceptional and should be applied exclusively when faced with extraordinary circumstances."[43]

71. A rationale like the one in *LG&E* could be and is indeed shared by the Tribunal in the case at hand (para. 1128), although certain flexibility should be applied when defining the end of the state of emergency because it is too simple to set a fixed date to put an end to a period of *factual* emergency. Thus, in *Continental*, the tribunal denied Argentina the benefit of Article XI with respect to the measures taken in early 2003; conversely, the tribunal in *CMS* held that the crisis period ended somewhere between late 2004 and early 2005, arguing that while the crisis had not been completely overcome, particularly in the social sector, its repercussions were not as intense and widespread, and the Argentine economy had substantially improved.[44]

72. If this flexibility were applied, it would be correct to suggest that the state of emergency ended *throughout 2004*.

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73. However, Argentina urges the Tribunal to analyze whether the emergency measures were necessary to prevent a return to the crisis. Argentina argues that the duty to fulfill treaty obligations does not imply restoring the system in force before the crisis but to comply with treatment standards in the new context, which requires analyzing the new factual circumstances. The consequences of worsening living conditions, in particular for low-income citizens – cast into poverty and indigence – is a feature of the new social reality, claims the Respondent. Argentina is today the "country of the new poor" and poverty and indigence levels determine public policy. The country, Respondent adds, is faced with the challenge of social reconstruction in a polarized society, with significant sectors off the market both in terms of asset acquisition and education. Suggesting that the crisis ended somewhere between late 2002 and mid 2003 on the basis of references to economic recovery is wrong from a conceptual viewpoint. When a country hits the bottom, the crisis is not over. Argentina

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[39] See § 226.
[40] See § 230.
[41] In 2009, Law 26,563 extended the state of emergency for two additional years, until the end of 2011.
[42] See § 227-228.
[43] See § 228.
[44] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT) Award, 12 May 2005, § 249-250.

has still to recover the lost growth, it has not left the state of emergency behind. Reversing the measures taken, Respondent concludes, would bring back the threats of a crisis.

74. This argument, however, goes beyond the boundaries of Article XI, which was conceived to address specific situations within the framework of an agreed model of investment and investor treatment intended to be restored in all its terms and consequences once the circumstances that threatened the maintenance of public order or essential security interests are overcome.

75. In reality, taking into account the years that have gone by, what Argentina is saying is that the application of the treaty's neoliberal model is a permanent threat to Argentina's public order and security, which makes permanent the measures taken on the basis of emergency.[45] This, however, is alien to Article XI and part of another analysis, namely, the scope of the State's regulatory power to satisfy public interest and meet the commitments assumed towards the investments and investors protected under the Treaty. It is one thing to *suspend* the model for a while and a very different one to *abandon* it altogether when public interest is not deemed served by such model. If that were the case, what would be pertinent is the renegotiation of the treaty or its termination.

II. <u>Fair and Equitable Treatment</u>

76. Undoubtedly, there is tension between the State's regulatory power and the stability of the regulatory framework promised to the investor, which is considered an essential element of legitimate expectations. Fair and equitable treatment of the investor and investments requires that these expectations be respected. This tension significantly increases when the State has to face serious economic and social crises, systemic crises.

77. In *El Paso* award, the tribunal rightly noted that while "FET is linked to the objective reasonable legitimate expectations of the investors," these expectations "have to be evaluated considering all circumstances."[46] The standard entails "reasonableness and proportionality."[47] Following this criterion, "[t]here can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis."[48] The *El Paso* tribunal notes that "... the measures adopted in the context of the crisis were not arbitrary but reasonable and consistent with the aim pursued. They were intended to face the extremely serious crisis that Argentina was going through and emanated from the police power regularly exercised by governments."[49]

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[45] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT) Award, 12 May 2005, § 107.
[46] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 (US/Argentina BIT), Award, 31 October 2011, § 364.
[47] § 373.
[48] § 374.
[49] § 322.

78. Even tribunals mostly inclined to set limits to the State's regulatory power and expand investor's expectations recognize that upon a crisis, it is unthinkable for such crisis not to have consequences or for businesses to carry on as if nothing happened.[50]

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79. Tension increases even more when the investor, as in the case at hand, relies on the fact that the State assumed a particular and specific commitment of regulatory stability under the *umbrella clause* embodied in Article II.2(c) of the Treaty, pursuant to which: "Each Party shall observe any obligation it may have entered into with regard to investments."

80. First, it is necessary to fully understand what *umbrella clause* means.[51] While this general provision could be perfectly interpreted as a redundancy of *pacta sunt servanda*, it has generally been construed as transforming certain contract obligations assumed by the host State *vis-à-vis* the investor into *treaty* obligations and, therefore, such clause submits their enforceability to the dispute resolution mechanisms provided for in the treaty, avoiding the jurisdiction of the State's courts and/or other mechanisms agreed under contract.

81. In any case, applying the *umbrella clause* gives rise to two problems. The first problem lies in defining the boundaries between the contract obligations covered by the clause and those that are left out. In my opinion, there must be express stability commitments directly assumed by the host State *vis-à-vis* the investor in order for a contract obligation to be protected under the *umbrella clause*.

82. The second problem relates to the treatment that should be accorded to a contract obligation that is to be handled as a *treaty* obligation. It has been argued that one of the purposes of the *umbrella clause* was to prevent the State from depriving investors from their contract rights – considered by them as acquired rights – through a legislative or regulatory change of the applicable legal framework. If this were so, simply verifying the breach of contract obligations would be enough to hold that the treaty has been violated.

83. In my opinion, this point of view is inadmissible because it fully ignores the State's regulatory power, which is an attribute inherent in sovereignty whose exercise should be rooted in public interest and be judged under the circumstances. Therefore, if treaty coverage is extended to certain contract obligations, what follows is examining such obligations in light of the treatment standards agreed upon. No more, no less.[52]

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[50] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT) Award, 12 May 2005, § 356; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16(US/Argentina BIT) Award, 28 September 2007, § 269, 346-347.

[51] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT) Argentine Republic's Application for Annulment, 8 September 2005, § 89-100; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina,* ICSID Case No. ARB/03/13 (US/Argentina BIT) *BP America Production Company, Pan American Sur S.R.L., Pan American Fueguina, S.R.L. and Pan American Continental, S.R.L. v. Argentina*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, § 96-116; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, § 296-301.

[52] *Pan American Energy LLC and BP Argentina Exploration Company v. Argentina,* ICSID Case No. ARB/03/13 (US/Argentina BIT) *BP America Production Company, Pan American Sur S.R.L., Pan American*

84. This is the position the Tribunal in this case seems to uphold when it concludes (paras. 1013, 1132(b)) that Argentina has violated the *umbrella clause* embodied in Article II.2(c) of the Treaty "to the extent the obligations pertinent to the investment to which Argentina has specifically entered into with the Claimants have been breached and *have resulted in the violation of the standards of protection under the BIT*" (emphasis added). Of course, this is also my view.

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85. Now, under the circumstances, have investors been treated unfairly, inequitably, discriminatorily or arbitrarily? Or have they been deprived of their assets or defenses? The Tribunal understands and concludes that Argentina has breached the fair and equitable treatment standard (paras. 969-987 and 1132(b), in particular). I reach the same conclusion but following a different path.

86. Analyzing the impact of the *Emergency Law* (No. 25,561) and Decree No. 214/02 on pesification of the economy and the abrogation of the Convertibility Law, as well as the subsequent provisions on foreign investment treatment as of that date, implies considering from the outset whether, under the circumstances, the legislative change – *i.e.*, the loss of the legal stability Claimants claim to be an acquired right – breached the "fair and equitable treatment" standard under the Treaty.

87. In the *El Paso* award, the tribunal found the State may not unreasonably change the legal framework in violation of a very specific commitment not to do so, even if faced with an extremely serious economic crisis.[53] If it did, it could be said that the exercise of the State's regulatory power in disregard of a particular and specific obligation to keep the investment's legal framework in force is not consistent with the treatment standards under the Treaty, which are applicable when the tribunal concludes there is no state of emergency. The State has to be liable for its mistakes, notwithstanding the fact that all circumstances must be taken into account when assessing the standards agreed on and the consequences of their breach.

88. The way I see it, even if Article XI of the Treaty were set aside, the loss of legal stability Claimants consider to be an acquired right would not breach the "fair and equitable treatment" standard under Article II.2(a) of the Treaty if the significance of public interest in a state of emergency like the one experienced by Argentina and the role that State institutions are to play faced with such contingency are weighted, which would be required to exercise its undeniable regulatory power to its fullest.

89. It would have been irresponsible in that case not to take the measures challenged by the Claimants. They resemble travelers who are victims of a sunken ship and, when offered a seat in a lifeboat, waive their tickets claiming to be brought to shore in first class. It was fair and equitable for investors to share the burden imposed to others, whose dreams, expectations, hopes and also savings were vanished. There was no discrimination against them or

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Fueguina, S.R.L. and Pan American Continental, S.R.L. v. Argentina, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, § 112; *LG&E v. Argentina,* ICSID Case No. ARB/02/1 (United States/Argentina BIT) Decision on Liability, 3 October 2006, § 124.

[53] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 (US/Argentina BIT), Award, 31 October 2011, § 364, 374.

arbitrariness; simply, the same yardstick was used, the general rule. The Claimants, as the rest of the investors, were treated as mere mortals, not better or worse, under the circumstances – bad for all, disastrous for some (not the Claimants).

90. In response to those who take the requirements for the application of Article XI to their fullest, turning such provision into an *avant la lettre* clone of "state of necessity", it could be suggested that, conversely, Article XI was conceived to eliminate any doubt regarding the consistency between the "fair and equitable treatment" standard and the measures adopted in a state of emergency and applied in violation of specific legal stability commitments. It could be argued that one of the reasons why host States have accepted standards as flexible as these concerning the treatment received by investors has been the incorporation of safeguard clauses like the one embodied in Article XI of the Treaty.

91. The pesification of the economy and the repeal of the Convertibility Law had a strong impact on the dollarized economy. Contract obligations agreed in USD were converted into pesos at par and adjustment clauses as well as clauses that provided for dollar or other foreign currency indexation, or which were based on price indexes of foreign countries, were abandoned. The Argentine peso soon reached an exchange rate of 4 - 1 as against the dollar when the Government allowed it to float freely (Decree No. 260/02). Contracts had to be adjusted to the new circumstances through renegotiation by the parties, which were invited to equally share the effects of the change, following the principle of shared sacrifice, or through court order when agreement was impossible (Decree No. 214/02, Article 8). Insofar as the Administration prevented gas distributors and energy generators from passing the increases in prices requested by producers through to tariffs, the renegotiation was unsuccessful and, therefore, a *de facto* freeze of natural gas prices followed in the domestic market, where the value of the peso had dropped to 0.28 USD in May 2002 and producers were not allowed to cancel their contracts.

92. There is no doubt this is not what the Claimants had expected when they invested in natural gas production. They claim the State interfered with price setting after pesifying the contracts and forbidding natural gas distributors and energy generators to pass through to consumers the cost overruns represented by the prices agreed with gas producers upon renegotiating the contracts with no strings attached. According to the Claimants – which hold themselves out as beneficiaries of specific commitments and guarantees made by the Argentine Government, – their situation was substantially different from that of the rest of the Argentine economy.

93. In my view, such a statement is unacceptable in the context of a crisis like the one Argentina went through. Even if we were to admit that the Argentine Government allegedly committed to providing a stable legal framework to investors as of the date of the investment, the dramatic change in circumstances from the last decade of the 20th century to the early 21st century gave rise to a situation from which such commitment could not escape and corrected the assessment of the "fair and equitable treatment" standard that would have otherwise covered the Claimant's requests.

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94. Should we conclude, then, that the measures taken by Argentina stood up to and were consistent with the standards under the Treaty and, in particular, with the “fair and equitable treatment” standard embodied in Article II.2(a)?

95. Once again, the problem lies in setting the time periods within which to frame this interpretation of the standard. The criterion needs to be the one applied to the measures taken in a state of emergency invoking Article XI of the Treaty. If we understand that the "factual emergency," in the terms of the *LG&E* award, ended in late April 2003 or later, after the one-hundred-day grace period that is usually given to the administration (in this case, President Kirchner) after inauguration, the measures taken or extended afterwards could not benefit from the interpretation explained above. Any breach of a legal stability clause set out in contracts or licenses executed with the Claimants could not hide behind the State’s exercise of its regulatory power.

96. I have already stated, applying a flexible criterion, that the state of emergency ended “throughout 2004,” which would make me lean towards rescuing the First Gas Agreement signed on April 2, 2004 by the Argentine Government with the largest natural gas producers to ensure market supply, thus setting a price schedule that was supposed to provide a reasonable return on their investment and promising convergence to complete market deregulation when the Agreement came to an end (December 2006).

97. It is, however, an established fact that the promises contained in the First Gas Agreement were not met, which leads me to the conclusion that the adjustment and renegotiation process concerning natural gas production and supply contracts carried out from 2004 – upon violating the commitments undertaken by Argentina *vis-à-vis* the Claimants to ensure them a free market, free disposition of production, price deregulation, royalties and fiscal stability – breached the standard of “fair and equitable treatment” to which the Claimants were entitled under the Treaty.

98. Notwithstanding the above, other gas producers entered into agreements with the Government to ensure supply in exchange of guarantees of reasonable returns to producers through prices. This issue will need to be considered, of course, when determining the quantum of damages. Argentina has argued that, as a result of the agreements and programs sponsored by the Argentine Government, the wellhead price of natural gas recorded increases higher than transportation and distribution tariffs and, for most of demand, above the level prior to 2002 – exceeding, in some cases, the long-term contract projections signed in the 1990s. Thus, Argentina argues, the prices collected by the Claimants do not significantly differ from their projections, aside from the fact that the peso devaluation reduced their production costs in dollar terms.

99. That being said, there is no doubt there was a change from free prices to regulated prices and that the latter would remain in force irrespective of the exceptional circumstances that had justified such change, thus completely destroying the previous regulatory framework and breaching the specific obligations undertaken *vis-à-vis* the Claimants.[54] Even in times of

[54] *LG&E v. Argentina,* ICSID Case No. ARB/02/1 (United States/Argentina BIT) Decision on Liability, 3 October 2006, § 139: "The Tribunal […] recognizes the economic hardships that occurred during this period, and certain political and social realities that at the time may have influenced the Government’s

"economic emergency," the Argentine Supreme Court does not validate legislation that overrides legally acquired rights on a permanent basis.

III. <u>The State of Necessity</u>

100. I have serious doubts about the appropriateness of giving a role to the "state of necessity" in an investment dispute between a host State and an investor, especially when it is framed within a treaty that includes a safeguard clause such as that embodied in Article XI of the U.S.-Argentina Treaty.

101. Is the "state of necessity" a defense that can operate in investor-State arbitration? This is no longer – or not only – about the practical consequence that, since the requirements of the safeguard clause (Article XI) are less stringent than those of the "state of necessity" under customary international law, an arbitrator who is not willing to apply the safeguard clause would be even less willing to ground a decision on the "state of necessity".

102. This is about being very clear –something which is often confusing (as it is in the Decision, paras. 1028, 1062, 1063, 1066) – that the ultimate non-enforcement of the Treaty's substantive provisions in view that the safeguard clause (Article XI) is applicable in a particular case, does not eliminate the host State's hypothetical international responsibility for acts that can be challenged by the investor's State, either because such State believes its rights have been overridden or when it exercises diplomatic protection of its nationals, provided the requirements for such mechanism are met.

103. It is in this context that the host State could invoke the "state of necessity" to exclude the wrongfulness of its behavior, leaving the door open – in any case – for the reparation of any damage or injury caused. The operation of Article XI of the Treaty does nothing but safeguard the application of the measures necessary to maintain public order and the State's essential security interests *vis-à-vis* treaty obligations while the state of emergency is in force, but does not affect – in any case – the assessment of its lawfulness under rules of customary international law or other obligations undertaken in other treaties or any other source of obligations recognized by international law.

104. Be that as it may, analyzing the "state of necessity" defense at least briefly is – as already stated – mandatory because it was relied on by the Respondent and extensively discussed during the proceedings, where markedly different viewpoints were put forward and the Tribunal – after ruling out the application of Article XI – reached the conclusion that the measures taken by Argentina breached the "fair and equitable treatment" standard of investments and investors under Article II.2(a) of the Treaty.

105. It has to be presumed that if the factual situation does not meet the requirements for the application of Article XI of the Treaty, it will be harder for it to do so for the "state of necessity", which is a more stringent standard. The Parties agree on the exceptional nature of this defense, subject to strict and rigorous requirements. International case law, such as that

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response...But…Argentina went too far by completely dismantling the very legal framework constructed to attract investors."

of the International Court of Justice[55] or ICSID tribunals,[56] confirms this view. Conversely, it could be argued that if these requirements were met in the case at hand, they would meet the requirements under Article XI more easily,[57] a conclusion that would also please those who claim that this safeguard clause is to be construed on the basis of the "state of necessity" as an interpretative rule.

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106. The first condition is that the party relying on the "state of necessity" has not contributed to the state of emergency. This contribution, as specified by the ILC in its commentary to Article 25 of its Draft Articles, must be *substantial.* However, as noted by the Annulment Committee in the *Enron* decision*,* it is worth wondering if the *substantial* nature of that contribution calls for evidence that the State has deliberately attempted to create the situation to escape a claim for wrongful behavior or if a lower or higher degree of recklessness or negligence when making its decisions would be enough.[58]

107. In the case at hand, as already stated, the Tribunal incorporated this condition to Article XI of the Treaty by way of interpretation. My disagreement with this decision, which destroys the very own significance of such provision as a safeguard clause, has already been noted. However, even if – hypothetically – I had accepted the premise set by the Tribunal, my conclusion would still have been the opposite because, in my view, the measures taken by the Respondent were not the substantial cause of the systemic crisis the Respondent attempted to address.

108. According to the Claimants, who follow to the letter the opinions put forward by Professor Edwards in his written reports and oral deposition before the Tribunal, it was Argentina's wrong policies, and not external shocks, the cause for the crisis that broke out in late 2001. The Claimants argue that Argentine authorities never had the will to implement the reforms they knew were indispensable to avoid that situation.

109. Irrespective of the reply by the Respondent to the opinions of Professor Edwards, and the value they might have to ground a legal decision,[59] our case involves a number of factors, both internal and external (reversal of capital flows, decrease in exports, lower prices for exports, the strong depreciation of the Brazilian currency – Argentina's largest trading partner and competitor, – appreciation of the USD, increase in interest rates of the Federal Reserve, implementation of an economic contraction policy in a recessive phase of the Argentine

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[55] CIJ, *Gabcikovo-Nagymaros,*

[56] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8 (US/Argentina BIT) Award, 12 May 2005*,* § 317; *Enron Corporation and Ponderosa Assets, L.P v. Argentine Republic*, ICSID Case No. ARB/01/3 (US/Argentina BIT) Award, 22 May 2007, § 304.

[57] *LG&E v. Argentina,* ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, § 245, 258.

[58] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* 12 ICSID Case No. ARB/01/3 (United States/Argentina BIT) Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, § 387-389.

[59] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* 12 ICSID Case No. ARB/01/3 (United States/Argentina BIT) Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, § 392-393.

economy, with which Argentina itself had little or nothing to do,…) which, together, led to the outbreak of the crisis.

110. Professor Roubini, at odds with Edwards, noted that "minimizing the importance of such external shocks and their association with collapses of many currency pegs, including Argentina, is inconsistent with the facts." According to Roubini, these "large, severe and persistent" factors were an essential element of the outbreak of the crisis; no other emerging country in similar circumstances has been faced with them in equal magnitude, succession, and pace. In my opinion, it cannot be argued that Argentina's contribution to the crisis was *substantial* so as to prevail over external shocks.

111. Moreover, Argentina did try to implement the recommendations of international organizations; in fact, Argentine governments implemented major changes in economic policy following such recommendations, such as relaxing the labor market and opening to foreign trade so much so, as stated by Roubini, that Argentina became the "poster country" of the Washington Consensus. The IMF Managing Director presented Argentina as an example to follow: "Argentina has a story to tell the world…." The increase in disbursements to repay the debt was the main cause for fiscal deficit; the long-term cost of capital refinancing has more to do with the capital market than elements under the Argentine Government's control. Fiscal deficit is not a synonym with economic collapse and *default* on debt: developed countries have fiscal deficits much higher than Argentina's deficit during the entire crisis. With or without fiscal problems, there would have been a crisis.

112. As concluded by the tribunal in *LG&E*: "There is no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity. In these circumstances, an economic recovery package was the only means to respond to the crisis. Although there may have been a number of ways to draft the economic recovery plan, the evidence before the Tribunal demonstrates that an across-the-board response was necessary, and the tariffs on public utilities had to be addressed."[60]

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113. The second condition that, under Article 25 of the ILC Draft Articles, must be fulfilled for the "state of necessity" to operate is that the measures adopted be the "only way" to safeguard the State's essential interests from the grave danger of social dissolution and political anarchy. If we were to follow the criterion adopted by the Annulment Committee in *Enron*, this defense will be excluded only if there is a feasible and effective alternative that does not entail a violation of international law or a less serious breach of such law.

114. However, who gets to decide if there is any such alternative? The tribunal when it renders the award, having the benefit of knowledge and experience that were not available to the Government when it had to take the measures? The tribunal, applying the reasonableness standard of a "good family father" adequately qualified, on the basis of the information available as of the date on which the decision was made? Or else – as equally reasonable people may argue – should the State have a *margin of appreciation*? The Annulment

[60] *LG&E v. Argentina,* ICSID Case No. ARB/02/1 (United States/Argentina BIT) Decision on Liability, 3 October 2006, par. 257.

Committee in *Enron* was faced with these same questions, considering that the tribunal that had rendered the award had failed to consider a number of essential matters to assess whether the "only-way" requirement had been met and, if it had considered them, had been unable to explain the reasons that led the tribunal to its decision.[61]

115. Arbitration case law supports recognizing that a host State has a margin of appreciation. In *Continental*, the tribunal held that "a time of grave crisis is not the time for nice judgments, particularly when examined by others with the disadvantage of hindsight."[62]

116. The Respondent noted that before taking the challenged measures it tried to overcome the situation with other measures that proved to be insufficient. De la Rúa's Administration did everything in an attempt to maintain the effectiveness of the Convertibility Law (Law No. 23,928), including public expenditure reduction programs (a 13-% reduction in state worker's salaries and pensions) and tax increases, with the support of the IMF (rescue plan in 2000 of forty billion USD from international Organizations and foreign States.) In March 2001, the Argentine Government implemented new measures: 1) a debt swap (*megaswap*) for approximately 30 billion USD to improve maturities; 2) the modification of the exchange rate parity by adding the Euro to the USD as the basis for conversion; 3) a program to adjust public expenditure to real earnings (zero deficit).

117. However, these measures fueled mistrust rather than trust by markets and citizens and massive bank deposit withdrawals followed (25% in 2001) as well as capital flight, a dramatic reduction in reserves (40% in 2001), the IMF suspension of disbursements of agreed loans (1.6 billion USD for the last quarter of 2001,) and fear of default on Argentina's sovereign debt. Therefore, on December 3, 2001 (Decree No. 1570), the Government was forced to freeze bank deposits – which, in practice, translated into the abandonment of the convertibility system – until the restructuring of the foreign debt was completed. On January 6, 2002, Emergency Law No. 25,561 was enacted as the only possible and effective response to the crisis.

118. Even before the state of emergency was declared, renowned economists (Krugman, Musso, Frenkel & Danill) had warned that pesification was the "only way" to overcome the crisis. The Central Bank reserves would have been insufficient to meet demand. Dollarization would have not avoided the collapse of the banking system. If contracts had not been adjusted, social tensions impossible to handle would have unleashed. The *LG&E* tribunal, after specifically describing the state of emergency in Argentina, concluded that the Emergency Law was the kind of swift unilateral action against the crisis necessary at the time. This view was shared by the *Continental* tribunal.

119. It is always possible to resort to a "*but-for*" line of reasoning to argue that other measures could have been taken. It is not possible, however, to prove that alternative

[61] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* 12 ICSID Case No. ARB/01/3 (United States/Argentina BIT) Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, § 367-378.

[62] *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9 (US/Argentina BIT) Award, 5 September 2008, § 181

measures would have proven more effective. Conversely, it can be argued that the measures actually implemented substantially contributed to avoiding that the worst catastrophic outcome of the crisis became true.

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120. With regard to the other requirements listed in Article 25 of the ILC Draft Articles, the third requirement – *i.e.*, that an essential interest of another State or of the international community as a whole be not impaired – is completely alien to the case submitted to this Tribunal.

121. The fourth requirement, equal treatment, is fully met. I hereby incorporate by way of reference the considerations on discrimination and arbitrariness included in the Decision (paras. 865-893).

122. The fifth and last requirement is that the treaty does not prohibit reliance on the "state of necessity". According to the Claimants, both the object and purpose of the U.S. - Argentina Treaty, as well as its specific provisions, would imply such prohibition. In their opinion, such Treaty was mainly executed to protect investors during harsh times, so interpreting that the Treaty would allow Argentina to rely on the "state of necessity" defense would be totally inconsistent with the primary object and purpose of its execution, even more so in light of the background of Argentine history. However, the consequences the Claimants intend to draw from the object and purpose of the Treaty are exaggerated. The Treaty's object and purpose are, as already noted, something more than simply protecting investments.

C. Measures Concerning Export Restrictions, Export Withholdings and Royalties

123. As far as the measures on export restrictions and the re-routing of a specified amount of gas to the domestic market are concerned – as well as those on export withholdings and royalties, – it is worth noting first that the Respondent itself seems to hesitate when referring to the appropriateness of relying on Article XI of the Treaty to justify such measures. On the first pages of its Rejoinder, the Respondent focuses the application of Article XI on the measures concerning contract pesification, while relying on the tribunal's lack of jurisdiction for the remainder measures, on the *fork-in-the-road* provision for export restrictions and gas re-routing to the domestic market, and the tax-matter exception provided for in Article XII.2 of the Treaty for export withholdings. It is only later that the Respondent goes back to Article XI looking for shelter with respect to all these measures and argues that the 2004 energy crisis created a situation that could have affected "public order".

124. The natural gas shortage in Argentina in 2004 is a proven fact. The Parties have submitted conflicting opinions on its cause. In any case, I believe this "crisis" is independent from the systemic crisis that broke out in the austral summer of 2001-2002 and, therefore, it should be assessed by its own merits and not as a corollary of the latter. In January 2002, export contracts were not affected by pesification. In fact, the export of natural gas made available a large amount of foreign currency to producers. Article XI of the Treaty or the interpretation we have proposed on the fair and equitable standard in the above paragraphs

may not cover for the measures taken to ensure domestic supply to the detriment of producers' export and fiscal stability rights previously recognized by the State. Undoubtedly, natural gas domestic supply is a primary and fundamental objective in any country, as well as collecting taxes, rates and duties to meet public service needs, including energy supply. However, these circumstances are completely foreseeable and need to be considered in any cautious and prudent law.

125. In fact, with regard to export permits, the legislation in force before the challenged measures were implemented provided over and over again that domestic market needs had to be met. These legal guarantees go against Argentina's argument, not for it. Export permits were granted after assessing domestic supply needs. Setting the provisions concerning excess gas exports aside, export authorizations were given as firm and final permits whose suspension or cancellation was only possible under the circumstances provided by law. Thus, Argentina should have demonstrated that producers holding export rights over certain natural gas volumes had breached their legal obligations. From this perspective, I understand that the measures taken were not – are not – *necessary* pursuant to a reasonable interpretation of Articles XI and II.2 (a) of the Treaty.

126. As far as the export withholdings and the calculation basis for the payment or royalties are concerned, the challenged measures were protected by the Emergency Law, but they were applied only after the Government decided to restrict exports and force the re-routing of certain natural gas volumes to the domestic market. Therefore, the appropriateness of Article XI of the Treaty needs to be considered only from the 2004 energy crisis viewpoint, which leads to the same conclusion reached on these measures. Argentina has breached the fiscal stability commitment assumed *vis-à-vis* the Claimants, covered by the *umbrella clause*, which is inconsistent with the fair and equitable treatment standard. A different issue is establishing the consequences with respect to damage and injury caused, which will be considered when determining the amount of reparation.

Professor Antonio Remiro Brotóns
Arbitrator
Date: March, 27, 2013