INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Case No. ARB/02/16 and ARB/03/02

BETWEEN

SEMPRA ENERGY INTERNATIONAL & CAMUZZI INTERNATIONAL, S.A.

Claimants

-and-

THE REPUBLIC OF ARGENTINA

Respondent

OPINION OF JOSÉ E. ALVAREZ

INTRODUCTION

1. My name is José Enrique Alvarez. I have been asked by the law firm of King & Spalding LLP, counsel for Sempra Energy International and Camuzzi International, S.A. ("*Claimants*") in this claim, to give my opinion concerning certain issues arising at this stage of this proceeding, in particular those raised in the Witness Statement of Anne-Marie Slaughter and William Burke-White, dated July 19, 2005 (henceforth "Statement").

QUALIFICATIONS

2. I have been teaching and writing on public international law issues, including questions directly relating to foreign investment, for over 20 years. As is described in further detail in my curriculum vitae annexed to this opinion (Annex 1), I first became familiar with these issues as an attorney-adviser in the Office of the Legal Adviser of the U.S. Department of State in the course of arbitrations before the Iran-United States Claims Tribunal from 1983-85. As an attorney-adviser in the Office of International Claims and Investment Disputes, I handled "small" claims ($250,000 or less) on behalf of private U.S. claimants and government-to-

government (or "official") claims on behalf of the U.S. Government. I also assisted attorneys from the private bar responsible for "large" claims on behalf of U.S. claimants. That tribunal established numerous precedents relating to the admissibility and merits of claims arising from alleged breaches of the doctrine of state responsibility as well as alleged violations of a Friendship, Commerce and Navigation (*"FCN"*) Treaty between the United States and Iran.

3. My next position in the Office of the Legal Adviser was with the Office of Economic, Business and Communications Affairs, for the period of mid-1985 through 87. As the principal attorney-adviser responsible for issues relating to foreign investment, I was the chief negotiator for the United States for bilateral investment treaties (*"BITs"*). In that period, I and an attorney from the United States Office of the Trade Representative represented the United States in various BIT negotiations. I also helped to draft the submittal letters for the first group of U.S. BITs submitted to the Senate for its advice and consent in 1986; responded regularly to inquiries as to the interpretation of these treaties by members of the public, other executive agencies and members of Congress; engaged in periodic assessments of the U.S. Model BIT text, and drafted the changes that would become the 1987 U.S. Model BIT; and was one of the two principal negotiators for the investment chapter of the U.S.-Canada Free Trade Agreement, which was the predecessor to Chapter Eleven of the North American Free Trade Agreement (*"NAFTA"*).

4. While I was still in the Office of the Legal Adviser, in the period of 1983-88, I began teaching as an adjunct professor of law at Georgetown Law School. Upon leaving the State Department, I became an associate professor of law at George Washington School of Law and subsequently a tenured professor of law at the University of Michigan Law School. I am presently the Hamilton Fish Professor of International Law and Diplomacy at Columbia Law School and executive director of Columbia's Center on Global Legal Problems. As is evident from my curriculum vitae, since 1988 I have regularly lectured and written on a wide range of issues in public international law. I have taught courses and published articles on foreign investment for approximately 10 years; supervised a number of student papers on the subject (several of which have been published in international law journals); given talks on BITs and related topics at a number of learned societies and law schools in the United States and abroad; and, in June 2003, organized an academic conference at Columbia Law School on "The

Regulation of Foreign Direct Investment," which drew some of the most well-known practitioners and academics in the field from around the world and resulted in a symposium issue of the Columbia Journal of Transnational Law. At the latest annual meeting of the American Society of International Law, I gave a lecture on "The Emerging Regime for Foreign Direct Investment."

5. At present, I am a member of the board of editors of the American Journal of International Law, a member of the U.S. Secretary of State's Advisory Committee on Public International Law, and a member of the Council on Foreign Relations. I have recently completed a term as Vice President of the American Society of International Law and will become its President at its Centennial Meeting in April 2006.

6. I have submitted expert testimony, relating to public international law and foreign investment legal issues, in both federal district court and arbitrations.

7. This opinion is based both on my personal experience as a negotiator of investment treaties on behalf of the United States Government and my knowledge as an academic long concerned with foreign investment issues. I want to indicate at the outset, however, that while I drafted the model text on which the U.S.-Argentina BIT was based, I was not in the U.S. State Department at the time that this treaty was negotiated; have no direct knowledge of any representations made by either party during the course of those negotiations other than what is in the public record; and do not now purport to speak on behalf of the U.S. Department of State (with which I therefore have not cleared my views). For purposes of preparing this Opinion, I have reviewed the U.S.-Argentina BIT, sections of the memorials and counter-memorials filed in this case, and the statement of Slaughter and Burke-White.

SUMMARY OF CONCLUSIONS

8. As set out below, I am of the view that, contrary to the views expressed by Slaughter and Burke-White, (1) Article XI of the U.S.-Argentina BIT, which is the "essential security/public order" clause, does not require a "broad reading" of either "essential security" or "public order;" (2) Article XI is not either self-judging or subject to a mere "good faith" interpretative test; (3) Article XI should not be presumed to apply to government actions

allegedly taken in response to an economic crisis directed at foreign investors and that the stringent traditional requisites of affirmative defenses under customary international law, such as necessity, need to be satisfied in any case; (4) the heavy burden of proof for affirmative defenses such as necessity lies with the party asserting such a defense and that party must demonstrate that the specific governmental actions that are alleged to violate a treaty were and remain "necessary;" (5) Article XI is not the equivalent of a "denial of benefits" or termination clause in that treaty, and, consistent with customary international law, does not permanently negate state responsibility to pay compensation for actions that harm foreign investors even when that clause is successfully invoked; and (6) Article IV(3) of the U.S.-Argentina BIT provides foreign investors with an additional right of non-discriminatory treatment if the government takes remedial action after civil or international conflict or comparable events.

A. The Arbitrability, Interpretation and Applicability of Article XI

9. Although the U.S.-Argentina BIT is part of a growing international network of more than 2000 such treaties, it remains first and foremost a bilateral treaty, reflecting a particular bargain struck between two discrete parties at a particular moment in time. As the United States affirmed when submitting this very treaty to the U.S. Senate for its consent to ratification, each BIT "must be interpreted in accordance with its own terms."[1] This accords with the customary international rules governing treaty interpretation, codified in the Vienna Convention on the Law of Treaties, which require giving principal consideration to the plain meaning of the language of the relevant treaty in accordance with its object and purpose, and secondary consideration to treaty context, along with, among other things, "any relevant rules of international law applicable in the relations between the parties."[2] These customary international law rules require that the U.S.-Argentina BIT be interpreted according to the plain

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[1] *See, e.g., Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova and Romania: Hearing Before the Senate Committee on Foreign Relations*, 103rd Cong. 27 (September 10, 1993) (Response of U.S. Department of State to Questions Asked by Senator Pell) (hereinafter "Hearings"), at Exhibit 1. *See also 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: Hearing Before the Senate Committee on Foreign Relations*, 102nd Cong. 32 (August 4, 1992) (Response of the Administration to Questions Asked by Senator Pell) ("The terms of a BIT continue to prevail between States notwithstanding changes made in subsequent treaties with other States), at Exhibit 2. Thus, a definition given a term in a later treaty with another state cannot be regarded as determinative of the meaning of that term in an earlier treaty that does not specifically define it.") (hereinafter "Hearing of August 4, 1992"), *see also* Exhibit 2.

[2] Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969; *entered into force* on 27 January 1980, 8 ILM 679 (1969), art. 31(3)(c) *available at* http://www.un.org/law/ilc/texts/treaties.htm.

meaning of *its* text, including *its* context, and, if necessary to confirm this meaning, *its* particular negotiating history. Except to the extent that the treaty's own provisions for most-favored-nation treatment provide otherwise, we must avoid improperly reading into this BIT provisions from other treaties or negotiating history connected to other BIT negotiations with other parties at other times.

10. Based on my personal experience with BITs and my reading of the U.S.-Argentina BIT and its negotiating history, including the letter submitted to the U.S. Senate and the Senate hearings on the treaty, it is readily apparent to me that Article XI of this treaty (which I will sometimes call an "essential security clause" for ease of reference) adheres to an objective and not a self-judging standard with respect to a state's taking of necessary measures.

11. Much of Slaughter and Burke-White's statement is devoted to their contention that Article XI of the U.S.-Argentina BIT must be interpreted as self-judging or as merely requiring that Argentina took certain actions in "good faith." In my opinion, this contention is unsupported by the accepted rules of treaty interpretation and further ignores the historical background against which Article XI was adopted. Slaughter and Burke-White's theory is unsupported by the ordinary meaning of the clause, the context in which it appears, and the object and purpose of the treaty. Nor is it supported by any evidence that the parties to the U.S.-Argentina BIT interpreted this clause as self-judging at the time the treaty was concluded or at any time thereafter. In fact, the historical context in which the U.S. and Argentina negotiated the treaty provides a strong indication that Article XI was not understood as self-judging at the time it was concluded.

12. Additionally, I believe Slaughter and Burke-White have not only misconstrued Article XI, as a general matter, but have improperly conflated the "essential security interests" provision within Article XI with its "public order" provision in an effort to bring both within the ambit of their erroneous "self-judging"/"good faith" approach to interpretation. All of the evidence cited by Slaughter and Burke-White for the proposition that Article XI is self-judging relates exclusively to the "essential security interests" provision. They do not provide any evidence to suggest that the public order provision has *ever* been considered self-judging in any investment treaty concluded by the United States, and in fact no such evidence exists.

13. Slaughter and Burke-White have raised the *Nicaragua v. United States* case before the International Court of Justice ("*ICJ*").[3] The ICJ issued the decision in the Nicaragua case in 1986, five years prior to the 1991 conclusion of the U.S.-Argentina BIT. To understand the import of that case requires a look at the specific treaty language. First, the essential security clause in the U.S.-Nicaragua FCN examined by the ICJ provides:

> *"the present treaty shall not preclude the application of measures [by the state]... necessary to protect its essential security interests."*

14. Second, the language in the General Agreement of Tariffs and Trade ("*GATT*") to which the ICJ compared the FCN essential security clause provides:

> *"Nothing in this Agreement shall be construed ... (b) To prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests."*

15. Finding the critical difference between the two clauses to be the use of the phrase, "which it considers necessary," in the GATT, the ICJ found the FCN essential security clause not to be self-judging or subject to mere "good faith" demonstration by the state alleged to have violated the treaty.[4] The ICJ found that the "it" in this key phrase — the "it" being the state and the state being explicitly designated to evaluate the necessity of essential security measures – makes GATT-type language self-judging rather than subject to the judgment of an external decision maker.

16. Now let us look at the language of Article XI of the U.S.-Argentina BIT:

> *"This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or*

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[3] *See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ 14 (Judgment on the Merits of June 27), at paras. 222 and 282, Exhibit 3. *See also Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, 1984 ICJ 392 (Decision on Jurisdiction and Admissibility of Nov. 26), at para. 83, Exhibit 4. Notably, in the *Nicaragua* case, the self-judgment issue was treated – quite properly, in my view – as a question of admissibility and jurisdiction.

[4] Only U.S. Judge Stephen Schwebel, in dissent, found the FCN essential security clause to be subject to "good faith" interpretation. This dissenting opinion appears to be the sole basis for Slaughter and Burke-White's assumption that Article XI incorporates a "good faith" test since nothing in the legislative history that they rely on explicitly incorporates such a test.

restoration of international peace or security, or the protection of its own essential security interests."[5]

17. Article XI tracks the language of the U.S.-Nicaragua FCN, and not the GATT language. On the basis of the ICJ decision in the *Nicaragua* case, it is apparent that, contrary to the contentions of Slaughter and Burke-White in this case, the meaning of the essential security clause in the U.S.-Argentina BIT is not "ambiguous" on this issue. Like every other provision of the BIT that is made equally subject to dispute settlement, this clause is *not* self-judging or subject to some exceptionally deferential "good faith" test.[6]

18. This conclusion is further confirmed by Article IV(3) of the U.S.-Argentina BIT, which accords investors from either party national and most favoured nation treatment with respect to losses suffered as a result of "war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events." Under Slaughter and Burke-White's interpretation of Article XI, Article IV(3) would not provide foreign investors with the intended protections since a state party presumably suffering under a war or other condition identified in that provision could determine on its own that it could take action discriminating against foreign investors without legal consequence. This is not correct. Article IV(3), as well as Article XI, anticipates that even in circumstances involving armed conflict, BIT investor rights remain arbitrable. Both Articles IV(3) and XI, no less than other BIT provisions, are stated in objective language. Both contemplate that, should an investor invoke the dispute settlement clause, an independent tribunal will indeed be required to "second-guess the specific outcomes reached by political bodies,"[7] as indeed the ICJ judges themselves did with respect to the U.S. President's proclamation of a national emergency in the *Nicaragua* case. The BIT, as under Article IV(3), makes clear that such an independent assessment is anticipated even in the context of war or other armed conflict when government actions are alleged to violate investor rights.

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[5] Treaty Concerning the Reciprocal Encouragement and Protection of Investments, *signed at* Washington, D.C., 14 Nov. 1991, entered into force 20 Oct. 1994, art. IV(3), (the "U.S.-Argentina BIT"), *see* Annex 2.

6 This conclusion comports with my experience at the U.S. State Department. My team and I were certainly aware of the ICJ's decision in the Nicaragua case.

7 Compare Statement, para. 77 (suggesting that judges and arbitrators should not second-guess the outcomes reached by political bodies). It is, of course, the job of international tribunals charged with resolving either interstate disputes or disputes between a state and a private party precisely to "second-guess" the decisions of the political bodies. For other examples where the ICJ did precisely this, see cases cited *infra* at notes 41 and 76.

19. This interpretation of Article XI is also confirmed by the legislative history of this treaty. That legislative history is replete with references to the principal object and purpose of BITs generally and this BIT in particular, namely to establish a more stable and predictable legal framework for investment and to provide U.S. foreign investors in Argentina with greater and more enforceable rights than they had previously enjoyed.[8] The U.S. Letter of Submittal for this treaty, dated January 13, 1993, (*"Letter of Submittal"*) attached as Annex 2, does not indicate — as one would expect from Slaughter and Burke-White's interpretation — that the treaty departs from these goals through a self-judging or good faith exception in Article XI to the underlying investment rights provided in the treaty.

20. The Letter of Submittal uses standard language, common to earlier Senate letters of submittal for prior U.S. BITs, to describe how this treaty "satisfies the main BIT objectives."[9] Notably, the Letter of Submittal highlights the fact that the U.S.-Argentina BIT "contains an *absolute* right to international arbitration of investment disputes," despite Argentina's earlier adherence to the Calvo Clause.[10] If that right was not "absolute," but could be punctured by either party's self-judging invocation of "essential security," this fact would surely have been noted by the U.S. Executive.[11] This is especially true in this case since the U.S. Executive can be

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[8] In fact, the Letter of Submittal was careful to note those few instances in which the U.S.-Argentina BIT might be seen as reducing the rights enjoyed by foreign investors. Thus, the Letter of Submittal explains the reason why, in the protocol to this treaty, the parties provided that in case of conflict between the U.S.-Argentina BIT and the preceding 1854 FCN between the parties, the BIT's provisions would prevail. As the Letter of Submittal explains, this provision was added at the request of the United States because the FCN had provided Argentine citizens with national treatment in real estate ownership in the United States and this right (which is contrary to some contemporary laws of states of the U.S.) could no longer be assured by the United States. (Message from the President of the U.S. Transmitting the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Treaty Doc. 103-2, at p. vii.) Interestingly, that 1854 FCN anticipated that even in case of rupture of friendly relations between the U.S. and Argentina, citizens of the two states would be permitted to continue their trade and would continue to have their property rights respected. (Treaty of Friendship, Commerce, and Navigation, Between the United States and the Argentine Confederation, entered into force Dec. 30, 1854, 10 Stat. 1005, 5 Bevans 61, article XII, *see* Exhibit 5.) One would have thought that if the later U.S.-Argentina BIT was intended to carve out a self-judging exception to such rights, this change, far more fundamental than the one noted in the Letter of Submittal, would also have been noted.

[9] Compare Letter of Submittal for U.S.-Argentina BIT, *supra* note 5, at p. vi, to Message from the President of the United States Transmitting the Treaty between the United States of America and the People's Republic of Bangladesh Concerning the Reciprocal Encouragement and Protection of Investment, Treaty Doc. 99-23, at p. vi-vii (addressing the "four main BIT objectives" in substantially similar terms), Exhibit 6.

[10] Letter of Submittal, at p. v, Annex 2. *See also* Statement of Hon. Daniel K. Tarullo, Assistant Secretary of State for Economic and Business Affairs, at Hearings, *supra* note 1, at p. 5.

[11] On the contrary, Assistant Secretary Tarullo indicated in the course of Senate hearings on the U.S.-Argentina BIT that "U.S. BITs are the most rigorous in the world." Hearings, *supra* note 1, at p. 5. This would hardly be an accurate statement if the BIT in question contained a provision that, at the option of one of the parties, would render BIT provisions non-arbitrable and thereby ineffective.

presumed to have knowledge of Argentina's lengthy history of periodic proclamations of "emergency" amidst perennial currency crises. Instead, there is nothing in this Letter of Submittal or in the subsequent record of hearings before the U.S. Senate to suggest that Article XI of the U.S.-Argentina BIT means anything other that what the ICJ, only a few years previously, had said a similar provision meant.

21. Slaughter and Burke-White are inconsistent about a crucial point: namely whether in their view the essential security clause in U.S. BITs was from the very beginning of the U.S. BIT program in 1982 intended to be self-judging or whether, in their view, this was a "reinterpretation" prompted only by the 1986 decision of the ICJ in the Nicaragua Case.[12] Both of these contentions are problematic. Their contention that later U.S. statements about the self-judging nature of the "essential security" clause, made in the course of other treaties after the conclusion of the U.S.-Argentina BIT, merely "clarified" an established interpretation long held by the United States is ahistorical and highly unlikely. It would mean that, contrary to what the ICJ found in 1986, all prior U.S. treaties with comparable essential security clauses, including the numerous U.S. FCNs concluded in the 20th century, would have a self-judging carve-out despite the fact that the U.S. insisted, as with respect to Mexico in the cases leading to the famous articulation of the Hull Rule, that such a carve-out does not exist under pre-existing customary international law principles of state responsibility.[13] This is a particularly implausible account of what the United States must have intended since all foreign investment scholars recognize that the U.S. FCN treaty program was intended to strengthen, not to undercut, Hull's views of the rights of U.S. foreign investors. Slaughter and Burke-White's peculiar

[12] Compare Statement paras. 15 and 18 (suggesting that this was the intention of the US "from the very beginning" and that later US actions were merely "clarifications") to para. 16 (suggesting that this was a new "reinterpretation" undertaken sometime before 1991).

[13] The 20th century version of U.S. FCNs emerged in the wake of numerous violations of U.S. investors' rights arising in the course of forms of conflict, interstate and civil. They emerged in particular following an armed intervention in Mexico by France in 1838 and the famous exchange between Mexico and the United States that led to the pronouncement of the Hull Doctrine. The Mexican foreign minister in his original exchange with U.S. Secretary of State Hull had asserted that the "political, social, and economic stability and the peace of Mexico" required the expropriatory measures it had taken against U.S. investors. Such claims were, as is well known, rejected by the United States, which affirmed then and later that customary international law required prompt, adequate and effective compensation and recognized no such general exception. *See* Andreas Lowenfeld, International Economic Law 397-99 (2002), Exhibit 8. Slaughter and Burke-White's a historical interpretation would have us believe that the same government that was ready to send gunships to protect its nationals' rights pursuant to international law throughout the 19th and early 20th centuries simply chose to defer to host nations' good faith assertions of emergency to justify violation of its nationals' rights. It asks us to believe that the United States, which affirmed the rights of its nationals in no uncertain terms and the right to espouse their claims, silently took a far more timid approach and implicitly renounced its rights under customary international law when it concluded treaties designed to protect its foreign investors' rights. Neither the U.S. government, nor any foreign investment scholar, has ever suggested this.

interpretation would also mean that, when the U.S. decided further to strengthen the protections accorded to its foreign investors through specific treaties devoted to their rights in 1982, namely by initiating its own BIT program, it decided to undercut the protections already accorded such investors under customary international law. This suggestion, which Slaughter and Burke-White also make in suggesting that the BIT provides a *lex specialis* regime in derogation from customary international law (see Statement, at paras. 65-72) is contrary to the very text of the U.S.-Argentina BIT, which provides, as do all U.S. BITs of this period, that both parties must respect, at a minimum, the pre-existing rights of foreign investors under existing international law, including customary law (see Article II(2)(a), IV(2), and Article X (b) of the U.S.-Argentina BIT). It is also contrary to the experience of U.S. BIT negotiators prior to the conclusion of the U.S.-Argentina BIT in 1991. Certainly, I, as the principal State Department BIT negotiator through 1986, never suggested to any prospective BIT party that Article XI was self-judging or subject to any special deferential "good faith" test and the sworn testimony before the U.S. Congress of another U.S. BIT negotiator, Kenneth Vandelvelde, suggests that any such suggestion would have been a departure from established U.S. policy, at least prior to the inclusion of specific language to this effect in the (unratified) U.S.-Russia BIT in 1992.[14] It is therefore historically implausible as well as contrary to the plain meaning of the U.S.-Argentina BIT to assert that its Article XI reflected an original understanding that it was intended to be self-judging.

22. The interpretation being urged by Slaughter and Burke-White would, as they appear to concede (*see* Statement, para. 18), render the U.S.-Argentina BIT a *less* effective instrument for investor protection and for stable investment rules than were the older FCNs (at least prior to the United States' unprecedented and unsuccessful argument in the *Nicaragua* case).[15] Indeed, their view that investor protections, such as those requiring compensation for unlawful takings or requiring fair and equitable treatment, are subject to the host state's self-

[14] *See* Statement of Kenneth J. Vandelvelde, Associate Professor of Law, included in August 4, 1992 Hearings, cited in Statement, at fn. 29.

[15] Note that the United States' unsuccessful contention in the *Nicaragua* Case concerning the interpretation of an FCN's essential security clause was particularly implausible given the fact that a few blocks from the ICJ, the United States was, at the Iran-U.S. Claims Tribunal, relying on an FCN treaty with Iran, not unlike the one at issue in the *Nicaragua* Case, with nary a suggestion being made by anyone, least of all the United States, that the U.S.-Iran FCN was subject to a self-judging essential security exception. Indeed, the United States continued to rely on the U.S.-Iran FCN treaty before and after the ICJ's decision in the *Nicaragua* case. Notably, the United States has not taken such a position with respect to FCNs with similar language since the *Nicaragua* case, whether in the ICJ or at the Iran-U.S. Claims Tribunal.

judgment, however unlawful, would render the U.S.-Argentina BIT a less useful instrument of investor protection than the established customary international law rules governing state responsibility for harm inflicted on aliens. This is an extraordinary interpretation that is manifestly contrary to Article X of the U.S.-Argentina treaty, which assures foreign investors that they will receive treatment under the BIT no less favourable than that provided under international legal obligations, presumably including the customary international rules of state responsibility. Their interpretation, so clearly at odds with the object and purpose of these treaties generally and this BIT in particular, would require explicit evidence that it was contemplated by both parties that negotiated this treaty. No such evidence is presented by Slaughter and Burke-White. There is certainly no evidence of such an interpretation in the Letter of Submittal, as is confirmed by the responses given by the U.S. Department of State to questions posed by Senator Pell in the course of hearings on this treaty. While the purpose of Senate submittal letters is to "describe significant provisions which differ from some of the past BITs or which warrant special attention,"[16] the Letter of Submittal for this BIT contains not one word about Article XI, and certainly does not say or suggest that it is self-judging or subject to any special deferential "good faith" interpretation. On the contrary, that Letter of Submittal indicates that, subject to the exceptions specifically mentioned in that letter (reflected in the protocol to the treaty), the Argentina BIT tracks the 1987 U.S. Model BIT being used at that time.

23. Contrary to Slaughter and Burke-White's contention that a self-judging or good faith interpretation can be imputed by silence, the customary rules of treaty interpretation require specific evidence of such a "special meaning."[17] In this case the treaty parties did not indicate that Article XI, unlike all other provisions in their treaty, would be subject to a unique evidentiary burden even though it is clear from the protocol to this treaty that Argentina and the U.S. did focus on the meaning of Article XI. In paragraph 6 of the protocol (presumably in response to Argentina's inquiry), the parties explain how the middle phrase of Article XI ("the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security") reflects, at least in part, their obligations under the UN Charter. If the parties saw

[16] Hearings, supra note 1.

[17] Convention on the Law of Treaties, art. 31(4) available at http://www.un.org/law/ilc/texts/treaties.htm.

fit to mention this unexceptional point in the protocol, they certainly would have mentioned any agreement on a "special meaning" to the exceptional effect that this article, unlike all other provisions in this treaty, is self-judging or subject to a "good faith" interpretation.

24. If Slaughter and Burke-White are suggesting, on the contrary, that the US "reinterpreted" the meaning of Article XI sometime after 1982 but before the conclusion of the US-Argentina BIT, the evidence they present at paras. 16-21 actually points to the opposite conclusion. Indeed, the events described by Slaughter and Burke-White in paragraphs 16-21 of their Statement only confirm my conclusions in paragraphs 9-20 above that Article XI presumes that it is subject to the same kind of objective interpretation foreseen for comparable provisions in prior U.S. FCNs. In my 1989 Exon-Florio article (cited in Slaughter and Burke-White's Statement at footnote 5, and annexed in relevant part as Annex 3),[18] I surveyed the same events, along with their relationship to the interpretation of the first group of U.S. BITs submitted to the Senate for consideration in 1986. The conclusions that I reached in that article are at odds with Slaughter and Burke-White's. As I indicated in that article, the ICJ's jurisdictional judgment in the Nicaragua case did indeed prompt a Statement by the U.S. State Department to the Senate Foreign Relations Committee on August 11, 1986, during hearings held on those first BITs. The State Department indicated at that time that it was "considering whether any future procedural action is necessary" for the United States to preserve its right to protect its essential security interests.[19] As I indicate in my article, however, the Administration ultimately did not take any further action to modify the texts of its first ten BITs nor did it take up the suggestion made by Senator Christopher Dodd that the ten-year termination clause of the U.S. Model BIT (compare Article XIV of the U.S.-Argentina BIT) be modified to allow the parties to terminate the treaty "because of over-riding foreign policy considerations or national security reasons."[20] While Slaughter and Burke-White are correct that the first eight U.S. BITs (which of course did not

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[18] Alvarez, "*Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*," 30 VA. J. INT'L L. 1 (1989) (especially at 28-30 and 37-39) (hereinafter "Exon-Florio"), Annex 3. The Exon-Florio provision in U.S. law permits the President to suspend or prohibit any acquisition, merger, or takeover of a person engaged in interstate commerce by or with foreign persons if foreign control would threaten to impair national security. In 1993, the statute was modified to permit the President to act in situations that could affect the national security. *See* 50 App. U.S.C. § 2405 (2004), Exhibit 9.

[19] Exon-Florio, *supra* note 15, at 38.

[20] *Id.*

include the U.S.-Argentina BIT) emerged from the Senate with that body's "understanding" that "either Party may take all measures necessary to deal with any unusual and extraordinary threat to its national security," I stand by what I wrote in my article, namely that because the understanding:

> *"merely restates an exception already contained in article X [the equivalent of article XI of U.S. Argentina BIT], does not address the issue of arbitrability, and constitutes merely an 'understanding' and not a formal 'reservation,' it is not clear what effect the Senate's action would have in terms of an arbitrator's interpretation of standard article X."*[21]

I conclude in my article that since the Senate or the Executive Branch could easily have created an exception to arbitrability for essential security or other matters, but did not do so, an "ICSID arbitration would presumably still have jurisdiction to decide whether article X was properly invoked in a particular case."[22]

25. In my Exon-Florio article, I also explain why the United States Government, despite its initial inclinations as expressed to the Senate in August of 1986, was ultimately reluctant to make the essential security clause self-judging or to modify the termination clause as Senator Dodd had suggested: either of those changes to the U.S. Model BIT would have rendered its much valued private dispute settlement provision, its principal method for enforcement, "valueless for U.S. investors."[23] As Professor Kenneth Vandevelde would later indicate to the U.S. Senate, a self-judging essential security clause in a BIT:

> *"potentially eviscerates the entire agreement. A treaty which permits a party to take any measure necessary to its essential security interests and which permits that party to be the sole judge of what is necessary to such interests arguably imposes merely illusory obligations on the party."*[24]

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[21] *Id.* at 39.

[22] *Id.*

[23] *Id.*

[24] Hearing of August 4, 1992, *supra* note 1, at p. 73, Exhibit 2 (Statement of Kenneth J. Vandevelde, noting that a self-judging essential security clause in a BIT would considerably diminish the protection afforded by the treaty).

26. Either change would also, as noted above, have severely undercut the value of the entire U.S. achievement with respect to securing such an agreement from Argentina, the state that gave birth to the Calvo Clause. Note that this would be particularly true under Slaughter and Burke-White's interpretation because their view maintains that all parts of Article XI – including a party's own evaluation of what is needed to maintain public order as well as its responses to international peace and security – would be subject only to a good faith evaluation by an arbitral tribunal. Of course, even the ineffectual Senate "understanding" attached to the first U.S. BITs in 1986 was not attached to the U.S.-Argentine BIT in 1993.

27. My account of these events accords with that provided by my predecessor as principal BIT negotiator for the United States, Kenneth Vandevelde. As Vandevelde indicates, prior to the *Nicaragua* case, the U.S. had never taken the position that the essential security exception in its FCN treaties was self-judging.[25] The State Department's Statement on August 11, 1986, to the Senate in connection with the first six BITs appeared to reflect a temporary willingness to reconsider the scope of the essential security clause in the immediate wake of the "highly charged atmosphere of the Nicaragua case" but, as Vandevelde also indicates, "no such action was ever taken" by either the State Department or the Senate.[26] According to Vandevelde, "[i]t was as if, upon reflection, the Department had decided quietly to abandon its Nicaragua position."[27] Professor Vandevelde's interpretation of the Senate's "understanding" as to the early BIT's is also identical to mine: "the Senate had very clearly stopped short of endorsing the State Department's position that the essential security interests exception was self-judging."[28] Vandevelde also notes that:

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[25] Kenneth J. Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX & BUS. LAW (1993), 172, Exhibit 7. Indeed, even at the same time that the *Nicaragua Case* was being heard at the Hague in the Peace Palace, a short distance away I, along with my other colleagues in the U.S. State Department, were relying on the U.S.-Iran FCN at the Iran-U.S. Claims Tribunal. On a number of occasions, that Tribunal affirmed the arbitrability of that treaty despite the turmoil caused within Iran in the wake of the Iranian revolution. As is suggested below, this is also consistent with the position of the parties and the ultimate determination of the International Court of Justice in the Case Concerning Oil Platforms (*Islamic Republic of Iran v. United Status of America*, Exhibit 10, which addressed the same treaty, which has an essential security clause comparable to the one in the U.S.-Argentina BIT).

[26] *Id.*

[27] *Id.*

[28] *Id.* at 173.

> *"there was no public record that any U.S. BIT-partner ever had been informed that the United States regarded the essential security interests exception as self-judging. Given that the International Court of Justice had rejected the United States' position, that interpretation could hardly be regarded as the obviously correct one. Yet, notwithstanding this fact, the Department did not appear to have taken any steps to ensure that BIT-partners were aware of the special meaning that the United States attached to this clause."*[29]

28. Contrary to what Slaughter and Burke-White suggest, these 1986 events demonstrate that, at least at the time when the U.S.-Argentina BIT was under negotiation, the U.S. Government had not yet asserted that the essential security clause exception bore a meaning so directly at odds with its plain meaning. While, as is discussed below, in negotiating certain other U.S. investment treaties, the U.S. would specifically provide that each party would determine for itself what was in its "essential security" interests, the U.S. has been clear in each case when it intends such a special meaning to attach, and makes sure that this is reflected in the text of the treaty, as well as in the relevant negotiating history. Even in these other investment treaties, however, the U.S. has not asserted that the "public order" exception was self-judging or subject to a "good faith" interpretation. At no time has the U.S. government taken the position advocated by Slaughter and Burke-White, namely that all matters embraced by Article XI, including public order, should be subject to a self-judging or good faith interpretation.

29. A comparison between the U.S.-Argentina BIT and the U.S.-Russia BIT, which was signed in June 1992, seven months after the U.S.-Argentina BIT was concluded, illustrates this point. Article X of the U.S.-Russia BIT, including its essential security clause, is identical to Article XI of the U.S.-Argentina BIT.[30] In contrast to the U.S.-Argentina BIT, however, the Protocol to the U.S.-Russia BIT clearly states that "the Parties confirm their mutual understanding that whether a measure is undertaken by a Party to protect its essential security interests is self-judging."[31] There is no such statement in the Protocol to the U.S.-Argentina BIT. That Protocol does refer to Article XI — paragraph 6 of the Protocol explains the meaning of the

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[29] *Id.*

[30] Treaty Between the United States of America and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment, 17 June 1992, U.S.-Russian Federation (unratified by Russia) (U.S.-Russia BIT), Exhibit 11.

[31] *Id.*, Protocol para. 8.

middle phrase of Article XI referring to obligations with respect to the maintenance of or restoration of international peace or security — but it says nothing about that clause, or the essential security clause or the public order clause, being self-judging or subject to some deferential good faith interpretation. If the United States and the Argentine Republic had intended to apply such a special meaning to all or part of the essential security clause, this point would have been included in the Protocol to the U.S.-Argentina BIT.

30. Contrary to what is sometimes suggested by Slaughter and Burke-White, the United States has not adhered to a uniform or consistent view with respect to the meaning of the essential security clause that was suddenly (but silently) clarified sometime after 1986. The United States' case by case approach to the arbitrability of essential security issues under treaties is further suggested by the investment chapter of the NAFTA, which is essentially a trilateral version of the U.S. Model BIT, concluded in 1994. Article 1138 of the NAFTA states:

> "*Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to Article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party, or its investment, pursuant to that Article shall not be subject to such provisions.*"[32]

31. This appears to be a limited carve-out from investor-state dispute settlement in the NAFTA, since it anticipates only the non-arbitrability of certain national restrictions on entry, but not on post-entry treatment, when these are imposed for national security reasons. This provision is presumably intended to protect the right of the U.S. President to take certain decisions pursuant to the Exon-Florio provision in U.S. trade law.[33] But, as is clear from its text, Article 1138 does not resolve whether the NAFTA's national security exception in Article 2102, which is comparable to the language contained in the original GATT and possibly self-judging on the basis of the ICJ's *Nicaragua* decision, is in fact self-judging or what that might mean to an

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[32] North American Free Trade Agreement, signed December 17, 1992, entered into force January 1, 1994, Article 1138 (hereinafter "*NAFTA*"), *available at* http://www.tcc.mac.doc.gov/cgi-bin/doit.cgi?204:64:c94477ae8445d1936563b14503eae97b2cf198aca90812eb7c17aa8dcc64f0bc:174.

[33] *See generally*, Exon-Florio, *supra* note 18.

arbitrator who presumably retains the competence to decide his or her own competence (*compétence de la compétence*).[34]

32. Most recently, the United States has proposed yet a third resolution of the essential security exception issue. Article 18 of the most recent U.S. Model BIT, dated February 5, 2004, contains the following clause:

> "*Nothing in this Treaty shall be construed:*
>
> *1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*
>
> *2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*"[35]

33. This article provides an additional exception not contained in the U.S.-Argentina BIT (precluding the requirement to provide certain sensitive information); drops one of the exceptions contained in Article XI of the U.S.-Argentina BIT (by making no mention of an exception for the "maintenance of public order"); and, again unlike the U.S.-Argentina BIT, makes the essential security clause as a whole subject to a party's own invocation of what "it considers necessary..."[36] This latest iteration of the essential security clause, presumably reflective in part of post-September 11 concerns within the United States, adopts the GATT-type language that was considered by the ICJ in the *Nicaragua* case to be self-judging, but shrinks its domain by removing the exception for maintenance of public order.

34. Taken together, the three distinct versions of an essential security exception in U.S. investment treaties discussed above illustrate vividly that: (1) the U.S. certainly knows how

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[34] *See* NAFTA, art. 2102 (providing that nothing in this agreement shall "prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests"). Note that Art. 2102 does not include an exception for "public order," whether self-judging or otherwise.

[35] 2004 Model BIT (Draft), released November 2004, Article 18, Exhibit 12, *also available at* www.state.gov/documents/organization/38710.pdf.

[36] Various post-1994 U.S. BITs already contain variations of these aspects of the 2004 U.S. Model BIT, *i.e.*, the U.S. BITs with Albania and Uzbekistan do not include the "maintenance of public order" provision; the U.S. BITs with El Salvador and Bahrain and the free trade agreements with Singapore and Chile use the "what it considers necessary" language but not in connection with public order.

to draft a self-judging exception when it wants to do so — as in the 1992 U.S.-Russia BIT;[37] (2) the U.S. knows how to render a particular issue non-arbitrable when it wishes to do so precisely — as in Article 1138 of the NAFTA; (3) the U.S. does not necessarily regard even GATT-like (ostensibly self-judging) "that it considers necessary" language as tantamount to rendering an issue non-arbitrable — compare Articles 1138 and 2102 of the NAFTA; and (4) more generally, that the U.S. is well aware that, under the standard rules of treaty interpretation, parties must establish special meanings at odds with the ordinary meaning of a treaty's text "conclusively" and by "decisive proof."[38] These three U.S. approaches to the issue also suggest that, contrary to what Slaughter and Burke-White conclude, the U.S. had *not* reached a uniform conclusion on whether to make a far-reaching essential security carve-out to its investment treaties at the time that the U.S.-Argentine BIT was negotiated, and that, indeed, the U.S. apparently still is experimenting with different resolutions of the issue, presumably dependent on a variety of circumstances, including the level of trust enjoyed with the particular treaty party with which it is negotiating.[39] Thus, while the 1992 U.S.-Russia BIT provides an example of one attempt by the U.S. in the course of one particular BIT negotiation to render matters relating to essential

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[37] Of course, the 1992 U.S.-Russia BIT does not mark the first time that the United States was involved in drafting an explicitly self-judging clause. As is well known, the United States was a key player in drafting the original 1947 GATT clause that was the subject of the ICJ's Nicaragua's 1986 decision. Long before 1986 the United States was well aware that submitting a matter to international dispute settlement subject to a self-judging clause was such a potential attack on a dispute settler's normal competence de la competence that the matter had to be explicitly provided for. *See also* note 38 infra.

[38] Waldock, Third Report on the Law of Treaties, [1964] II Y.B. Int'l L. Comm'n 5, 57 UN Doc. A/CN.4/1767 and Add. 1-3, at 57, Exhibit 13. *See also Legal Status of Eastern Greenland*, 1933 P.C.I.J., (ser. A/B) No. 53, at 49, Exhibit 14 ("if it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to [the word 'Greenland'], it lies on that Party to establish its contention"), *Conditions of Admission of a State to Membership in the United Nations*, 1948 I.C.J. 57, at 63, Exhibit 15 ("To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required"). Note that long before the U.S.-Argentina BIT was concluded, the United States adhered to an established practice of adopting specific language when it sought to render a specific determination to be one reserved for its own judgment and not for third party adjudication. Thus, when it submitted to the ICJ's optional clause in 1946, it included a clause precluding that Court's jurisdiction regarding "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America **as determined by the United States of America**." Declaration of United States, August 14, 1946, 26 VIII 46 (emphasis added). This continued to be the case at the time that the U.S.-Argentina BIT was concluded. Thus, for example, when the United States adhered to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1990, the Senate attached to that treaty a proviso requiring the United States to notify all present and prospective parties to that Convention that this treaty would not require action prohibited by the United States Constitution "as interpreted by the United States." U.S. Reservation, Understandings, and Declaration, Convention Against Torture, 136 Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990), Exhibit 16.

[39] Thus, in the course of Senate hearings on the self-judging essential security clause of the U.S.-Russia BIT, the Administration suggested particular reasons why it was confident that Russia would not abuse its self-judging privilege. It indicated that since Russia was "going to great lengths to attract U.S. investment in conversion of defense industries," this was a "strong indication that they will not be inclined to use this provision in an expansive manner to limit investment." Hearing of August 4, 1992, *supra* note 1, at 51.

security to be self-judging, the subsequent NAFTA includes a more limited and clearly stated exception to arbitrability, and the 2004 U.S. Model BIT suggests yet a third resolution.

35. The U.S.-Argentina BIT does not adopt any of these alternative conceptions of a self-judging essential security clause, even though the United States was put on notice by its loss in the *Nicaragua* case that an explicit statement was needed. The U.S.-Argentina BIT was also contemporaneous with the negotiation of the U.S.-Russia BIT where explicitly self-judging language was included, but only with respect to essential security and not public order. Even assuming that only one party's presumed intention is relevant to the interpretation of a bilateral treaty, which is not correct, it would be inappropriate to apply the United States' (differing) intentions reflected in these *other* treaties to the U.S.-Argentina BIT.[40] The explicit trade-offs reflected in other U.S. investment obligations strongly support the conclusion that, absent hard evidence that particular U.S. treaty partners were made aware of any special meaning attached by the U.S. to the essential security clause, that clause needs to be given its plain meaning.

36. To conclude, contrary to what Slaughter and Burke-White and Argentina (in its Counter-Brief in this case) suggest, the meaning of Article XI of the U.S.-Argentina BIT is not ambiguous and has a plain meaning: it is not self-judging or subject to a special good faith burden of proof.

B. PRINCIPLES OF TREATY INTERPRETATION ESTABLISH THAT ARTICLE XI IS NOT SELF-JUDGING

37. The basic rules of treaty interpretation establish that Article XI was not intended to be self-judging. Under the plain meaning of Article XI, the determination of whether it applies is an objective determination to be made by an impartial third party, as by this tribunal under the treaty's investor-state dispute settlement clause. The question of whether this provision applies is, like other matters in this treaty, an arbitrable issue under Article XII, and not a matter for one of the state parties to decide as a judge in its own cause. Article XI does not look to what one of the states, itself, considers necessary. As the ICJ has found on more than one

[40] *See supra* note 1. Slaughter and Burke-White provide, of course, no evidence that Argentine negotiators understood Article XI to mean anything other than what is suggested here and what its plain meaning suggests: namely that it is a clause subject to arbitral consideration and application like any other treaty provision.

occasion, invocation of an essential security clause with the Article XI type of wording is "not purely a question for the subjective judgment of the party."[41]

38. Applying the accepted rules of treaty interpretation set forth in the Vienna Convention on the Law of Treaties illustrates the point. First, Article 31(1) of the Vienna Convention requires that a treaty provision be interpreted in good faith in accordance with its ordinary meaning in its context.[42] There is nothing in the text of the essential security clause in Article XI stating or suggesting that each contracting State is the judge of the application of the clause. As noted, the U.S. Government knows how to make an essential security clause self-judging when that is what it wants to accomplish. But it did not do so in the U.S.-Argentina BIT. Slaughter and Burke-White's proposition would render superfluous the additional self-judging terms included in other U.S. investment agreements, such as the U.S.-Russia BIT, a position that clashes with fundamental principles of treaty interpretation.[43]

39. Second, under Article 31(1) of the Vienna Convention, a treaty provision must be interpreted in light of the object and purpose of the treaty.[44] The object and purpose of the U.S.-Argentina BIT is, as explained in the Preamble, "to promote greater economic cooperation between [the Parties], with respect to investments by nationals and companies of one Party in the territory of the other Party."[45] Indeed, the title of the treaty indicates that it is for the "Reciprocal Encouragement and Protection of Investment." A self-judging essential security interest clause would strongly derogate from the obligations imposed by the treaty for the promotion and protection of foreign investment. It would be inconsistent with the object and purpose of the treaty to infer a derogation of such magnitude without explicit textual support. With respect to the U.S.-Argentina BIT in particular, replacing the Argentine Government's ability to serve as its own judge in investment disputes with an impartial review process was a salient aspect of that

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[41] *See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment on the Merits, November 6, 2003, at para. 43, at Exhibit 10, in addition to the *Nicaragua* Case, *supra* note 3; *see also Case Concerning The Gabčikovo-Nagymaros Project* (Hungary/Slovakia), 7 ICJ Rep. (1997), at para. 51, Exhibit 17 (finding that a state is not the sole judge of the strictly defined conditions permitting invocation of a state of necessity under international law).

[42] Vienna Convention on the Law of Treaties art. 31(1).

[43] *See; e.g.*, R. Jennings and A. Watts, 1 *Oppenheim's International Law* 1280 (9th ed. 1992) (citing International Law Commission, *Commentary (Treaties)*, art. 27, para. 6, YBILC (1966), ii, 219), Exhibit 18.

[44] Vienna Convention, art. 3 1(1).

[45] U.S.-Argentina BIT, first preambular clause, Annex 2.

treaty, given the history of Argentine resorts to proclamations of "emergency" and resulting conflicts with foreign investors. After considering the U.S.-Argentina BIT, the Senate Committee on Foreign Relations recommended that the U.S. Senate ratify the treaty and noted in its Report:

> "Argentina, like many Latin American countries, has long subscribed to the Calvo Doctrine, which requires that aliens submit disputes arising, in a country to that country's local courts. This treaty, however, contains an absolute right to international arbitration of investment disputes. Consequently, U.S. investors will be removed from the restrictions of the Calvo Doctrine."

40. Third, Article 31(4) of the Vienna Convention provides that a "special meaning shall be given to a term if it is established that the parties so intended." Slaughter and Burke-White's opinion is a plea for attributing a special meaning to Article XI, which on its face is not self-judging.[46] Professor Kenneth Vandevelde, who held the BIT portfolio at the State Department before me, writes the following about applying such a special meaning to BITs concluded at the time of the U.S.-Argentina BIT:

> "The Vienna Convention does permit a party to a treaty to establish that language has a specialized meaning, but a specialized meaning must be 'established conclusively' by 'decisive proof.' It is unclear whether any such evidence exists with respect to any BIT except that with Russia ... With respect to the BITs concluded after August 1986, for the reasons explained above, various U.S. BIT-partners may well have concluded that the United States had abandoned its claim that the essential security

[46] Cf. Statement, at para. 35 (suggesting a "clear statement" rule requiring that treaties that are subject to international dispute settlement, like BITs, include a clause that they are not meant to be self-judging). This turns the clear statement rule that exists in international law, under VCT, article 31(4), on its head. When parties agree to submit their treaty disputes to international arbitration, they are presumed to also respect their arbitrators' general compétence de la compétence and that in the ordinary course their liability will be determined by the traditional rules governing state responsibility. Derogations from arbitrators' full power to review and to apply the traditional rules of state responsibility are not encouraged and certainly cannot be presumed by mere silence. Slaughter and Burke-White contend, on the contrary, that this traditional rule is undesirable since it would encourage states to include explicit self-judging language. Statement, at paras. 36-37. But indeed the merits of the traditional jurisdictional rule that, unless the treaty parties say otherwise, arbitrators have full power to review all alleged treaty breaches and to consider all affirmative defenses pleaded is precisely to force treaty parties to indicate when they want to deviate from this traditional rule in order to provide for a different form of review or to indicate that a matter that would otherwise be arbitrable is not to be reviewed by the arbitrators. Notably, the U.S. has been circumspect in deviating from the traditional rule, as in the Bahrain BIT, and has not given itself or its treaty partners self-judging discretion with respect to all issues embraced by the essential security clause, as with respect to public order. It has also suggested that some limited issues, as in the NAFTA as discussed, are not subject to dispute settlement at all. This is as it should be since arbitrators are entitled to presume that unless the parties say otherwise, they are not licensed to fabricate innovative new review tests, whether tests of good faith, "least restrictive alternative," or "order-of magnitude," and can rely on established law, such as the requisites for satisfying the necessity defense.

> interests exception was self-judging unless they were given information to the contrary during negotiations. Certainly, the total public silence on the part of the United States on this issue after 1986 does not constitute the decisive proof needed to establish a specialized meaning. Only if the matter was explicitly discussed during negotiations should it be concluded that the essential security interests exception in a post-1986 BIT is self-judging."[47]

41. I am not aware of any evidence that the United States conveyed any desire, during the negotiation of the U.S.-Argentina BIT, to interpret Article XI as self-judging, much less that any such understanding was the mutual intent of the parties. Slaughter and Burke-White refer to no negotiating texts or inter-governmental communiqués relating to the U.S.-Argentina BIT. The only documents pertaining to the U.S.-Argentina BIT to which they refer are materials that are part of the internal U.S. debates over ratification of the treaty. Nothing in these materials suggests that the essential security clause was intended by one or both parties to be self-judging. The remaining evidence relied upon by Slaughter and Burke-White relates to other treaties, and includes legislative materials relating to certain BITs submitted to the U.S. Senate in 1988, three years before negotiations on the U.S.-Argentina BIT concluded. The statements in these earlier internal debates merely acknowledge that the treaties at issue contained essential security clauses; they say nothing about whether the clauses are self- judging. *See* Slaughter & Burke-White para. 17. Slaughter and Burke-White also rely on similar evidence for other U.S. BITs negotiated or concluded after the U.S.- Argentina BIT. Whether or not these debates support the conclusion that the essential security clause in some U.S. treaties was intended by the United States (let alone the other contracting States) to be self-judging at least in part, no such evidence has been presented pertaining to the U.S.-Argentina BIT, nor is there any evidence that the Argentine Government was ever made aware of the Congressional debates cited by Slaughter and Burke-White. *See* Statement, paras. 19-21, 25-29.[48]

42. When the U.S.-Argentina BIT was submitted to the Senate in 1993, there was no mention that Article XI was intended to be interpreted, by either party, in the special way

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[47] Vandevelde, *supra* note 25, 174-75 (citations omitted).

[48] The point is not, as Slaughter and Burke White contend, whether Argentina has ever challenged the view that Article XI is self judging (Cf. Statement, at para. 45), but whether there is any evidence, apart from its pleadings in this and similar cases, that Argentina ever affirmed this special meaning during treaty negotiations or at the time the U.S.-Argentina treaty was concluded or submitted to its legislature, before it became an issue in cases like this one.

proposed by Slaughter and Burke-White. As I noted previously, the Letter of Submittal from the State Department to the President, which is intended to "describe significant provisions which differ from some of the past BITs or which warrant special attention," said nothing about Article XI.[49] The President's Letter of Transmittal to Congress that accompanied the U.S.-Argentina BIT was similarly silent.[50] Likewise, when the U.S.-Argentina BIT was submitted to the Argentine Congress for ratification, the record of proceedings contains no indication that the Argentine Government understood Article XI to be self-judging.

43. Fourth, Article 32 of the Vienna Convention authorizes resort to supplementary means of interpretation, including the negotiating history, to confirm the meaning of a term arrived at by applying the rules contained in Article 31 or when the application of Article 31 leaves the meaning of a provision ambiguous or obscure. In my view, there is no need to resort to supplemental means to interpret Article XI of the U.S.- Argentina BIT because there is no ambiguity or obscurity left after applying the rules of Article 31, as the ICJ indicated with respect to a comparable provision in 1986. Nevertheless, since the sources on which Slaughter and Burke-White rely offer only supplementary means of interpretation, I will respond to their arguments.

44. In support of their position, Slaughter and Burke-White cite a comment on the non-precluded measures clause included in the 1992 version of the Model U.S. BIT when it was submitted to Congress in July-August 1992. *See* Slaughter & Burke-White paras. 19, 28. In that communication, the U.S. State Department informed the U.S. Congress that it had decided to inform particular BIT partners that the essential security clause would have a self-judging interpretation. The U.S.-Argentina BIT, however, had been signed in 1991 and had been negotiated on the basis of an earlier U.S. Model BIT (presumably the 1987 model). BITs generally take some months, often years, to negotiate. As I have noted, during my time in the State Department and particularly during the period in which I was the chief negotiator of BITs for the United States, I did not understand the essential security clause to be self-judging. The plain language of the essential security clause that was included in the 1984 and 1987 Model BITs, just as the plain language of Article XI of the U.S.-Argentina BIT, did not state that the

[49] Hearings, *supra* note 1, Exhibit 1.

[50] Letter of Transmittal for US-Argentina BIT, supra note 5, Annex 2.

clause was self-judging. Nor did the State Department manual on which I was required to rely as a BIT negotiator indicate that the United States viewed the clause as self-judging. No one at the State Department suggested to me that the clause was self-judging and I was never instructed to make such a contention to prospective BIT partners. To my knowledge, during my tenure with the State Department no potential U.S. BIT partner was informed that the United States interpreted the essential security clause in its model BIT as self-judging. This is significant since given my position as the principal BIT negotiator at the Department at the time, any such pronouncement would necessarily have been made through me or with my knowledge.

45. I do not dispute that the State Department in 1992, after the end of negotiations on the U.S.-Argentina BIT, told Congress in the course of that body's consideration of other U.S. BITs, that it had begun to inform prospective BIT partners that the essential security clause would be self-judging. But this single statement in the course of a voluminous record says nothing about the exact nature of these assurances (e.g., whether it was applicable to all of part of the essential security clause) and this does not indicate whether these assurances, whatever their contents, were invariably made to all prospective U.S. BIT parties. The State Department certainly did not say that this new position merited re-opening BIT negotiations for treaties that were already in the pipeline (such as Argentina's) in order to make this change. This statement, in short, says nothing about the State Department's understanding of the essential security clause in the U.S.-Argentina BIT in 1991, let alone whether any such understanding *had been communicated to and accepted by the Argentine negotiators.* It strains credibility to believe that the U.S. Government chose to rely solely on a sub silentio interpretation between the parties to affirm an interpretation that the ICJ had recently concluded needed to be made explicitly on the face of a treaty.

C. ARTICLE XI AND "ECONOMIC EMERGENCIES"

46. I disagree with the assertion made by Slaughter and Burke-White that Article XI should be read broadly to extend generally to economic emergencies or matters of general economic policy (see Statement, at paras. 46, 54, 64 and 84). As is further discussed below, I believe that both the text of Article XI as well as the established pre-requisites for successful invocation of traditional customary international law defenses, including necessity, make it highly unlikely that government measures targeting foreign investors that ostensibly respond to

an economic crisis constitute the envisioned "measures not precluded." Before I address that question, I note that a government's general characterization of an alleged crisis as "economic" or of some other kind does not in itself determine whether Article XI provides a defense to its actions against investors. As was pointed out by the arbitral tribunal in *CMS v. Argentina*, BIT arbitrators are not being asked, when they apply clauses like Article XI, about the political judgments that drive a government to characterize a particular crisis as "political" or "economic."[51] Contrary to what Slaughter and Burke-White suggest, the principal question under Article XI is not whether the respondent government proclaimed, in good faith, a public emergency or was justified in enacting the Emergency Law of January 6, 2002 (Cf. Statement, at para. 62). Nor is the sole or indeed the most relevant question whether the respondent government can defend, in good faith, its determination that its "essential interests" were threatened between 2000-2002 (Cf. Statement, at paras. 39-40). The central question for arbitrators, as the CMS tribunal points out, is whether the *specific* measures that are alleged to have adverse consequences on the Claimants and to violate the BIT are necessary measures that are not precluded. In a case like this, the question is whether those Argentine government actions that allegedly violate the BIT, with respect to the gas tariff scheme and licenses at issue here, are "measures not precluded," whether or not Argentina proclaimed a national emergency or state of crisis. Reliance on Article XI requires showing a nexus between these specific challenged actions and maintaining public order or responding to a threat to its own essential security interests or to international peace and security. The issue is not, as Slaughter and Burke-White imply, whether Argentina suffered a sufficiently difficult situation in 2001 or 2002, but whether the government can demonstrate that the specific acts taken in violation of the BIT respond to the underlying threat and are limited to remedying it. This means, in particular, that Argentina must show that the threats it faced are connected in time to the actions that it took in response that are challenged in this proceeding. If, as Slaughter and Burke White sometimes suggest, the principal threats faced by Argentina were civil unrest and resulting damage to property, Argentina would need to demonstrate how permanently depriving the Licensees of the contractual rights granted in their licenses addressed such temporary threats. Similarly, if, as Slaughter and Burke-White also imply, the underlying threats to the Argentine state existed only from 2000 to 2002, Argentina would have, in my view, a very difficult time demonstrating why

[51] *CMS*, at para. 159.

any of its challenged actions that either preceded that period or remained in place after that time constitute "necessary" measures under Article XI. While Slaughter and Burke-White make very brief reference to some of the specific Argentine governmental actions that are under challenge in this case, such as the price freeze on gas tariffs, *see Statement, at para. 60,* their statement falls far short of satisfying Argentina's general burden of proof, much less the additional requisites needed to satisfy, as is discussed below, the specific defense of necessity.

47. Article XI is an example of a "public order/essential security" derogation clause that preserves the parties' right to take measures preserving the physical security of the state and civil society:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace and security, or the Protection of its own essential security interests."[52]

48. Article XI thus recognizes three types of non-precluded measures, none of which generally or presumptively encompass measures responding to "economic emergencies." First, Article XI refers to measures to maintain "public order." This term is generally understood to refer to actions taken to ensure internal security, often involving the temporary curtailment of individual liberties. Examples include imposing martial law, establishing curfews, implementing measures to quell coup attempts or insurrections, or otherwise safeguarding the security of the state's citizens.

49. Second, Article XI refers to "the fulfillment of obligations with respect to the maintenance or restoration of international peace and security." This language was included in the standard "essential security" clause included in U.S. bilateral investment treaties to preserve the rights of states to meet their peace and security obligations under the U.N. Charter.[53]

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[52] U.S.-Argentina BIT, art. XI, Annex 2.

[53] Note that under Slaughter's and Burke-White's interpretation of the essential security clause of the U.S.-Argentina BIT, both parties to that treaty would be saying, silently, that each of them would also have the right to determine unilaterally what the UN Security Council was requiring of each of them pursuant to Chapter VII of the UN Charter. This is not what Protocol 6 of the U.S.-Argentina BIT indicates.

50. Third, Article XI refers to "essential security interests." It does not refer to "emergencies," but "security" interests, and only those security interests that are "essential." This phrasing is considerably narrower than "essential interests" even though Slaughter and Burke-White often refer to the two phrases interchangeably.[54] I am not of the opinion that "essential security interests" is a particularly open-ended term. "Security" normally refers to military or defense matters and "essential" means only the most important or serious. However, even if one could possibly view the term more broadly, application of Article 31(1) of the Vienna Convention on the Law of Treaties and the *ejusdem generis* principle would necessitate that the phrase as it appears in Article XI be read in context with, and interpreted in light of, the phrases that precede it: "public order," and "maintenance or restoration of international peace and security." As these two phrases refer to matters of physical security, "essential security interests" should be read in a like manner. To the extent that customary international law defenses such as necessity may encompass actions responding to a purely economic crisis, I believe that Article XI's text suggests an intention, consistent with Article 25(2)(a) of the Rules of State Responsibility, to narrow that exception.[55]

51. The "public order/essential security" derogation clause of the U.S. BIT in use when the U.S.-Argentina BIT was concluded, identical to the one contained in the first group of BITs on which I worked and the 1987 model BIT that I helped to draft, was intended to indicate the possibility of three distinct gateways to using the well-established exceptions to state responsibility under customary international law. The clause was included at least partly out of an abundance of caution, as the U.S. was well aware that contemporaneous European BITs, such as the Belgium-Luxembourg BIT with Argentina, chose to rely on existing law and did not contain an explicit reference to such an exception. Such clauses were intended to recognize a narrow right of derogation in certain limited circumstances encompassed by Article 61 of the Vienna Convention of the Law of Treaties (supervening impossibility of performance) as well as those otherwise reflected either in customary international law or general principles of law. Today, these other exceptions are reflected in Articles 23, 24, and 25 of the International Law

[54] Cf. Statement, at para. 30. Note that this means that arbitral precedents referring to international obligations that permit actions to protect a party's "essential interests" also need to be examined with care.

[55] Article 25(2)(a) permits treaty parties to "exclude" (and presumably to narrow) the possibility of invoking necessity through specific treaty provision.

Commission's (ILC) Articles on State Responsibility, addressing "*force majeure*," "distress," and "necessity," respectively. These are the "relevant rules of international law applicable in the relations between the parties," which, under the Vienna Convention on the Law of Treaties, need to be used when interpreting the U.S.-Argentina BIT.[56]

52. Before I address the specific requisites of these customary international law defenses, it is necessary to address Slaughter and Burke-White's extraordinary argument that it is somehow improper to read Article XI in light of customary international law (*see* Statement, at paras. 65-72). While I would agree with their contention that the U.S.-Argentina BIT, like all BITs, creates a *lex specialis* regime that, among other things, provides foreign investors with an arbitral forum that would otherwise not be open to them for violations of their treaty-granted rights, I totally disagree with their suggestion that applying the customary international law rules of state responsibility, including those governing the defense of necessity, is contrary to either the text of Article XI or the object and purpose of this treaty.[57] As discussed above, the U.S.-Argentina BIT is replete with references to the backdrop rules of international law, including customary rules (see Articles II(2), IV(2), and X(b)). Indeed, it specifically states that foreign investors are to get the benefit of any additional protections to which they are entitled under those rules (see Article II(2)) precisely because the overall object and purpose of this treaty is to affirm the rights of foreign investors under existing international law, provide them with additional rights, and provide an international forum where the investor can vindicate all of these rights. Moreover, the drafters of the BIT were also well aware that unless customary international law or other international legal obligations were expressly excluded by the terms of the BIT, they were, quite properly, likely to be read into the treaty by the operation of the traditional rules of treaty interpretation, as indicated in article 31(3)(c) of the Vienna Convention on the Law of Treaties (providing that "any relevant rules of customary international law applicable between the parties" be considered along with context). To this end, consistent with the BIT manual from which I worked as a negotiator, I informed prospective BIT partners that Article XI needed to be read in light of pre-existing defenses under customary international law.

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[56] *See* Vienna Convention on the Law of Treaties, art. 31(3)(c), *supra* note 2.

[57] I therefore agree with the distinctions made in the Claimants' Memorial as to the nature of the BIT's *lex specialis* regime, at paras. 330-348 (arguing that while the US-Argentina BIT trumps Argentine law to the extent that law is inconsistent with the treaty, it envisions a complementary role for customary international law throughout its terms and provides that the foreign investor get the better of national law, BIT, or customary international law).

Indeed, it was not rare, based on the reference in that article to "measures necessary," for BIT negotiations to get into discussions of the doctrine of necessity under customary international law. For these reasons, customary international defenses such as necessity are routinely considered by international dispute settlers, alongside treaties that otherwise create comparable *lex specialis* regimes, whether through FCNs, BITSs, or other treaties. This is as true for the ICJ, *see, e.g., Oil Platforms Case*, as for ICSID arbitrators, *see CMS v. Argentina*.

53. I disagree with Slaughter and Burke-White's contention that this standard interpretation somehow makes Article XI of the U.S.-Argentina BIT superfluous. Article XI serves a variety of useful functions. First, at the time the U.S.-Argentina BIT was concluded, neither the United States nor Argentina had the full benefits of the International Law Commission's codification efforts, which, of course, culminated in its Rules of State Responsibility and attendant commentaries. It was useful, particularly at that time, to have a provision recognizing that unlike some treaties whose very terms or subject matter make customary international law defenses such as necessity inapplicable, such defenses remained applicable in the context of this investment agreement. Second, as noted above, the U.S. BIT's essential security clause attempted to delineate when, for purposes of this treaty, defenses such as necessity would remain permissible, namely in respect to measures necessary to maintain public order, to protect essential security, or to respond to the needs of international peace and security (such as the demands of the Security Council). To this extent, the United States sought to confine the customary international law defenses to these three instances, in order to limit the discretion of the state parties and further protect the foreign investor. Third, by clearly indicating that Article XI was merely a "measures not precluded" clause, and not a termination clause or a denial of benefits clause, the BIT parties clarified that a successful invocation of this provision would not preclude state responsibility, a proposition that was only later codified explicitly by the International Law Commission (as discussed below). For all these reasons, notwithstanding the relevancy of the backdrop rules of customary international law, Article XI is not superfluous.

54. Slaughter and Burke-White's contentions about the lack of connection between Article XI and customary international law is all the more bizarre and inconsistent given their own reliance on other backdrop customary rules, such as the customary rules of treaty interpretation which, like the rules on the defense of necessity, are not explicitly incorporated by

the U.S.-Argentina BIT. Their interpretation would also mean that it would be improper, for example, to consider the meaning of "fair and equitable treatment," "full protection and security" or the rules governing compensation for expropriation provided in that treaty in light of the abundant customary international law rules that underlie all of these investor rights. The terms of Article IV(2) clearly anticipate for purposes of expropriation, as does Article X(b) for the treaty as a whole, that the investor gets the benefit of explicit treaty rights or pre-existing international law rights, whichever is most favourable. Implicit in that formulation is the parties' acceptance that arbitrators under Article VII will be duty bound to consider customary international law, alongside treaty rights. As this provision suggests, it is not unusual in BITs for particular treaty provisions to restate rules of customary international law. As the United States has repeatedly indicated, including to its own Congress, many of the substantive investment protections in these treaties merely reflect rights that the United States believes are already protected by customary international law. Whether or not the United States is correct in this respect, no one has ever suggested that provisions like Article IV are therefore "superfluous" or that it would be wrong to apply that article in light of relevant customary international rules governing, for example, the determination of damages.

55. For these reasons, Slaughter and Burke-White's creative attempts to displace the customary international rules governing necessity with a "least restrictive alternative test," apparently inspired by U.S. Constitutional law (*see* Statement, at notes 91 and 92) cannot be taken seriously. As is further discussed below, the relevant customary international law defenses that are incorporated into Article XI, and that would apply in any case unless expressly displaced by treaty, anticipate that the burden of proof is borne by the party that asserts such an affirmative defense. Principles of substantive international law support this rule. Since international law presumes that states must comply with their international law obligations and seeks to discourage lack of compliance, it puts the burden on the party claiming an excuse from compliance. As is clearly stated by the International Law Commission and as has been repeatedly found by international courts and tribunals, an application of this principle is to heavily disfavour defenses like necessity by, among other things, imposing a heavy burden of proof on those seeking to invoke such defenses from compliance.[58] This makes sense from an evidentiary standpoint as

[58] As the ILC's Commentary indicates, Article 25 is phrased in the negative (indicating that necessity may not be invoked unless two factors are met), "to emphasize the exceptional nature of necessity and concerns about its possible abuse." ILC Commentary,

well as a substantive one. The burden of proof is put on those who would invoke defenses like necessity because this state party is usually in the better position to prove what the law requires: namely that the measures they took were in fact needed to address the significant threat, that they did not otherwise contribute to the state of necessity that led to the violation, and that their breach of international law was the only possible route of action. To the extent a state claiming necessity is unable to prove that it considered these issues and therefore carry its burden of proof with respect to them, that, in itself, is a reason to find that an affirmative defense has not been proven. For these reasons, I cannot disagree more with Slaughter and Burke-White's conclusion that the burden of proof is on the challenger of "necessary" action (*see* Statement at paras. 73-76) and I know of no international tribunal that has so held. Indeed, it would be extraordinary if those who rely on their international law rights, particularly private parties such as foreign investors or for that matter individuals under human rights treaties, would be themselves expected to prove that the governments who violate their rights had no other recourse but to violate their rights.

56. I also disagree with those portions of Slaughter and Burke-White's Statement that appear to suggest different standards with respect to affirmative defenses other than those codified by the International Law Commission in its Rules of State Responsibility. Slaughter and Burke-White draw unexpectedly wide conclusions from the statement in *CMS v. Argentina* that major economic crises are not in principle excluded from the scope of Article XI (see Statement, at para. 53). They fail to point out, of course, that that tribunal, ruling upon the same alleged situation of necessity at issue here, did not find that such a defense actually relieved Argentina of its obligations. The reasons that no tribunal of which I am aware has accepted a defense of necessity or other comparable defense in a context where a government takes economic actions ostensibly in response to an economic crisis is that the customary international law limitations imposed on these derogations from treaty obligations make it exceedingly difficult for this to occur.

57. "*Force majeure*," as reflected in both Article 61 of the Vienna Convention on the Law of Treaties and Article 23 of the ILC's Articles on State Responsibility, is the well-

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Article 25, at 202. See also Commentary at 194 (necessity applies to "exceptional" cases and is "narrowly defined"), 195 (will "rarely be available" and "strict limitations" are imposed to "safeguard against abuse"), 202 ("stringent conditions" are imposed).

established derogation that provided the principal inspiration for the standard public order/essential security BIT clause. That well-established derogation, as is clearly indicated by the ILC's attempt to codify it in its Article 23, only applies to situations or events beyond the control of a state that make it impossible to perform an obligation, such as an unforeseeable natural disaster. As the ILC's Commentaries clearly indicate, *force majeure* does not apply in cases in which "performance of an obligation has become more difficult, for example due to some political or economic crisis."[59] This derogation, then, is not applicable in cases involving alleged economic emergencies.

58. While I agree with Slaughter and Burke-White that the exception for the maintenance of public order in Article XI exists to enable a BIT party to take measures necessary to safeguard the lives of its citizens and to protect property, as in situations of hostilities or open riot, this exception needs to be understood in light of the customary international law exception for "distress" as recently codified by the International Law Commission in Article 24 of its Articles on State Responsibility. As the International Law Commission recognized, the wrongfulness of an act of a state in such cases "is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care."[60] This exception from international legal obligation, involving cases of "extreme urgency involving elementary humanitarian considerations,"[61] does not apply if the situation of distress "is due, either alone or in combination with other factors, to the conduct of the State invoking it."[62] As is shown by the ILC's Commentaries to this article, none of the underlying cases involving "distress" involves voluntary actions taken by a state in order to, for example, "stabilize its economy." And it is no surprise why this should be the case: it is difficult to see how this exception can be applicable in cases of voluntary or discretionary state action directed at solving perceived economic crises,

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[59] J. Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), at 171 (hereinafter "Commentaries"), Exhibit 19.

[60] *Id.* Article 24 at 174.

[61] *Id.* at 175.

[62] *Id.* Article 24(2)(a) at 174.

typically emerging in circumstances implicating at least partly the conduct of the state suffering the crisis.

59. In the same way, the Article XI exception for measures "necessary" to protect parties' essential security interests needs to be read in light of the international legal principle that inspired it, namely the well-established derogation for "necessity" now codified in Article 25 of the ILC's Articles on State Responsibility. Under that principle, as was recognized by the ILC, the state may invoke necessity as a ground precluding wrongfulness if (1) the act taken "is the only means for the State to safeguard an essential interest against a grave and imminent peril,"[63] which normally involves a threat to the very existence of the state[64] and (2) the state has not "contributed to the situation of necessity."[65] It is difficult even to conceive of an economic situation of such magnitude that it would genuinely both (1) pose the necessary threat to the very existence of a state *and* (2) require a solution preventing payment of compensation to a foreign investor. Indeed, the leading case involving an attempt to use necessity to excuse an economic debt cited in the ILC's Commentaries, the *Russian Indemnity* case, rejected the plea precisely because the arbitrators found it implausible that paying the sums due "would have imperilled the existence of the Ottoman Empire or seriously endangered its internal or external situation."[66]

60. Article XI is not, as discussed, merely a codification of existing customary international law defenses. Interpreters of this provision must read those customary defenses, including necessity, in light of the actual text of that article. The text of that article indicates that the measures not precluded are only those that a party takes in certain delimited circumstances, including measures necessary to protect a party's "own essential security interests." I disagree

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[63] *Id.* Article 25(1)(a) at 178. Although at one point, Slaughter and Burke-White acknowledge, as they must, that this is the law, see Statement, at para. 65, they appear to dispute it elsewhere, see Statement, at para. 73. The requirement that a state claiming necessity needs to demonstrate that what it did was the "only way" to respond to an underlying threat has, of course, been affirmed repeatedly by international tribunals since the ILC released its Rules of State Responsibility. *See, e.g., Oil Platforms Case* (ICJ), Exhibit 10; *Gabcikovo-Nagyaros Project* (ICJ), Exhibit 17; *Legal Consequences of the Construction of a Wall (ICJ Advisory Opinion)*, Exhibit 26; *CMS v. Argentina* (ICSID). Indeed, even sources cited by Slaughter and Burke-White acknowledge how well established this principle is. *See, e.g.*, Michael F. Keiver, The Pacific Salmon War: The Defence of Necessity Revisited, 21 Dalhousie L. J. 408, 413 (noting that jurists affirm that necessity requires, among other things, a demonstration that "the action taken by the state" is the "only one that could safeguard its essential interest") (cited by Slaughter and Burke-White at note 96).

[64] Commentaries, *supra* note 59 at 178.

[65] *Id.*, Article 25(2)(b) at 178.

[66] *Id.* at 180. Even in that case, the Ottoman Empire styled its defense as *force majeure* rather than necessity.

with Slaughter and Burke-White's contention that at the time the U.S.-Argentina BIT was concluded the United States had concluded that a reference to its "essential security interests" required a broad interpretation tantamount to "essential interest" (cf. Witness Statement, at para. 50). As I describe in the article I wrote on the Exon-Florio Act,[67] the United States has a history of distinguishing among different types of "essential interests." While the context of the Exon-Florio Act and bilateral investment treaties are dissimilar, the drafting history of the Exon-Florio provision on "national security" interests can shed light on what interests the United States was seeking to protect by including a reference to "essential security interests" in its BITs. As I document in my article, in 1987, just four years before the signing of the U.S.-Argentina BIT, members of Congress considered a proposal to extend the President's divestiture authority under the Exon-Florio Act to cover cases involving "essential commerce which affects national security." This proposal was ultimately rejected precisely because it would have permitted the Executive Branch to take action solely on the basis of economic considerations, which raised a concern that foreign governments might, in turn, do the same to U.S. investors.[68] For these reasons, the reference to "commerce" was dropped, and the President's discretion under the Exon-Florio statute was ultimately restricted to cases involving "national security."

61. Given this history, it is clear that, at the time the U.S.-Argentina BIT was signed and ratified, the U.S. Congress and the Executive Branch were well aware of the difference between national security interests and economic interests. Accordingly, the phrase "essential security interests" in Article XI of the BIT must have been intended to convey nothing more or less than its plain meaning: fundamental interests relating to defense or military concerns, usually involving exceptionally serious external threats to the security of the United States. This has been the established meaning in foreign policy and military parlance for many years. It is also the meaning that the ICJ gave the same phrase ("essential security") in comparable clauses contained in Friendship, Commerce and Navigation (FCN) treaties. The Court's rulings reflect the narrow interpretation given to the phrase: even open physical hostilities do not necessarily give rise to a defense based on protection of essential security interests. As I discussed earlier in

[67] Exon-Florio, *supra* note 18. The Exon-Florio provision in U.S. law permits the President to suspend or prohibit any acquisition, merger or takeover of a person engaged in interstate commerce by or with foreign persons if foreign control would threaten to impair national security. In 1993, the statute was modified to permit the President to act in situations that "could affect the national security."

[68] *See id.* at 63-85.

my statement, in the *Nicaragua Case*, the ICJ rejected the claims by the United States that Nicaraguan military activities posed a threat to the United States sufficient to permit the United States to invoke the "essential security" clause of the U.S.-Nicaragua FCN treaty (which provided that the "treaty shall not preclude the application of measures [by the state] ... necessary to protect its essential security interests").[69] In the most recent ICJ case addressing the meaning of an "essential security" clause in a FCN treaty, the *Oil Platforms Case* between Iran and the United States, both parties sought to invoke their rights under the Iran-U.S. FCN treaty to engage in free commerce in the face of armed hostilities between the parties. The Court rejected on the merits both the claim by Iran and the counter-claim by the United States, as well as the defense by the United States that its attacks on Iranian oil platforms were excused because they were conducted to protect essential U.S. security interests. As in the *Nicaragua Case*, the Court imposed a heavy burden of proof on a government trying to invoke its "essential security" to avoid obligations established via treaty. That the Court understood the essential security clause as applying to physical threats is supported by the fact that the Court examined the invocation by the United States of the essential security clause through the lens of "the principle of the prohibition in international law of the use of force, and the qualification to it constituted by the right of self defense."[70]

62. For measures to be cognizable under Article XI, they must not only fall within one of the categories described above but they must be "necessary" to accomplish such ends. It is not enough that measures simply be aimed at such goals. Similarly, in both the *Nicaragua Case* and the *Oil Platforms Case*, the ICJ found that the requirement that measures be "necessary" to protect a party's essential security interests imposed a distinct and heavy burden on the party seeking to rely on an "essential security" clause. In the *Nicaragua Case*, the Court, noting that "whether a measure is necessary to protect the essential security interests of a party is not ... purely a question for the subjective judgment of the party," found U.S. pronouncements of necessity to be insufficient to meet the "necessary" requirement.[71] In the *Oil Platforms Case*, the Court found that the United States had failed to sustain its burden of proof to show that its

[69] *See Nicaragua* Case, *supra* note 3, at 447.

[70] *Case Concerning Oil Platforms*, *supra* note 25, ¶ 43.

[71] *See Nicaragua* Case, *supra* note 3, ¶ 282.

actions satisfied the criteria of necessity and proportionality.[72] Of course, given that "essential security interests" refers to exceptionally serious, and by contrast to public order, external military threats, a measure "necessary" for the "protection" of that interest would normally involve a country's military or defense capabilities.

63. The text and meaning of Article XI, and each of its three components, thus supports the conclusion that Article XI is a highly restricted provision that is not *generally* available to a state claiming to suffer from an economic crisis. I am aware of no arbitral or judicial case presented to date in which an economic crisis would, in my opinion, trigger a successful application of a clause expressed in the same terms as Article XI. My conclusion about the scope of Article XI is bolstered by a review of the customary international law principles reflected in Article XI.

D. RELIANCE ON AND EVALUATION OF A DEFENSE UNDER ARTICLE XI

64. In line with the decisions of the ICJ in the *Nicaragua* and *Oil Platforms* cases, it is my opinion that Argentina bears a heavy burden of proof if it seeks to rely on Article XI in this case given (a) the text and meaning of Article XI and (b) the intentionally narrow derogations of necessity, *force majeure*, and distress available under international law. There is yet a third reason to impose an exceptionally heavy burden of proof on a party attempting to interpret Article XI as encompassing economic emergencies. If a state could invoke mere economic difficulties to justify reneging on foreign investment obligations, the very purpose and object of BITs would be eviscerated. As is clearly indicated by the history of BITs, the preamble to the U.S.-Argentina BIT, and the legislative history of this treaty in both the United States and Argentina the principal "object and purpose" of this treaty is to promote foreign investment in both the United States and Argentina and to protect foreign investors in each country. Article 31(1) of the Vienna Convention on the Law of Treaties directs interpreters to read the text of the U.S.-Argentina BIT in light of this object and purpose, and this is of course part of the relevant "context" for interpreting this treaty under Article 31(2) of the Vienna rules. Historically, the problems that BITs aim to solve emerge most often in times of economic crises, when host

[72] *Case Concerning Oil Platforms*, *supra* note 41, paras. 76-78.

governments are tempted, for financial or political reasons, to disfavor the interests of foreign investors, including through expropriatory measures or nationalization.[73] The U.S. BITs, and the U.S.-Argentina BIT in particular, must be interpreted in light of this well-known correlation between economic woes and the accompanying potential threat to foreign investments. BITs – the U.S. Argentina BIT being no exception – are designed in part to thwart a state from succumbing to the temptation of declaring an emergency due to underlying economic conditions, and thereafter injuring foreign investors' property or contractual interests at a time when these are most vulnerable. Consistent with the treaty's plain meaning, object and purpose, context, and negotiating history, it was this type of political risk that this treaty was intended to address in order to promote mutual flows of foreign investment. The U.S.-Argentina BIT was premised on both states relinquishing the ability to stabilize or rectify their economic situation in times of trouble by revoking legal protection granted to foreign investors. By signing the BIT, Argentina traded the right to use this tool in exchange for stability of investment expectations. This stability benefits Argentina as a host state by attracting investors who might otherwise consider investment in the country too risky. It would be a gross reworking of the bargain struck in the U.S.-Argentina BIT if Argentina were now permitted to claim economic exigencies to derogate form the rights it agreed to guarantee investors under the treaty.[74]

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[73] *See generally* Andreas F. Lowenfeld, *International Economic Law* (2002), Exhibit 8.

[74] Slaughter and Burke-White's repeated invocation of Société Commerciale de Belgique, at Statement, paras. 52 and 82, and their ambiguous contentions suggesting that Argentina has some kind of "order-of-magnitude" defense, appear intended to suggest that either the sums at stake in this case or in all investment disputes faced by Argentina or the "wider situation of financial collapse" (presumably back in 2001) so "jeopardized the very existence of the state" that Argentina ought to be relieved of its investment obligations. *See* Statement, at 77 -84. The cases they cite for this proposition are all drawn from the ILC's Commentaries for the Rules of State Responsibility and were duly considered by the ILC when they drafted Articles 23-25. Insofar as Slaughter and Burke-White are suggesting that financial inability to pay is a distinct defense under either customary international law or Article XI, apart from the defenses of force majeure, distress or necessity, nothing in the ILC Commentaries so states and I strongly disagree. Indeed, I do not understand Argentina to be making the claim in this case that the Greek government appeared to have been trying to make, but was rejected, in Société Commerciale, namely that it is now excused from paying its debts due to inability to pay. I am not aware of any successful invocation of a defense to state responsibility or to BIT obligations based on a functional equivalent of a plea of state bankruptcy. Dicta in Société Commerciale indicating that the question of Greece's capacity to pay was outside the scope of that proceeding does not provide support for such a new defense, which nowhere appears in the Rules of State Responsibility. Of course, such a defense would be expressly contrary to the object and purpose of BITs since absent special language these treaties are generally designed to prevent any such claims. Insofar as Slaughter and Burke White are suggesting, on the contrary, that a state's financial difficulties may threaten its very existence, their claim is reducible to a claim of distress, force majeure or necessity and we are back to considering whether the elements of these defenses and of Article XI are fulfilled. Although Argentina in its briefs sometimes appears to be suggesting that its fundamental attributes of sovereignty were threatened, at least back in 2001, it would still need to prove, under the requisites of necessity, as discussed, that it faced a threat to its "essential security" (and not merely to its economic interests), that the specific measures that it took against Claimants were the only way to safeguard against the threat to its security, and that it did not contribute to the underlying threat to these security interests. It would also need to show, as I argue in the next section, contrary to what is contemplated by both Article XI and the ILC Rules of State Responsibility, that it is relieved of paying compensation to injured investors even though its existence as a state is admittedly no longer threatened. The cases cited by Slaughter and

65. The exceptions in Article XI anticipate careful scrutiny, by an impartial third party, to determine whether particular measures taken by a state party are indeed "necessary" and respond proportionately to the underlying crisis cited in justification by the state.[75] The underlying international law derogations that Article XI reflects depend upon conscientious and independent scrutiny in evaluating whether they have been properly invoked and applied. Notably, the strict preconditions required for the proper invocation of necessity anticipate that "the State concerned is not the sole judge of whether those conditions have been met."[76] I therefore disagree with Argentina's numerous contentions that the tribunal presiding over this case should analyze the Government's actions and invocation of a defense of necessity with the highest deference to Argentina.[77] The Tribunal should consider Argentina's actions and its invocation of necessity with no less deference than it would afford any other substantive claim or defense arising under the U.S.-Argentina BIT. Indeed, the stringencies of Article XI discussed above suggest that, if there is to be a distinction in terms of deference, a party invoking Article

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Burke-White in their "order-of-magnitude" section of their Statement do not undercut this analysis, which is based on the ILC's black letter Rules for State Responsibility and the limited defenses recognized in Articles 23-25. While it is true, for example, that in the French Company of Venezuela Railroads award an umpire limited the damages due from the Venezuelan government, this was because much of the damage in that case was not caused by the Venezuelan government and could not be attributed to the government. *See French Company of Venezuelan Railroads* Case, Vol. X Reports of International Arbitral Awards, at 285 (Cf. Statement, at para. 80). This would continue to be the case today to the extent challenged action, whether under a BIT or otherwise, cannot be attributed to a government. I do not understand that the Claimants here are making any claims for actions caused by non-government agents and this case is therefore inapposite. Similarly, the fact that in these or other cases arbitrators may sometimes have suggested that they were willing to *consider* defenses of necessity in certain circumstances but ultimately found these claims not to satisfy the stringent requirements of that defense speaks volumes to the difficulties of proving that defense – as well as to the accuracy with which the ILC codified the black letter law in its articles.

[75] *See, e.g., Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, June 27, 1990, at paras. 57-59 (examining under a BIT "war clause" whether a state's security forces engaged in disproportionate destruction and whether the action was "necessary" or could have been "reasonably avoided"), Exhibit 21. *See also Nicaragua* Case, *supra* note 3, para. 266; *Case Concerning Oil Platforms*, *supra* note 41, ¶ 41.

[76] Cf. Commentaries, *supra* note 59, at 182, (quoting *Gabčikovo-Nagymaros Project* (Hungary/Slovakia), ICJ Rep. 1997, at ¶ 51). *See also Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 2004 ICJ Rep. 131, Exhibit 26, at para. 140 (applying article 25 of the ILC Rules of State Responsibility noting that the state is 'not the sole judge' of whether the conditions of necessity have been met, that necessity requires that the act being challenged be 'the only way for the state to safeguard an essential interest against a grave and imminent peril,' and concluding that construction of a wall was not the 'only means'). Similarly, *force majeure* anticipates a disinterested inquiry into whether the act in question was indeed brought about by an "irresistible force or an unforeseen event" that is truly "beyond the control of the State" and that makes it "materially impossible in the circumstances to perform the obligation." *See* Commentaries, *supra* note 59, at 170. *Force majeure* also anticipates an impartial inquiry into whether the state has by "neglect or default" brought about the situation. *Id.* at 171. Distress also anticipates someone other than the self-interested state weighing whether the "interests sought to be protected ... clearly outweigh the other interests at stake in the circumstances." *Id.* at 177.

[77] It is, of course, a fundamental rule of international law that a state's internal law provides no justification for its failure to perform a treaty. *See, e.g.*, Vienna Convention on the Law of Treaties, supra, note 2, article 27. Even assuming for the sake of argument that Argentina's challenged actions somehow respond to a "grave and imminent peril," its measures "need to remain in conformity with appropriate international law." *Consequences of the Construction of a Wall*, Exhibit 26, at para. 141.

XI should face a higher burden of proof than it would in respect of other provisions of the U.S.-Argentina BIT.

E. ARTICLE XI IS NOT THE FUNCTIONAL EQUIVALENT OF A "DENIAL OF BENEFITS" OR TREATY TERMINATION CLAUSE

66. Slaughter and Burke-White conclude in their Declaration that Argentina's declaration of public emergency, made in good faith, "relieves Argentina of its obligations under that treaty." Statement, at para. 62. While I do not claim particular expertise with respect to the facts of this case, to the extent that this reflects a legal and not merely a factual conclusion, I disagree. In particular, I disagree with their apparent contention that Article XI ought to be read as having the same effects as would application of the treaty's "denial of benefits" clause (Article I(2), reserving the right of either party "to deny to any company of the other Party the advantages of this treaty" in certain cases) or its termination clause (Article XIV, permitting termination of the treaty after an initial ten-year period subject to a one-year notice and protection of existing investments).

67. By its terms, Article XI states merely that the BIT does "not *preclude* the *application* by either Party" of certain measures (emphasis added); or in Spanish, "would not impede."[78] In other words, the state is permitted to take the measures. In contrast with Article I(2), however, Article XI does not permit either party to "deny" treaty benefits as if they never existed.[79] Nor does Article XI, in contrast with Article XIV, permit either party at its sole discretion to terminate the treaty for all or some investors once certain triggering events occur. The drafters of these provisions presumably intended some difference between clauses that (1) do not preclude or do not impede certain measures, (2) permit a party clearly to deny treaty benefits, or (3) permit treaty termination. Interpreting Article XI as, in effect, permitting one party permanently to deny treaty benefits on the grounds of public order or essential security eliminates the significance of the difference in wording between this clause and Article I(2). And the interpretation that Slaughter and Burke-White give to Article XI is directly at odds with

[78] The Spanish language version of Article XI provides that the treaty "no impedirá la aplicación," which literally means "would not impede" the application of certain measures. For these reasons, Article XI is not an affront to a government's ability to determine the existence of an emergency and to take action in response. Cf. Statement, at para. 44.

[79] Indeed, in the 2004 U.S. Model BIT the provision comparable to Article I(2) of the U.S.-Argentina BIT is titled "Article 17: Denial of Benefits," while the clause immediately following is titled "Article 18: Essential Security."

Article XIV(2) and (3), which clearly evince an intent to protect the settled expectations of foreign investors for a minimum of ten years after the treaty enters into force, as well as benefit those who have engaged in sunk costs by investing in the territory of either party in reliance on the rights conferred under the treaty. Under their interpretation, a state party is apparently free permanently to terminate treaty benefits even if it injures those who have invested in reliance on the BIT and even if these government actions enrich the government or other private parties.

68. The plain meaning of Article XI, which is essentially a "measures not precluded" clause, rather than a denial of benefits clause or a termination clause, reflects underlying principles of customary law. These are surveyed in paragraphs 51-55 above, namely, *force majeure*, distress, and necessity. As is recognized in the ILC's exhaustive Commentaries on each of these well-recognized and narrow exceptions to state responsibility, each of these precludes a finding of wrongfulness only insofar as required by the exigencies of the situation. First, *force majeure*, which as suggested above, does not appear applicable to economic crises, precludes the wrongfulness of a state's conduct only "for so long as the situation of *force majeure* subsists."[80] *Force majeure* does not excuse non-performance "if the State has undertaken to prevent the particular situation arising or has otherwise assumed that risk."[81] Second, distress excuses wrongfulness only "so far as it is necessary to avoid the life-threatening situation."[82] Third, necessity covers those "exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency."[83] As this suggests, the underlying principles of law that Article XI was intended to encompass are *time-sensitive*. They permit only temporary circumscribed and proportional relief from international legal obligations while the "imminent" or existing threat persists. Article XI anticipates that state parties must be free to take (that is, as the Spanish text provides, the article does not impede state parties from taking) certain measures, such as temporarily barring entry into certain premises,

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[80] Commentaries, *supra* note 59, at 170.

[81] *Id.* at 173.

[82] *Id.* at 177 (noting that "it does not exempt the State or its agent from complying with other requirements (national or international) . . .").

[83] *Id.* at 178.

but it says nothing about permitting any party *permanently* to deny treaty benefits to investors and does not relieve a state from its duty to compensate for the impact of its actions.

69. In this regard, Article 27(b) of the ILC's Draft Articles on State Responsibility is instructive. That article discusses the results that flow, or do not flow as the case may be, from a state's invocation of derogations including necessity, distress, and *force majeure*.

> "The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
>
> (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
>
> (b) The question of compensation for any material loss caused by the act in question."[84]

70. Argentina's and Slaughter and Burke-White's assertions that Article XI or the "state of necessity" exempts a state from liability is thus not supported by the text of the article or the principles of international law that underlie it.

71. For these reasons, among others, I suggest, in my Exon-Florio article, that the United States cannot rely on the notion of the general "police power" or a declaration of "national emergency" to avoid paying economic compensation under a BIT should a foreign investor suffer permanent economic injury from its actions under the Exon-Florio statute.[85]

72. As the foregoing suggests, Article XI, interpreted in light of the object and purpose of the treaty, no less than Article IV(3), requires arbitral supervision for its proper invocation and application. Far from being self-judging, the exceptions in Article XI anticipate careful scrutiny, by an impartial third party, to determine whether the relevant measure taken by a party is indeed "necessary" and responds proportionately to the underlying crisis cited in justification.[86] The underlying international law excuses that Article XI reflect — *force majeure*,

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[84] ILC Draft Articles, Art. 27(b) in Commentaries, at 189.

[85] *See, e.g.*, Exon-Florio, *supra* note 18, at 136.

[86] *See*, for example, a case cited by Slaughter and Burke-White, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Case No. ARB/87/3, ICSID, June 27, 1990, at paras. 57-59, Exhibit 21 (examining under a BIT "war clause" whether a state's security forces engaged in disproportionate destruction and whether the action was "necessary" or could have been "reasonably avoided").

distress, and necessity — depend upon considerable supervision. Thus, *force majeure* anticipates a disinterested inquiry into whether the act in question was indeed brought about by an "irresistible force or an unforeseen event" that is truly "beyond the control of the State" and that makes it "materially impossible in the circumstances to perform the obligation."[87] *Force majeure* also anticipates an impartial inquiry into whether the state has by "neglect or default" contributed to the situation.[88] Distress, as well, anticipates someone other than the self-interested state weighing whether the "interests sought to be protected . . . clearly outweigh the other interests at stake in the circumstances."[89] And the strict preconditions required for the proper invocation of necessity similarly anticipate that "the State concerned is not the sole judge of whether those conditions have been met."[90] These narrow permissible derogations presume that it is an impartial third party, and not the state, sitting in judgment over its own cause, that must determine whether the state has met its burden of proving that any relevant crisis actually persists. These realities suggest the underlying fundamental distinctions between a denial of benefits clause or treaty termination clause, on the one hand, and a mere "measures not precluded" clause such as Article XI, on the other.

F. SLAUGHTER AND BURKE-WHITE'S VIEWS ON ARTICLE IV(3) ARE IRRELEVANT

73. Slaughter and Burke-White consider Article IV(3) of the U.S.-Argentina BIT and conclude in their statement that the Argentine Government's measures in question "comply with Argentina's limited obligations to treat foreign corporations equally with domestic corporations in times of national emergency." Statement, ¶ 86. Slaughter and Burke-White's comments on Article IV(3) are irrelevant to this case. I understand that the Claimants do not contend that the Argentine Republic acted inconsistently with Article IV(3), but rather that Article IV(3) is simply of no benefit to the Argentine Republic as a basis for a defense.

74. Article IV(3) of the U.S.-Argentina BIT provides as follows:

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[87] Commentaries, *supra* note 59, Article 23(1), at 170.

[88] *Id.* at 171.

[89] *Id.* at 177.

[90] *Id.* at 182 (quoting the ICJ in *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997, at para. 51).

> "Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses."[91]

75. Article IV(3) on its face is of no benefit to Argentina. This clause is what is commonly referred to as a "war and civil disturbance" clause.[92] Article IV(3) does not authorize the parties to revoke or suspend protection for foreign investment at any time; rather, it provides that a party must accord non-discriminatory treatment when it seeks to compensate or take similar measures toward investors "whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events ...." In cases in which this article does apply then, it merely confirms that a state continues to be obligated to afford foreign investors most-favored-nation and national treatment in respect of compensatory measures. Article IV(3) provides further assurance to foreign investors; it is not a further exception permitting derogations from the treaty. Thus, Article IV(3) will not provide a party a means for evading the obligations imposed under other sections of the BIT. Article IV(3) can thus not exempt Argentina from liability under any circumstances.

76. Furthermore, Article IV(3) refers to losses "owing to" the events enumerated in the article. The provision thus envisions investments damaged by, for example, invading forces or domestic insurrections. Article IV(3) requires non-discriminatory treatment "as regards any measures [a state] adopts in relation to such losses." The non-discrimination requirement thus applies to cases in which a state decides to mitigate losses suffered by investors or to compensate investors for their losses "owing to" a covered event. In the present case, I understand that the Claimants claim to be harmed by the measures that Argentina adopted in response to the

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[91] Treaty Concerning the Reciprocal Encouragement and Protection of Investments, *signed at* Washington, D.C., 14 Nov. 1991, entered into force 20 Oct. 1994, art. IV(3) (the "U.S.-Argentina BIT"), Annex 2.

[92] *See, e.g.*, Vandevelde, *United States Investment Treaties: Policy and Practice* 212 (1992), at Exhibit 25.

"emergency" alleged by that Government, not by the "emergency" itself, and not by any compensatory measures the state took. Article IV(3) is therefore not applicable.

77. Apart from the fact that Article (IV(3) does not authorize a state party to revoke protection for foreign investment, it does not even relate to economic or financial crises. "Armed conflict," "revolution," "insurrection," and "civil disturbance" all refer to physical, security-related disturbances. Understood in context of the other listed events, as required by Article 31(1) of the Vienna Convention on the Law of Treaties and the *ejusdem generis* principle, "state of national emergency" and "other similar events" must also refer to physical, security-related disturbances. Properly read, article (IV(3)) should not be read to encompass economic crises.

G. Conclusion

78. Slaughter and Burke-White advance several interpretations for the meaning of Article XI, namely (1) that it has no clear meaning, (2) that it is self judging or subject to deferential good faith, (3) that it contracts out of the customary international law rules of state responsibility, (4) that it needs to be read broadly to generally permit measures to protect "economic" interests, (5) that it incorporates a "least restrictive alternative" test, or (6) that it requires an "order-of- magnitude" calculation. Apart from the evident fact that these creative constructions seem inconsistent with one another, none of them find support in the actual text, context, or negotiating history of this treaty, in the relevant rules of international law that need to be considered consistent with the VCT's article 31(3)(c), or in relevant arbitral or ICJ decisions. Their first two interpretations have been clearly rejected on a number of occasions by the ICJ and none of their proffered alternatives were accepted in the most direct arbitral decision on point dealing with the exact same provision under identical facts, namely *CMS v. Argentina.*[93]

[93] Slaughter and Burke-White suggest that their good faith interpretation of Article XI is better from a public policy standpoint. See Statement, at paras. 40-41. While, of course, their contention can have no relevance if it is at odds with what a treaty actually provides, I question their premise that either governments or arbitrators would find it more attractive to limit the review of Article XI measures to whether a government took these actions in "good" or "bad" faith. I doubt whether speculative conclusions about the subjective intentions of abstract entities like governments (or particular government officials) are more desirable than an objective and careful needs/ends assessment based on facts, as is required under the necessity test. Contrary to Slaughter and Burke-White, I suspect that the latter approach, which after all reflects existing law, provides the best hope for the long-term stability of both investment treaties and depoliticized investor-state dispute settlement.

79. Slaughter and Burke White suggest that they are offering these interpretations as a "compromise" that permits investment rights to be "clarified" consistent with "new dangers that may threaten the existence of the state itself." *See, e.g.*, Statement, at paras. 13, 41, and 54. But neither arbitrators or scholars can, consistent with international law, rewrite for the state parties the terms of their treaty; only the parties can do so if they mutually agree to amend or to terminate their agreement.[94] Neither can arbitrators nor scholars rewrite the rules of customary international law that the parties to the U.S.-Argentina BIT contemplated would be relevant to interpreting their agreement. Even assuming that, as Slaughter and Burke White imply, either Argentina or the United States *today* would not adhere to the same treaty subject to the same terms, this speculative question is irrelevant to what they agreed to in 1991. The U.S.-Argentina BIT was precisely designed to protect foreign investors, especially when their host states are disinclined from doing so or find this economically or politically difficult. Like other U.S. BITs of this period, they are precisely intended to enable an independent third party, namely this tribunal, to take a hard look at any actions that violate foreign investors' rights.

[94] But, as noted, the U.S.-Argentina BIT presumes that the pre-existing rights of foreign investors who relied on the original terms of the BIT need to be respected even in such cases. See U.S.-Argentina BIT, Article 24.

I declare that the foregoing is true and correct.

Jose E. Alvarez

José E. Alvarez

Sept. 12, 2005

Date