INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

Metalpar S.A. y Buen Aire S.A.	)	
	)	Case No. ARB/03/5
-against-	)	
	)	EXPERT REPORT OF
The Republic of Argentina	)	BENEDICT KINGSBURY

I, BENEDICT KINGSBURY, declare as follows:

1. I am Murry and Ida Becker Professor of Law and Director of the Institute for International Law and Justice at New York University Law School, New York. I have been a tenured professor of international law at New York University Law School since 1998, a member of the Board of Editors of the American Journal of International Law since 1997, and a member of the Advisory Board of the European Journal of International Law since 2000.

2. From 1993 until 1998 I was Professor of Law at Duke University Law School. From 1985-1993 I was a member of the Faculty of Law of Oxford University, where I taught international law and the law of contracts and served as University Lecturer in Law and Fellow of Exeter College from 1990-1993.

3. I have also served as a visiting professor of international law at Harvard Law School, and as Mitsubishi Global Capital Markets Visiting Professor of Law at the University of Tokyo Faculty of Law, and in Spring 2007 am appointed as a visiting professor of international law at University of Paris I (Pantheon-Sorbonne). I regularly teach courses on international law, globalization and global regulatory governance, and the theory and history of international law, and periodically teach specialist seminars on the work of the United Nations International Law Commission and on global administrative law.

4. I received a D.Phil in International Law (1990) and an M. Phil in International Relations (1984) from Oxford University. I received an LLB with first-class honours from the University of Canterbury, New Zealand in 1981, and am a Barrister and Solicitor of the High Court of New Zealand.

5. I have published over 50 papers on issues relating to international law and international governance, and received the Francis Deak Award for best article by a younger scholar in the American Journal of International Law. My writings include work on inter-state arbitration, recognition of governments, the United Nations, relations between international economic law and international environmental law, relations between sovereignty and inequality, compliance with international law, proliferation of international

tribunals, World Bank operational policies, human rights, indigenous peoples issues, and analysis of central themes in Oppenheim's International Law textbook.

6. I have edited several books published by Oxford University Press, and published two monographs. I am co-director (with Professor Richard B. Stewart) of NYU Law School's Global Administrative Law project, a major study of accountability issues in global governance, and during the past two years have made presentations on these issues at the American Society of International Law, the Japanese Society of International Law, the United Nations, Cambridge University, Oxford University, Princeton University, Columbia University, the University of Toronto, and a workshop of the University of Rome "La Sapienza". I have recently published several papers on these issues.

7. I am Co-Director (with Professor Martti Koskenniemi, member of the UN International Law Commission) of the Program in the History and Theory of International Law, and have published numerous papers in this area.

8. I have been asked by the Republic of Argentina to opine on the international law applicable, in the context of the Bilateral Investment Treaty between Argentina and Chile signed on 2 August1991 and the accompanying Protocol and subsequent Exchange of Notes [hereinafter collectively the BIT] and with regard to Article 10(4) of the BIT, to measures affecting foreign investors that may have been taken under state powers to deal with emergencies, maintain public order, or protect fundamental public interests.

9. The outline of my opinion is as follows. First, the basis of any claim must be the basis set out in the BIT, in conjunction with the ICSID Convention. The BIT, as a treaty made between states, must be analyzed as an instrument of international law, and part of the enduring structure of general international law. The BIT itself refers to, and Article 10(4) requires that tribunal decisions take account of, all of the relevant principles of international law, and all of the relevant national law, which includes national law on emergency powers of the state. (Article 10(4) also refers to the BIT itself, and to any relevant agreements concluded with reference to the specific investment.) The BIT thus requires the careful meshing in legal analysis of investor protections and enduring governmental powers in relation to emergencies, public order, and other core public interests. This would also be the case were the claim to be based on customary international law. Second, the core powers of the government of each state party to the BIT to take appropriate measures to deal with emergencies and also to maintain public order and protect fundamental public interests are embodied in national law. Such powers are treated as essential to the raison d'etre of the state in many national legal systems, and are embodied in national law of many states. These powers were not disabled or eclipsed by general guarantees to investors and investments as established

in this BIT. Article 10(4) reinforces this assessment. Third, this understanding is also embodied and evident in the jurisprudence of arbitration tribunals and of international courts dealing with investment issues under treaties and under customary international law. Fourth, this means that the investor-protection provisions in the BIT, such as the requirement of fair and equitable treatment and the prohibition of expropriation, must in their general interpretation be understood as envisaging and accommodating, within limits and with necessary qualifications, the lawful powers of the state to deal with emergencies and also to maintain public order and protect fundamental public interests. Thus, for example, what is required by the "fair and equitable treatment" standard in ordinary situations is not necessarily what is required in a particular kind of large-scale emergency. Fifth, a robust body of general principles of law, applied in international law and in relevant national legal systems, and hence within the ambit of Article 10(4), is available to tribunals to structure evaluation of specific measures taken by states to deal with emergencies or otherwise to maintain public order and protect fundamental public interests. Prominent among these general principles of law, is the principle of proportionality. This principle is potentially of great importance in investment arbitration (a brief summary of the operation of the proportionality test will be provided in the immediately following paragraph.) Sixth, where measures taken by a state do not fall within the emergency powers that as a matter of treaty interpretation are left by the BIT to the state, or do not meet the test of proportionality, then, if these measures involve a prima facie breach of the BIT, consideration must be given to the customary international law dealing with circumstances precluding the wrongfulness of a state's action. This body of public international law, built up over more than a century of international legal practice and exemplified by the International Law Commission's Articles on State Responsibility, is also applicable under Article 10(4) to the legal evaluation of any state measures which may be found not to be in conformity with primary rules of the BIT as properly interpreted. I will focus here on requirements for "necessity" to exist as a circumstance precluding wrongfulness.

10. Applying a test based on the principle of proportionality, a tribunal determines whether the measure had a legitimate aim, whether the measure could at the time have been expected by the government to advance realization of that aim, and whether less restrictive measures would have been equally effective to achieve the legitimate aim. Tribunals apply a proportionality test to the emergency actions of a government as well as to other actions directed toward maintenance of public order and protection of fundamental public interests, so that a government's actions that affect private rights established under treaties or national law are not simply self-judging (unless the controlling law so provides). But where fundamental problems of public order or of emergency are involved, especially where the measures involve economic policy, a tribunal's review involves considerable deference to the government's evaluation of the situation and of necessary measures to deal with it. An

alternative policy choice the government might have made will be weighed by the tribunal only if the alternative was manifestly less restrictive while equally effective for realization of the legitimate aim.

11. Thus, in summary, the BIT must be understood as incorporating the continued exercise of core governmental powers to maintain public order, to deal with emergencies, and to protect fundamental public interests. These governmental powers operate as limitations on the investor-protection rules defined in the treaty. The analysis of the treaty rules depends on the complex interplay of the legal materials referred to in Article 10(4) of the BIT. Where, after such an analysis, state measures may initially appear to be inconsistent with a primary rule even when read in light of this qualification, a proportionality test should be applied to determine whether the measures are justified.

12. A central theme of this opinion is that it is essential for a Tribunal, confronting general measures that had wide effects on many investors and were taken to cope with, and later to help recover from, a large-scale socio-economic emergency, to apply the techniques and resources of the general international legal system, of which the BIT is a part, in order to evaluate BIT standards on matters such as expropriation and fair and equitable treatment in the context presented by this case.

13. The approach to emergency situations set forth in this report differs from that taken by the Arbitral Tribunal in CMS v. Argentina.[1] The CMS Award is among the first Awards under a modern investment treaty to deal with general measures taken by the state during (and then as part of the recovery from) a large-scale national socio-economic emergency. The legal analysis employed by the Tribunal in CMS involved first setting forth the Tribunal's view of the full amplitude of requirements such as "fair and equitable treatment" in the relevant investment treaty, as they would apply in situations where there was no large-scale emergency or other fundamental public interest to which the government needed to respond. Then, having concluded that Argentina's pesification laws and certain other measures were contrary to the full amplitude of this provision, the Tribunal moved on to consider whether the measures were taken in circumstances precluding wrongfulness (necessity) under the general international law of state responsibility. The present report argues that such an approach is seriously incomplete, and instead introduces two further stages after the first stage. The second stage is to interpret the treaty texts, in accordance with international law principles, to ascertain their specific meaning with regard to large-scale socio-economic emergencies: for example, it might be a proper interpretation of "fair and equitable treatment" that its requirements in a particular kind of emergency situation differ from its requirements in non-emergency situations. Then this treaty standard for such emergency situations is applied, using a proportionality standard, in which are weighed the importance and legitimacy of the aim of the measures, the

[1] CMS v. Argentina, Award of 12 May 2005.

reasonably-anticipated effectiveness of the measures for that purpose as compared with other reasonably-possible measures, the relationship between the harm caused to the investor and the aim pursued, and specific issues concerning the process and substance of the application of the specific measures in the precise context. If after that inquiry it appears the BIT has been infringed, the possibility is considered that a circumstance precluding wrongfulness exists under customary international law.

I. The Argentina-Chile Bilateral Investment Treaty Must be Interpreted as an Agreement Between States, and as Part of the General Structure of International Law. This Requires, as Article 10(4) Makes Obligatory, a Legal Analysis Integrating Investor Protection and State Powers in Relation to Emergencies, Public Order and Other Fundamental Public Interests.

14. This international claim arises under the BIT. It does not in itself arise from national law, although national law issues may well be relevant in the concrete application of specific BIT provisions. A starting point is thus to interpret the BIT, which as an instrument of international law is interpreted in light of international law principles. Using as a guide to the techniques of treaty interpretation the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969, provisions which are now widely acknowledged as embodying a good guide to the customary international law of treaty interpretation, the first inquiry is that indicated by Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The objective is to interpret (in good faith) the treaty as a whole, not simply some terms of a treaty in isolation.

15. The object and purpose of the BIT include, as stated in the Preamble, the intensification of economic cooperation between that two States, the creation of conditions favorable to greater bilateral private investment, the stimulation of individual business initiative, and increased well-being of the peoples of each state ("incrementar el bienestar de ambos pueblos"). The states parties each have a strong interest in the effective management of socio-economic emergencies and the maintenance of public order, which contributes to prosperity and well-being in the state, may in the short term help in protection of foreign investors and their investments, and may in the longer term help create conditions favorable to bilateral private investment. These objectives, like the substantive provisions of the Treaty, are applicable equally to the two contracting states. Reciprocity between the states parties is a value that is at the core of the structure of the treaty.

16. In light of this, and of long-established and reasoned understandings of the powers and obligations of the states whose governments entered into the BIT,

it is to be expected that the states parties will have and retain powers relating to the safety of persons and property, the prevention of crime and disturbances, protection of public health and basic human rights, and maintenance of the basic viability of the economy, the democratic system, and the social fabric. It would be surprising if the BIT were to be understood as seriously limiting, without any express indication, the continued existence of those powers and their use where necessary. It is to be expected that this understanding will be reflected in the interpretation and application of substantive provisions of this BIT. In most of the arbitral jurisprudence on interpretation of the comparable substantive provisions of similar investment treaties, the question of the meaning of these provisions in relation to emergency-type measures is not considered, because the facts of these cases typically did not involve emergencies and emergency powers. In the present case, however, such issues are of central importance.

17. The point that the states parties were well aware of the possibility of emergency-type situations occurring – a point that seems almost inescapable in light of the modern histories of the states parties -- is reinforced by Article 4(3) of the BIT. This clause, dealing with restitution and compensation in situations of national emergency, envisages that losses to investors might occur in states of emergency, and rather than require compensation at a particular level, simply prohibits the state from treating a covered foreign investor less favorably than nationals or other foreigners in such situations. The careful drafting of such a clause is an indication that states envisaged that a special regime with regard to covered investors may apply in situations of an emergency nature.

18. The proper interpretation of the substantive provisions of the BIT would entail consideration of emergency-type issues even if no specific provisions about applicable law were included in the BIT. In this particular case, however, the matter can be further addressed through the frame of Article 10(4) of the BIT. Article 10 as a whole is headed "Solución de controversias relatives a inversiones." Article 10(4) provides:
"El órgano arbitral decidirá en base a las disposiciones del presente Tratado, al derecho de la Parte Contratante que sea parte en la controversia -incluidas las normas relativas a conflictos de leyes-, y a los términos de eventuales acuerdos particulares concluidos con relación a la inversión come así también a los principios del derecho internacional en la materia."

19. Article 10(4) applies to the arbitral tribunal's core function of deciding the dispute. It sets a demanding standard: "decidirá en base a..." the BIT provisions, national laws, contract or other agreement terms, and applicable principles of international law. It is thus essential, in deciding the case, to examine comprehensively all of the norms contained in the different sets of norms mentioned in Article 10(4), and to develop an integrated approach to fitting them together. Article 7(1) introduces a further requirement that any

general or special legal regime under national law of a Contracting Party or pursuant to international law obligations, whether currently existing or established in the future, shall prevail over the BIT to the extent that such a regime would provide certain investments by an investor of the other Contracting Party to a treatment more favourable than is provided for by the BIT. But Article 7 does not establish hierarchies among the various kinds of norms other than in those special circumstances where they should prevail over the BIT norms, nor does it address relations among norms other than norms entitling investments to "un trato más favorable que el previsto en el presente Tratado."

20. Actions to deal with emergencies, to maintain public order and to protect fundamental public interests are usually taken under national law. Both Argentina and Chile have longstanding sets of national law rules on state powers in emergencies, and on the non-application or variation of state contracts in certain situations. Situations of emergency, and powers to maintain public order and protect specific public interests, are also addressed through principles of international law, including certain obligations on states to take action to protect persons and property and manage emergencies, some principles bearing on the interpretation of primary rules in emergency situations, and principles concerning necessity as a circumstance precluding wrongfulness. Article 10(4) brings these different bodies of law explicitly into the decision the Tribunal is called upon to make, along with the various provisions of the BIT and of any applicable contracts or other agreements. Article 10(4) has the effect that these all must be read together and fitted together as the basis for the decision. The question whether the BIT is lex specialis, a question which in any case requires very fine-grained analysis between the relations of different bodies of law, is rendered otiose for many purposes by the terms of Article 10(4). This is because, even if the BIT did have some priority in a specific context, the BIT itself stipulates that attention be paid to the various norms referred to in Article 10(4).

21. Clause 10(4) is not part of the general pattern of BITs of many "Northern" countries.[2] By contrast, clauses broadly comparable to Article 10(4) do appear in many other BITs of Argentina, such as the Bilateral Investment Treaty between Argentina and the Belgium-Luxembourg Economic Union

[2] For example, no such provision is found in the UK BITs with Indonesia (April 27, 1976), China (May 15, 1986), Grenada (February 25, 1988), Bolivia (May 24, 1988), Ghana (March 22, 1989), Morocco (October 30, 1990), Nigeria (December 11, 1990), Honduras (December 7, 1993), India (March 14, 1994), Nicaragua (December 4, 1996), Bosnia and Herzegovina (October 2, 2002), or Vanuatu (December 22, 2003). A provision on applicable law is found in the BIT concluded between the United Kingdom and the Czech and Slovak Federal Republic signed in 1991, Article 8(3) providing that the arbitral tribunal "shall, in particular, base its decision on the provisions of this Agreement." The United Kingdom-Vietnam BIT signed on August 1, 2002, provides in Article 10(4) that the arbitral tribunal "shall reach its decision on the basis of the domestic law of the Contracting Party... and the rules of international law (including this Agreement) as may be applicable."

signed on 28 June 1990,[3] and the Bilateral Investment Treaty between Argentina and the United Kingdom signed on 11 December 1990.[4] It may be noted that the clause draws explicit attention of prospective investors and other readers to the relevance in the BIT of the national legal regime of the state in which they may choose to invest.

II. Core Powers of States to Deal with Emergencies, Maintain Public Order, and Protect Fundamental Public Interests, including Powers to Modify Private Contracts where such Situations warrant, are so Deeply Established in National Law of each State that it is Unlikely that the Governments Severely Weakened these by entering into the Argentina-Chile Bilateral Investment Treaty

22. The powers and the responsibility of the government to deal with emergencies, maintain public order, and protect fundamental public interests are recognized in many national legal systems. These are not limitless powers, and exercises of them are not exempt from certain forms of review. But they are of central importance. In this section, I will examine general emergency powers, state powers in relation to contracts, and state powers concerning the maintenance of public order. I will begin with some notes on the law of civil law systems with affinities to that of Argentina and Chile. Then, because the question of how state emergency powers are accommodated within bilateral investment treaties is not unique to this BIT but implicates many states parties to comparable BITs, I will comment on the treatment of state emergency actions affecting contracts in the national law of the United Kingdom, the United States of America, and related common law jurisdictions. Although there is considerable variation between national legal systems on specific provisions and doctrines, there has long been, and continues to be, wide acceptance that such powers are central to the state and to the functions and responsibilities of government.

23. The law of Argentina concerning the state's emergency powers, and concerning maintenance of public order (orden público, ordre public) and

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[3] Article 12, dealing with "Solución De Controversias Relativas A Las Inversiones", provides in paragraph 7. "El órgano arbitral decidirá en base al derecho de la Parte Contratante que sea parte en la controversia -incluidas las normas relativas a conflictos de leyes-, en base a las disposiciones del presente Convenio y a los términos de eventuales acuerdos especiales concluidos con relación a la inversión, como así también según los principios del derecho internacional en la materia."

[4] The text of Article 8(4) in the Argentina-UK BIT reads: "El tribunal arbitral decidirá la controversia de acuerdo con las disposiciones de este Convenio, el derecho de la Parte Contratante que sea parte en la controversia -incluidas las normas relativas a conflicto de leyes-, los términos de acuerdos especiales concluidos con relación a la inversión y los principios de derecho internacional que resulten aplicables. La decisión arbitral será definitiva y obligatoria para ambas partes."

protection of fundamental public interests, seems generally consonant with the principles followed in France and other civil law countries on these issues. (My understanding is that the law of Chile is broadly comparable to other states in this tradition also.) The parties to this case address the law of Argentina in much detail. I will therefore comment instead on approaches that have been more fully developed in other civil law legal systems, particularly France, as these are indicative of basic principles underpinning expected approaches in Argentina's legal system at the time of the negotiation and signature of the BIT, outside the context of the measures challenged in current proceedings against Argentina.

24. In the French legal system, the state may take certain measures on grounds of public order that would not otherwise be permitted by the law. Such measures relate to safety, property, and elements of the salus populi, and sometimes extend more widely to measures relating to morality and public health. The French Constitutional Council (Conseil Constitutionnel), which has the function of ruling on the constitutionality of legislation, has addressed the maintenance of public order (*ordre public*) in both emergency-related cases and other cases. In 1985, in dealing with the constitutionality of legislation establishing a state of emergency in New Caledonia after disturbances there, the Council said that the Constitution "did not exclude the possibility for the legislature of providing for a state of emergency to reconcile, as we have seen, the requirements of freedom and the preservation of public order."[5] In 1993 the Council commented that administrative police measures that might affect the exercise of Constitutional liberties could be justified by the need to safeguard public order.[6]

25. The protection of fundamental public interests through law includes specific powers of the state in relation to private contracts as well as state contracts. These powers are particularly pertinent to the maintenance of public order and managing responses to emergencies, but they are not limited to dealing with emergencies. For example, in relation to contracts between private parties, Article 6 of the French Civil Code sets a pattern followed in many civil law systems in its very general provision that: "Statutes relating to public policy and morals may not be derogated from by private agreements."[7] Essentially the same principle is included in Article 21 of the Argentine Civil Code.

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[5] Décision n° 85-187 DC du 25 janvier 1985, Loi relative à l'état d'urgence en Nouvelle-Calédonie et dependences.

[6] Décision n° 93-323 DC du 5 août 1993, Loi relative aux contrôles et vérifications d'identité. See also Décision n° 2003-467 DC du 13 mars 2003, Loi pour la sécurité intérieure.

[7] French Civil Code of 1804, Article 6: "On ne peut déroger, par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes moeurs." (Inséré par Loi du 5 mars 1803 promulguée le 15 mars 1803.) Available at: http://www.legifrance.gouv.fr/. The Belgian Civil Code contains the same provision.

26. Turning now to the United Kingdom, the Emergency Powers Act of 1920, which as amended in 1964 remained in force until 2004, empowered the Crown to proclaim a peacetime state of emergency where "there have occurred, or are about to occur, events of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial part of it, of the essentials of life". Under this legislation, emergency regulations were promulgated on several occasions of industrial unrest, as for example during a strike by coal miners in 1972, when the regulations authorized cuts in electric power services and restricted uses of electricity. This legislation was finally replaced in 2004, by the Civil Contingencies Act, but substantial emergency powers continue to be conferred, particularly by Part 2 of that Act.

27. The emergency powers of the UK government seem to include certain powers to interfere with existing as well as future private contracts. Such effects on contracts between private parties are inherent in measures such as the requisitioning of ships or essential supplies for emergency use, and the sudden imposition of asset freezes or of prohibitions on financial or trade dealings with persons of a specified foreign state. The UK legal system also treats certain categories of private contracts as "illegal", with varying consequences including in many cases the non-enforceability of the contract.[8] The English legal system, like many common law systems, has long accepted a power of the state to modify or terminate contracts to which it is a party, on grounds of a higher public interest. In English law, this doctrine was formulated in the much-cited case of Amphitrite v. The King.[9] One leading treatise summarizes the current position as follows:
"English law has no theory of 'administrative' or 'public' contracts, but a public authority cannot by contract bind itself not to exercise powers conferred on it by statute.[10] The exact scope of this principle is not clear. It has been suggested that the underlying principle is that of governmental effectiveness, so that 'no contract would be enforced in any case where some essential governmental activity would be thereby rendered impossible or seriously impeded.' Such a contract, it is suggested, is not void if it is the kind of contract that the authority has power to make, but it is not specifically

[8] United Kingdom Law Commission, Illegal Transactions: The Effect of Illegality on Contracts and Trusts (Consultation Paper 155, 1999).

[9] Amphitrite v. The King [1921] All England Reports 542. This case is famous for the statement at p. 544: "It is not competent for the government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State." The court thus rejected a claim for damages by a Swedish shipowner which had sent its vessel to a British port on the basis of an undertaking by the British government that the ship would not be detained, but suffered losses when this undertaking was withdrawn for reasons of national interest after the ship's arrival.

[10] Citing a series of cases from *Ayr Harbour Trustee v. Oswald* (1883) to *Royal Borough of Windsor and Maidenhead v. Brandrose Investments* [1983] 1 W.L.R. 509.

enforceable. This leaves open the question of compensation to the other contracting party, which is due in justice but for which the common law does not seem to make provision."[11]

28. The materials referred to above on the power of the state in these different legal systems to modify or terminate contracts to which the state or one of its instrumentalities is a party, outside the terms of the contract, indicate that these powers are quite extensive. In relation to contracts made purely between private parties, where the state itself has not made any promise within the contract and may indeed have no knowledge of the contract, it is to be expected that the state's powers should be no less extensive. Because of its responsibilities to manage emergencies and protect fundamental public interests, the powers of the state in relation to contracts between private parties are typically much more extensive than the ordinary civil law powers of a private party to such a contract wishing to renegotiate or to unilaterally modify or terminate the contract. These state powers have been exercised in many different ways, depending upon the legal system and the circumstances, including by the alternative modalities of changing the contract by law, of changing or suspending enforceability of certain contract terms, or more indirectly by amplifying the rights of one or both parties, such as the right to require or to seek a contract modification.

29. The characteristic pattern of national law approaches to state regulation of existing private contracts in situations of deep national economic emergency is well illustrated by the jurisprudence of the United States Supreme Court. The relationship between contract regulation and emergency powers was explicitly theorized by that Court in addressing legislation designed to deal with the socio-economic emergency of the Great Depression of the early 1930s. A notable example is the decision of the US Supreme Court in 1934,[12] upholding the State of Minnesota's Mortgage Moratorium Law, a Depression-era statute which extended redemption periods on mortgage contracts and placed limits on foreclosures and forced sales of mortgaged properties despite the terms of the contracts. The statute's preamble and first section stated: "Whereas, the severe financial and economic depression existing for several years past has resulted in extremely low prices for the products of the farms and the factories, a great amount of unemployment, an almost complete lack of credit... Whereas, many owners of real property, by reason of said conditions, are unable, and it is believed for some time will be unable to meet all payments as they come due.... Whereas, the inherent and fundamental purposes of our government is to safeguard the public and promote the general welfare of the people...Section 1... the Legislature of the State of Minnesota hereby declares that a public economic emergency does exist in the State of Minnesota."[13]

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[11] O. Hood Philips and Jackson, Constitutional and Administrative Law (2001), pp. 713-714.
[12] Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).
[13] Quoted in Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398, p. 421 (1934).

This legislation was challenged under Article 1, section 10 of the US Constitution, which provides that no state shall pass any law impairing the obligation of contracts. Chief Justice Hughes, writing for the majority in the US Supreme Court, commented that:

"the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while, -- a government which retains adequate authority to secure the peace and good order of society... The reservation of this necessary authority of the state is deemed to be part of the contract."[14]

He implied that this applies to "all contracts, whether made between states and individuals or between individuals only."[15] He quoted an earlier Supreme Court decision, Manigault v. Springs (199 US 473), to the effect that "the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals"[16] He applied a five-step analysis in upholding the Minnesota legislation:

"1. An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community... 2. The legislation was addressed to a legitimate end; that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society... 3. In view of the nature of the contracts in question—mortgages of unquestionable validity – the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions... 4. The conditions upon which the period of redemption is extended do not appear unreasonable... 5. The legislation is temporary in operation. It is limited to the exigency which called it forth."[17]

30. In a later case, the Veix case decided in 1940, the US Supreme Court upheld a depression-era 1932 New Jersey statute that limited the existing contractual rights of shareholders in private building and loan associations to withdraw their money.[18] The Supreme Court stated: "With institutions of such importance to its economy, the State retains police powers adequate to authorize the enactment of statutes regulating the withdrawal of shares."[19] The Court noted that, whereas the Minnesota statute upheld in Blaisdell was temporary, the New Jersey statute was a permanent piece of legislation, but the Court held that the same analysis applied. The court did not agree that

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[14] Blaisdell, at p. 435.
[15] Id, p. 435, quoting Long Island Water Supply Co. v. Brooklyn, 166 US 385.
[16] Blaisdell, at p. 437.
[17] Blaisdell, at pp. 444-8.
[18] Veix v. Sixth Ward Building and Loan Association, 310 U.S. 32 (1940).
[19] Veix, at p. 38.

emergencies are always to be seen as "suddenly arising and quickly passing." In this case: "The emergency of the depression may have caused the 1932 legislation, but the weakness in the financial system brought to light by that emergency remains. If the legislature could enact the legislation as to withdrawals to protect the associations in that emergency, we see no reason why the new status should not continue... threatened insolvency demands legislation for its control in the same way that liquidation after insolvency does. Such legislation may be classed as emergency in one sense but it need not be temporary."[20]

31. The principles in the Blaisdell and Veix cases are consistent with the approach the majority of the US Supreme Court took in upholding the US legislative action (the Joint Resolution of June 5, 1933) declaring "gold clauses" in existing private contracts to be contrary to US public policy and hence unenforceable; creditors were obliged to accept paper money at face dollar value, not at the prevailing price value of gold, and creditors were not entitled to any compensation for this change.[21] Whether the gold clauses in private contracts interfered with the monetary policy of the US Congress depends, the Court said, "upon an appraisement of economic conditions and upon determinations of questions of fact. With respect to these conditions and determinations, the Congress is entitled to its own judgment. We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decision of the Congress as to the degree of necessity for the adoption of that means, is final."[22] The Court commented that the Congress was entitled to consider the huge volume of existing contacts with gold clauses, totaling more the $75 billion at the time, in reaching its determination that these clauses we an obstacle to Congress's policy for managing the monetary emergency.

32. I refer to these US cases not as a summary of the current US law, which would require a lengthy and complex analysis addressing contestation about several constitutional provisions, but as examples of reasoning by a high judicial body about fundamental powers to deal with an economic emergency.

33. Against this background of deep-seated recognition, in civil law systems and in common law legal systems, of governmental powers and responsibilities for the maintenance of public order, the protection of fundamental public interests and the management of emergencies, it seems prima facie unlikely that the parties to the BIT intended that these powers held by each of them be severely restricted by this treaty. I turn to some of the international jurisprudence relevant to this issue in the next section.

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[20] Veix, at pp. 39-40.
[21] Norman v. Baltimore and Ohio R. Co., 294 U.S. 240 (Feb 18, 1935).
[22] Norman v. Baltimore and Ohio R. Co., 294 U.S. 240, at p. 311.

III. International Law Decisions Strongly Suggest that the Argentina-Chile Bilateral Investment Treaty Does Not Efface These Core Powers and Responsibilities of States in relation to Public Order, Emergencies, and Protections of Fundamental Public Interests

34. International tribunals have frequently held that core state powers for public order and emergency situations, which (as shown above) are widely recognized in national law, have not been eclipsed by specific investor-protecting treaties they are interpreting. Three examples illustrate this point.

35. In the ELSI case, decided two years before the Argentina-Chile BIT was signed, the International Court of Justice considered the temporary requisition of a factory by the Mayor of Palermo. The factory had been requisitioned to prevent the US owners from closing it, this factory being a major employer in an economically depressed region that was further suffering from the effects of an earthquake. Commenting on the right of the investors, set forth in Article 3(2) of the bilateral Italy-US treaty, to "control and manage" their corporation's plant, the Court observed: "Clearly the right cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like."[23] The ICJ then went on to consider the opinions of the local courts on the validity of the requisition. These courts held that the requisition was not justified under the local law on grave necessity and unforeseen urgency, as it was not an effective measure to secure the long-term future of the plant as an employer. The ICJ took account of this in finding a prima facie violation of the treaty right.[24]

36. The arbitral tribunal in the Tecmed case also addressed this question, commenting: "The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable."[25] This case concerned non-extension of operating permits for a hazardous waste landfill in Mexico. The landfill had been subject to vigorous community opposition, including blockades of its access road involving some 400 people. Although the tribunal held that a sufficiently grave emergency did not exist in the particular case, it recognized that the existence of an emergency could preclude the finding of an indirect expropriation without having recourse to an argument of necessity under the law of state responsibility. In this regard, the tribunal stated that it:

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[23] Elettronica Sicula s.p.a.(ELSI) (United States v. Italy), Judgment of 20 July 1989, ICJ Reports, 1989, 15, at para 74.

[24] Judgment of 20 July 1989, para 75. See also para 127.

[25] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003 – 43 ILM 133 (2004), para 118.

"should consider whether community pressure and its consequences, which presumably gave rise to the government action qualified as expropriatory by the Claimant, were so great as to lead to a serious emergency situation, social crisis or public unrest, in addition to the economic impact of such a government action, which in this case deprived the foreign investor of its investment with no compensation whatsoever. These factors must be weighed when trying to assess the proportionality of the action adopted with respect to the purpose pursued by such measure."[26]
The Tribunal concluded that, in the specific case, the circumstances "do not give rise, in the opinion of the Arbitral Tribunal, to a serious urgent situation, crisis, need or social emergency that, weighed against the deprivation or neutralization of the economic or commercial value of the Claimant's investment, permits reaching the conclusion that the Resolution did not amount to an expropriation under the Agreement and international law."[27]

37. These cases strongly suggest that international law has not treated the legal protections accorded to foreign investors, under the general terms of bilateral investment treaties and other comparable treaties, as effacing the powers of the states parties to maintain public order and deal with emergencies. They suggest that the primary rules in such treaties, that is the treaty obligations of the state in relation to relevant foreign investors and investments, are themselves qualified by non-textual but legally operational understandings about the continuation of state emergency powers and other state powers. These qualifications operate in at least three different ways. First, they limit the scope of the primary rules themselves, as the ICJ indicates in the ELSI case in analyzing the treaty right of the foreign investor to control and manage the plant as being in itself qualified by the state's powers to act in emergencies. Second, they require specific application, including through a proportionality analysis or a similar test. This specific application connects also with special rules as to whether state actions do or do not trigger a compensation requirement, and if so then at what level, depending on the circumstances and the controlling legal regime. Third, they are subject to the situations of circumstances precluding wrongfulness under the rules of general international law.

IV. Provisions of the BIT on Fair and Equitable Treatment, Expropriation, and Other Protections for Investors, Must be Interpreted in Light of the General Powers of the States Parties to Take Measures to Maintain Public Order, Deal with an Emergency, or Protect Fundamental Public Interests,

38. The states parties to this BIT wished to offer substantial encouragement and legal guarantees to relevant foreign investors, but it is a reasonable inference

[26]Tecmed, para 133.
[27] Tecmed, par. 139.

that they did not wish or expect to incapacitate themselves from dealing with major emergencies and exercising other core powers where warranted. How was this balance accomplished in the framing of this BIT? In terms of the text of the BIT, aspects of this balance may be provided for in Article 4(3), dealing with states of emergency as well as revolution and armed conflict. More generally and more fundamentally, this BIT in Article 10(4) envisages the complex interplay between various kinds of applicable norms. These different sets of norms help determine the bounds, exceptions, specific operation, and factors of balancing, that arise in relation to the texts of the various primary rules of investor protection in the BIT. In this section, I will consider the general interpretation of treaty clauses concerning fair and equitable treatment, and expropriation, in the context of the exercise of state powers to deal with large-scale economic emergency, including post-emergency recovery. In the following section, I will discuss some issues arising in the specific application of these clauses.

39. The interplay between different legal sources, including provisions relating to emergency powers, must operate in relation to the open-textured BIT Article 2(1) standard of fair and equitable treatment ("tratará las inversiones justa y equitativamente").[28] This standard can readily be understood as accommodating basic powers of states to maintain public order and deal with emergencies – what is fair and equitable treatment in ordinary times is not the same as what is fair and equitable treatment in an emergency of a particular kind and scope. Modern arbitral jurisprudence on the requirement of "fair and equitable treatment" is extensive, and has articulated important protections for investors. However, the Tribunals have seldom focused on the meaning of this clause in relation to state conduct in large-scale socio-economic emergency situations, because the cases have generally not arisen from such situations. The CMS v. Argentina case did involve such a situation, but the Tribunal did not focus on the implications of emergencies for what is fair and equitable. The Tribunal's proposition that "a stable legal and business environment is an essential element of fair and equitable treatment"[29] is extremely broad, and does not seem in itself to provide an operable general legal test. In particular, a large scale socio-economic emergency almost inevitably disrupts the business environment. In so far as the government attempts to respond to the emergency through legislation and other legal action, which may also draw the courts into the issues, changes in the specific legal environment are also likely. For the reasons already given, it seems improbable that the clauses in treaties requiring "fair and equitable treatment",

[28] A very similar analysis applies to the prohibition of arbitrary or discriminatory measures (medidas arbitrarias o discriminatorias) in Article 2(3). Often, this standard will overlap substantially with the fair and equitable treatment standard. For an example of the overlap between the "fair and equitable treatment" standard and a standard dealing with certain "unreasonable or discriminatory measures", see Saluka v. Czech Republic, Award of 17 March 2006, paras 457-481 and 503-504.

[29] CMS v. Argentina, Award of 12 May 2005, para 276. See also the identical language in Occidental v. Ecuador, Award of 1 July 2004, para 183.

to which very many states have subscribed, represent an undertaking by the state that such instabilities will not occur. Equally, in so far as investor expectations and predictability of specific legal treatment are relevant to the analysis of "fair and equitable treatment", in the manner suggested by the idea of "legitimate expectations" or cognate notions, these elements must be framed in relation to the possibility of emergencies.[30] Investors in countries that are not facing emergencies very likely do not have "expectations" of an emergency. This does not mean that the "fair and equitable" treatment to which they are entitled excludes the government taking general measures that affect investors, should an emergency arise. An expectation that foreign investors will necessarily be shielded from any such general measures is usually not in itself a legitimate expectation for the purposes of the "fair and equitable treatment" standard. This doctrinal point is well established in the longstanding international law doctrine of the international minimum standard.[31] In the modern law on "fair and equitable treatment", this approach also receives some support from the Award of the Arbitral Tribunal in Saluka Investments v. Czech Republic,[32] which, although not concerned with an emergency, does address the scope properly left to a state, in conformity with the "fair and equitable treatment" requirement, to determine and implement public policy in different situations.

40. The fact that a government takes a measure to respond to an emergency, or in the management of a post-emergency recovery, does not, of course, mean that the measure necessarily meets the standard for "fair and equitable treatment." As the analysis employed in the Saluka Award implies, one element in deciding whether actions in an emergency meet the fair and equitable treatment standard is to determine whether they comported with long-established national law of general application: were the triggering conditions for invocation of those legal powers met, were procedural requirements met, were the measures taken proportionate and within the government's margin of appreciation having regard to what was known of the emergency? The question of how to apply this treaty standard to specific measures and individual situations will be addressed more fully later in this opinion.

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[30] Several Tribunals and commentators have placed considerable emphasis, in deciding whether treatment was fair and equitable, on the consistency of the state's conduct with expectations the investor had when making or expanding the investment, particularly if explicit and specific representations were made to the investor at that time. See e.g. Waste Management v. Mexico, Award of 30 April 2004, para 98. Whether breach of the expectations of the investor (expectations based on express representations, or general expectations based simply e.g. on the terms of an investment treaty) engages a separate pillar of the "fair and equitable treatment" standard is open to question. Many breaches of such expectations can in fact be analyzed as violations of due process, misrepresentation, improper discrimination, or breaches of other established pillars of the "fair and equitable treatment" standard.

[31] Dickson Car Wheel Co. v. United Mexican States, 4 RIAA 669 (Mexico-US Claims Commission).

[32] Award of 17 March 2006, para 306. Arbitrators: Sir Arthur Watts (Chairman), Maître L. Yves Fortier, and Professor Dr Peter Behrens.

41. The fair and equitable treatment standard requires that covered investments and the foreign investors be accorded treatment that accords with an evolving international minimum standard. This standard has much in common with general rule of law principles, prohibiting arbitrary or prejudiced conduct toward the investor, manifest and unremedied denial of justice in judicial proceedings, gross failures of administrative due process, and the like.[33] Once the international minimum standard of treatment is met, the "fair and equitable treatment" requirement in this BIT and in comparable treaties does not appear in itself to require that foreign investors receive special rights under national law. Many states, including many OECD states parties to investment treaties, do not appear to provide such special rights to foreign investors on any systematic basis. Indeed, the Tribunal in Methanex v. USA recently indicated that the "fair and equitable" standard in NAFTA Article 1105 does not in itself prohibit discrimination *against* foreigners.[34]

42. A breach by a state of its own national law does not in itself establish a breach of the BIT or of customary international law, just as compliance with national law does not preclude all possibility of the state being in violation of international law. Nevertheless, in many situations the national law can be relevant to application of the "fair and equitable treatment" standard. In determining whether a state has acted in accordance with its own domestic law, the highest jurisprudence of the state's own courts is of central importance for an international tribunal, provided the state has a functioning rule of law system. The basic approach is well represented by the 1929 decision of the Permanent Court of International Justice (PCIJ) in the Serbian Loans case. The loans Serbia had received were denominated in gold francs, but French legislation of 1914 relieved the central bank of an obligation to provide specie in return for paper francs, and a 1916 law may have had the effect that creditors paid in France were obliged to accept paper francs at face value in place of gold francs that were by then worth much more. The PCIJ noted that "the doctrine of French courts, after some oscillation, has now been established" (p. 47), notably by the Court of Cassation, as continuing to permit a gold stipulation in international contracts even if payment was to be made in France. "For the Court [the PCIJ] itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal and which, in its results,

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[33] An attempt to compile criteria deployed in Awards under NAFTA relating to this standard was made by the Tribunal in Waste Management v. Mexico, Award of 30 April 2004, para 98, referring to state conduct harmful to the claimant that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process which offends judicial propriety – as might be the case with a manifest failure of justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."

[34] Methanex v. USA, Award of 3 August 2005, Pt IV, Chap. C, paras 13-16. The Tribunal thus implies a doubt about the non-discrimination element in the above-quoted list enunciated by the Tribunal in Waste Management v. Mexico.

seems to the Court reasonable, would not be in conformity with the task for which the Court has been established and would not be compatible with the principles governing selection of its members.... It is French legislation, as applied in France, which really constitutes French law, and if that law does not prevent the fulfillment of the obligations in France in accordance with the stipulations made in the contract, the fact that the terms of legislative provisions are capable of a different construction is irrelevant."[35]

43. A statement of the characteristic approach of modern international investment tribunals is provided by the 1999 Award in Azinian v. Mexico, a NAFTA Chapter 11 case. A Mexican local authority had annulled a waste management contract, on various grounds including misrepresentation by the foreign contractor, and this annulment had been upheld in challenges brought at three levels of the Mexican court system. The Tribunal observed that: "a governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level*."[36] The Tribunal noted that a state could have liability under an investment treaty for acts of its judiciary. "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA. *What must be shown is that the court decision itself constitutes a violation of the treaty.* Even if the claimants were to convince this Arbitral Tribunal that the Mexican courts were wrong with respect to the invalidity of the Concession Contract, this would not per se be conclusive as to a violation of NAFTA. More is required: the Claimants must show either a denial of justice, or a pretence of form to achieve an internationally unlawful end."[37] The Tribunal went on to explain that: "A denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way... There is a fourth type of denial of justice, namely the clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of 'pretence of form' to mask a violation of international law."[38] The Tribunal had no difficulty in finding that the Mexican court decisions complied with these standards and so rejected the Claimant's challenge. It may be noted that in formulating these tests, the

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[35] Case Concerning the Payment of Various Serbian Loans Issued in France (France/Serbia), Judgment of 12 July 1929, PCIJ Series A, No. 20 (1929), at. pp. 46-47.

[36] Robert Azinian et al v. Mexico, ICSID case ARB(AF)/97/2, Award of 1 November 1999, para 97 (emphasis in original). .

[37] Azinian v. Mexico, para 99 (emphasis in original).

[38] Azinian v. Mexico, paras 102-103. These four dimensions of denial of justice were quoted with apparent approval by the Arbitral Tribunal in Mondev v. USA, Award of 11 October 2002, at para 126. See also ADF v. USA, Award of 9 January 2003, Case No. ARB(AF)/00/1 (NAFTA).

Tribunal was mindful of the facts and dicta of other cases where national court decisions were in question, such as Amco v. Indonesia.[39]

44. The CMS v. Argentina Award addressed a situation in which Argentine courts had issued rulings on the validity in the legal order of Argentina, including under the provisions of Argentina's Constitution dealing with the right to property, of laws and decrees of general application concerning pesification and other economic measures taken in relation to the 2001-02 crisis. The Arbitral Tribunal elected not to follow the most recent decision(s) of the Supreme Court of Argentina, but did not base itself on the kind of analysis referred to in Azinian, nor even on the older and more general considerations enunciated by the PCIJ in the Serbian Loans case. There are grounds for doubt that the CMS Tribunal's analysis of Argentine law, and in particular its reasoning and justification for reaching a different view of that law than had been reached in the most recent decision of the Supreme Court of Argentina, are sufficient under current international law standards.

45. As regards the prohibition of expropriation in Article 4(2), different international treaty provisions on expropriation, like the customary international law on expropriation, have long been interpreted by international tribunals as leaving considerable scope for state police powers and regulation – see e.g. Too v. Greater Modesto Insurance Associates,[40] Sea-Land Service v. Iran,[41] Dickson Car Wheel Co. v. United Mexican States,[42] French Company of Venezuelan Railroads,[43] and Jahn v. Germany.[44] The Tecmed arbitral award begins to develop an explicit method for analysis of claimed emergency measures as a special element in specification of the meaning of an expropriation standard (this issue of methodology for analyzing specific situations will be discussed in detail below).

46. The large corpus of diverse international decisions and published commentaries on expropriation, naturally include not only some divergent views, but also include abstract phrases or highly generalized analyses, that can be marshaled to a multitude of irreconcilable positions. However, recent Arbitral awards on treaty provisions comparable to Article 4 of this BIT, and recent state practice such as Annex 10-D of the 2003 Chile-US Free Trade Agreement, point to a current tendency to accept some central general propositions, among which the following may be mentioned. Direct expropriation generally requires transfer of title or physical seizure of the

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[39] Amco v. Indonesia, Award (20 November 1984), 1 ICSID Rep 413, 460 (1993); Decision on Application for Annulment, 16 May 1986), 1 ICSID Rep 509, 526-7: "An international tribunal is not bound to follow the result of a national court."
[40] 23 Iran-US CTR 378, esp at para 26.
[41] 6 Iran-US CTR 149, esp at p. 165.
[42] 4 RIAA 669 (Mexico-US Claims Commission), esp at p. 681.
[43] (France/Venezuela), 10 RIAA 335, esp. at p. 353.
[44] European Court of Human Rights, Judgment of 30 June 2005.

relevant asset, or very comparable measures.[45] Where such things did not occur, the analysis focuses on indirect expropriation. Cases where indirect expropriation is alleged (encompassed in the term "otras medidas que en sus efectos equivalgan a expropriación" in Article 4(2) of the BIT), may be divided into those in which the relevant measure was a general regulation, and those in which the challenge is to a specific measure having a special and distinctive relation to and impact on a particular investor or investment. In recent years, where a general regulation (that is, not a specific measure relating to the particular investment) has clearly been taken for reasons of general public welfare, arbitral tribunals have tended not to find that an expropriation has occurred, notwithstanding that the measure has had significant implications for holders of a relevant property interest (implications short of changing the ownership of the property interest.)[46] The Chile-US Free Trade Agreement of 2003 includes an interpretive provision that: "Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[47] However, where the relevant measure is

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[45]The tribunal in Lauder v. Czech Republic, Award of 3 September 2001, para 200, took the view that direct expropriation occurs only where the property interest of the investor is appropriated, while indirect expropriation occurs in other situations where the government measure "effectively neutralizes the enjoyment of property."

[46] International Thunderbird Gaming v. Mexico, award of 26 January 2006; Methanex v. USA, Award of 3 August 2005, Pt IV, chap. D (this Award suggests, obiter, that if a general regulation was adopted in breach of a specific undertaking that had been given to the investor, the calculus might shift) ; CMS v.Argentina, Award of 12 May 2005; Occidental v. Ecuador, Award of 1 July 2004; Feldman v. Mexico, Award of 16 December 2002, Corrected and Amended 13 June 2003; Pope and Talbott v. Canada, Award of 10 April 2001; S.D. Myers v. Canada, Award of 13 November 2000.

[47] Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, Annex 10-D. This Annex may usefully be quoted in its entirety:

"Expropriation. The Parties confirm their shared understanding that:

1. Article 10.9(1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 10.9(1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 10.9(1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by- case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

specific rather than general, indirect expropriations have been found in some recent cases. Metalclad v. Mexico and Tecmed v. Mexico are examples. In both cases, a large waste disposal plant could not operate because a government agency had refused to issue it with the necessary license. These regulatory measures were not general measures, but were taken in relation to the specific investment, and their effect was comprehensively to prevent the investor from making any real use of the investment. In cases here indirect expropriation is alleged, a proportionality analysis may be used. This involves weighing the legitimacy and importance of the aim pursued by the state measures, and the question whether this am could reasonably have been accomplished in a less disruptive way, against the harm inflicted by the measures. This analysis will be developed further below.

47. The tendency of Tribunals under investment treaties not to hold general regulations to be expropriatory, is suggestive of a likelihood that general regulatory measures taken to manage large-scale emergencies and post-emergency recovery were not intended by the parties to the BIT to be, and under current jurisprudence are not, within the BIT prohibition of expropriation. However, precise analysis is required in each case. A methodology for such an analysis will be set forth in the next section.

48. In relation to expropriation, just as in relation to fair and equitable treatment and other international law standards, the question of the meaning of national law relating to contract and property rights, and issues concerning compliance with that law and availability of remedies under it, are from the standpoint of international law a matter on which prevailing determinations by the state's own courts carry great weight.

49. State powers to deal with emergences, and to protect public order and other fundamental public interests, are also relevant to the proper interpretation of the meaning of the BIT clause concerning full protection and security ("plena protección y securidad juridíca") in Article 4(1), and the related clause in Article 2(2)). National law, and the specificities of any emergency context, may well be among the factors relevant in determining whether this standard is met.[48]

(b) Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."

[48] As a practical matter, although probably not as a legal matter, the jurisprudence on "full protection and security" clauses in investment treaties has hitherto focused mainly on situations in which physical security was compromised. In its pleadings in Mondev v. USA, the USA argued: "Cases in which the customary international law obligation of full protection and security was found to have been breached, however, are limited to those in which a State has failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien." Mondev v. USA, Transcript of Oral Hearings, vol. 5, at p. 1051 (2002), statement of Mr Clodfelter for the United States, quoting the US Counter-Memorial at p. 37. Available at: http://www.state.gov/documents/organization/15439.pdf. The Award in Mondev implies that the Tribunal did not share this limited view, but the Award does not focus on the

V. An Arbitral Tribunal Evaluating the Compliance with the BIT of State Measures taken to Maintain Public Order, Deal with an Emergency, or Protect Fundamental Public Interests, ought to Review the State Measures under a Test of Proportionality, with Deference to the Government's Evaluation of the Situation and Choice of Means.

50. Investment arbitration tribunals have not yet developed a systematic methodology for dealing with government measures taken to maintain public order, deal with emergencies, or protect fundamental public interests. However, a body of jurisprudence for structuring comparable decision-making has been developed by international tribunals dealing with other situations under international treaties providing for protection of private rights and interests. The salience of this (non-BIT) jurisprudence for arbitration under the BIT is buttressed by the decision of the states parties to require, in Article 10(4), that the tribunal shall decide in accordance with a set of legal materials that includes applicable principles of international law and the laws of the relevant state, in addition to the provisions of the BIT and the terms of relevant contracts and other agreements. At times states in investment arbitration have argued that it is entirely for them to determine whether a threat to public order or an emergency situation existed, and what measures should be taken to deal with this. Conversely, investors have on occasion argued that a tribunal should review the situation de novo, and simply make its own decision about the extent of any threat to public order or other emergency, and about what measures should properly have been taken. Neither of these approaches is correct (setting aside situations where the relevant legal instruments include specific provisions on these issues or where a special intent of the treaty parties can be established). It is necessary to articulate and apply an approach that encompasses both the vital function of an arbitral tribunal in reviewing state action, which is an essential protection for investors under the BIT, and the special situation of a government which has core responsibilities that continue and are not excluded by the BIT, this special situation being one in which a tribunal cannot take the place of a government.

51. To the extent that Argentina's measures involved genuine responses to a widespread emergency or to problems of public order or other urgent challenges to fundamental public interests, it was discharging core governmental responsibilities. These responsibilities, and the legal powers to perform them, were not effaced by the BIT. At the same time, the protection of the rights and interests of investors that is provided for in the BIT cannot

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point. See also Saluka v. Czech Republic, Award of 17 March 2006. paras 482-490, implying a broader view. In practice, in situations not involving physical security issues, "full protection and security" is often considered as covered within the ambit of "fair and equitable treatment." See e.g. Occidental v. Ecuador, Award of 1 July 2004, para 187.

simply be overridden by any governmental claim to act. It is necessary to refine a suitable test for evaluation of government measures affecting investments and investors. The most suitable test, because of the strength of jurisprudential support for it in parallel legal situations, is a proportionality test.

52. The proportionality test will operate differently in different legal situations. It may be used in defining the scope of a right, that is, in determining the boundaries of a right (it is often necessary, for example, to decide what are the limits of one right where this right meets a potentially incompatible right held by others.) And it may be used in deciding, when a state takes measures that involve prima facie limits on or inconsistencies with the right as defined in the abstract, whether these state measures are nevertheless permissible. These two categories often blur or overlap, but they are analytically separate. I will very briefly discuss each separately, then turn to their integrated application in claims asserting breach of BIT rules on expropriation or fair and equitable treatment.

53. A proportionality test has been used as part of the interpretative definition of the scope of a particular BIT right. Typically this is done in relation to a concrete case.

54. Thus the Tecmed arbitral tribunal used a proportionality test to determine whether particular measures directed toward a specific investment amounted to an indirect expropriation, specifically to integrate assessment of the effects of regulation on the property interest with assessment of the exercise of police powers implicitly and necessarily reserved to the state.

55. Similarly, a test very much like a proportionality test was applied to specification of the "fair and equitable treatment" standard by the Arbitral Tribunal in Saluka Investments v. Czech Republic. The Tribunal emphasized that this standard "requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other."[49] In operationalizing the standard, the Tribunal stated: "A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination."[50]

56. The arbitral jurisprudence dealing with fair and equitable treatment and related standards, is mainly addressed to situations in which the conduct of the state that is complained of was directed toward a specific investor or

[49] Award of 17 March 2006, para 306.
[50] Para 307.

investment, as was the case in Saluka v. Czech Republic and Tecmed v. Mexico. In several cases where the argument by the foreign investor was unsuccessful, the claimant sought to show that an apparently general legal regime of the host state was in fact targeted specifically at this investor or investment and was not fair and equitable, but the Tribunal found it to be a general regulation exercising public power. A prominent example of this is Methanex v. USA. In situations where the measure challenged is a general regulatory measure taken for important public purposes and applicable across the entire economy and national society, and where there was no contract or other specific relationship between the state and the investor, the balancing process in the general interpretation of the BIT provision is likely to attach great weight to the state's regulatory interest, as the Methanex decision indicates.

57. A proportionality test may be used in a second way: to evaluate a state's measures that restrict an already-defined right or interest under the BIT. The state measures may be subject to varying degrees of scrutiny (and thus a Tribunal may require varying degrees of exact proportion), ranging from deprivations of life or liberty at one extreme, to certain exercises of general economic powers or special emergency powers at the other. In the Saluka case, for example, the Tribunal stated in relation to the general rule of non-discrimination: "any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment."[51]

58. I turn now to the integrated application of these two kinds of proportionality tests, to both indirect expropriation and fair and equitable treatment. Typically, a tribunal determines (1) whether the state's measure conflicting with the apparent right under the BIT had a legitimate aim, (2) whether the measure could at the time have been expected by the government to advance realization of that aim, and (3) whether less restrictive measures would have been equally effective to achieve the legitimate aim. There may then follow a fourth phase, balancing the interests involved, and in some cases calibrating or fine-tuning this balance retrospectively or prospectively. This methodology can be applied to claims relating to the standards of expropriation and of fair and equitable treatment, as indeed to other substantive claims arising under investment treaties.

59. In drawing the line between a regulation (generating no entitlement to compensation under the international law provisions on expropriation) and an indirect expropriation undertaken for a public purpose (in which some obligation of compensation is entailed), in recent practice, regulatory measures of general application taken in a genuine way for a legitimate and

[51] Award of 17 March 2006, para 307.

important purpose of public welfare have usually not been characterized as indirect expropriations. An important starting point is thus to determine whether the measures in question were general, applying across the whole economy, or were targeted against specific investors or groups. It may also be relevant to inquire whether the measures were taken in the general societal interest, or simply to benefit particular persons of narrow groups. A next step is to determine whether the governmental measure had a legitimate aim, and how important the aim was. If measures were aimed at preventing the collapse of financial and banking sectors, and avoiding large numbers of bankruptcies and reducing certain risks of systemic economic failure, these are aims of great importance. Consideration would then turn to whether the measures taken could at the time reasonably have been thought likely to contribute to realization of these aims, and whether alternative measures causing less interference to the rights of foreign investors would have been equally effective and could reasonably have been taken instead. The overall context of the economy is relevant to determine what measures could have been effective – if, for example, contract obligations were specified in foreign currencies across the whole economy, or instead were relatively rare and of limited macro-economic significance, this may have a bearing on the degree to which transformation of these obligations into local currency was necessary given the macro-economic situation. The question whether all those suffering losses from the measures could realistically and affordably have been compensated in a comprehensive way, in the prevailing economic conditions, would be weighed. Where the measures have continuing operation, rather than temporary effects, consideration will be given to whether generalized restoration of the previous status quo among all affected contracting parties was a viable or reasonable policy choice. If these two requirements are met, the third stage is an analysis of the proportionality between the importance of the aim and the degree of interference with the protected rights. This part of the proportionality analysis balances the importance of the government's aim, and the need for it, with the general impact of the measure on the overall set of persons affected by it, in the specific context of the economic conditions then prevailing. Finally, any elements specific to the individual claimant, in particular if the general regulation had a much more severe impact on this claimant than on others comparably situated, would be considered. The availability of an effective procedure whereby a creditor suffering particular inequity or disadvantage could seek modification of a pesified contract, could be relevant in such a determination.

60. I have framed this as a proportionality test, which is the most standard framing in general international law. It would be very similar, if a little less precise, if framed as a balancing test, in the way that the Saluka Award seems to suggest. A proportionality analysis was applied by the arbitral tribunal in the Tecmed case, in the circumstances of deciding whether a specific regulatory measure

directed toward this investment (denial of an operating license for the waste disposal facility) was an indirect expropriation : [52]

"After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.[53] Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State in light of Article 5(1) of the Agreement to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.[54] To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not.[55] On the basis of a number of legal and practical factors, it should be also considered that the foreign investor has a reduced or nil participation in the taking of the decisions that affect it, partly because the investors are not entitled to exercise political rights reserved to the nationals of the State, such as voting for the authorities that will issue the decisions that affect such investors."

These factors, identified in the specific context of non-renewal of an operating license for a single plant, do not necessarily represent the list of relevant factors for other kinds of cases, such as measures taken in a large-scale socio-economic emergency. The analysis will vary on other issues also: in some cases, particular foreign investors may have considerable opportunity, perhaps more than nationals, to be consulted about, even to shape, local decisions; while in other cases they may not. The assessment of legitimate expectations

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[52] *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003 – 43 ILM 133 (2004), para 122. The following quotation also includes footnotes found in the arbitral award, which are the next three footnotes below.

[53] European Court of Human Rights, In the case of Matos e Silva, Lda., and Others v. Portugal, judgment of September 16, 1996, 92, p. 19 , http://hudoc.echr.coe.int.

[54] European Court of Human Rights, In the case of Mellacher and Others v. Austria, judgment of December 19, 1989, 48, p.24; In the case of Pressos Compañía Naviera and Others v. Belgium, judgment of November 20, 1995, 38, p. 19, http://hudoc.echr.coe.int.

[55] It has been stated that: "....on the whole [...] notwithstanding compliance with the public interest requirement, the failure to pay fair compensation would render the deprivation of property inconsistent with the condition of proportionality", Y. Dinstein, Deprivation of Property of Foreigners under International Law, 2 Liber Amicorum Judge Shigeru Oda, p. 849 et seq.; esp. p. 868 (2002).

must include expectations as to regulatory measures the state might take if an emergency were to arise, and the legal significance to be attached to any such expectations may vary across different cases and contexts.

61. Turning to the fair and equitable treatment standard, a similar proportionality analysis may be conducted. Absent express commitments to the contrary, and presuming proper procedures were met, it seems unlikely that a prospective regulation of general application requiring contract values to be determined only in the local currency would ordinarily violate a fair and equitable standard, where taken as a means of managing an emergency. The fuller proportionality analysis seems apposite, however, for a measure which altered the terms of existing private contracts. I am not aware of any modern arbitral jurisprudence under investment treaties that deals with a general regulation altering private contracts during an economic emergency or as part of post-emergency recovery. Conformity or non-conformity of the measures with the law of Argentina, as that law operates in an emergency context, is one relevant factor. The proportionality analysis, and the considerations that are relevant within it, would closely track the proportionality analysis that I outlined above in relation to expropriation.

62. With regard to expropriation, fair and equitable treatment, or other BIT standards, a tribunal is confronted with the question: what degree of deference ought an international tribunal to accord, in this case, to the state institutions in their choice of measures impacting private rights and interests established or protected by the treaty? In applying a standard proportionality test, international and national tribunals have recognized that the degree of deference owed by the tribunal to the state's policy choice will depend on several specific factors. As the case law of the European Court of Human Rights demonstrates, one element is a balance between the nature and importance of the right at issue, and the nature and importance of the state's justification for interfering with it. Thus the Court has given considerable deference to the state's decisions on economic and social policy,[56] and on national security.[57] Conversely, it has undertaken very strict review of state measures involving criminal procedure and deprivation of liberty, restrictions of free expression on political issues, or interference in aspects of private life.

63. Although special considerations arise for an international tribunal because of being more remote (see below), many of the considerations relating to degrees of deference for a judicial tribunal are also familiar from the jurisprudence of national tribunals. For example, the Supreme Court of Canada noted in 1997 that: "in the social, economic and political spheres, where the legislature must reconcile competing interests in choosing one policy among several that might be acceptable, the courts must accord great deference to the legislature's

[56] Powell and Rayner v. UK, (1990) 12 EHRR 355; James v. UK, (1986) 8 EHRR 123.
[57] Leander v. Sweden, (1987) 9 EHRR 433.

choice because it is in the best position to make such a choice."[58] As Justice La Forest put it in a 1995 case: "Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups."[59] A similar view was taken by a NAFTA Tribunal in the S.D. Myers case, holding that application of the "fair and equitable treatment" standard "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders."[60]

64. The French judicial system, in applying a test of proportionality for evaluation of rights-restricting administrative police measures taken to maintain public order, employs three different levels of deference, depending on the case. In some circumstances (including expulsion abroad of protected persons) a strict proportion is required between the infringement of rights and the public order justification, so that the rights-restricting measure meets the standard of being 'necessary' only if no less restrictive method was available to the state. An intermediate standard, applied to most exercises of administrative police powers (such as deprivation of liberty by the police), requires a reasonable proportion between the infringement of rights and the public order justification. A third standard, applicable to the making by the state of economic rules affecting individual actors, is that the court will only hold the state's action unjustified if there is a manifest disproportion.[61]

65. In some cases involving higher degrees of deference to the government's action, the court will apply a 'marginal check', which means that it does not put itself in the place of the administration while judging the reasonableness of the measure, and that it only qualifies a measure as illegal when the measure is totally disproportionate in the light of the facts, i.e. a measure that cannot reasonably be taken by any government on these facts. In such

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[58] Libman v. Attorney-General of Quebec, (1997) 3 BHRC 269, at p. 289.

[59] RJR-MacDonald Inc. v. Attorney-General of Canada [1995] 3 SCR 199, para 68. In para 70 he refers to his own observation in an earlier case, McKinney v. University of Guelph, [1990] 3 S.C.R. 229, at p. 305: "They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch... This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty

[60] S.D. Myers v. Canada, 40 ILM 1408 (2001), para 263.

[61] Marie-Caroline Vincent-Legoux, L'ordre public: étude de droit comparé interne (2001), pp. 296-310.

circumstances, it is only the process in which the discretion is exercised that is controlled by the judge, not the content.

66. Although Arbitral Tribunals under bilateral and multilateral investment treaties have not yet developed a comprehensive approach to review of emergency measures, or to review of other kinds of public order and public interest measures, such an approach is beginning to develop. The legal materials needed fully to structure such an approach are already available in general international law.

67. European courts have drawn a distinction between national and international tribunals with regard to the approach taken to the review of state action that impinges on private rights and interests. A principal rationale is stated by the European Court of Human Rights: "Because of the direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern... and of the remedial action to be taken... Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation."[62] The jurisprudence of the European Union, which engages integrally with the legal system of the United Kingdom, is informative in its approach to review to governmental powers, such as powers to maintain public order.[63] For example, a 1977 decision of the European Court of Justice held that, for the UK to justify a restriction on freedom of movement of citizens of member states by reference to *ordre public*, it was necessary that there be a threat that was real and sufficiently serious, affecting a fundamental interest of the society. The state had a margin of appreciation in determining whether such conditions existed and warranted the restriction.[64] In a similar case in 1974, the European Court of Justice, in permitting a state to impinge on cross-border freedom of movement by citizens of member states under European community law, on grounds of national public policy (*ordre public*), stated: "les circonstances spécifiques qui pourraient justifier d'avoir recours à la notion d'ordre public peuvent varier d'un pays à l'autre et d'une époque à l'autre, et qu'il faut ainsi, a cet égard, reconnaître aux autorités nationales compétentes une marge d'appréciation dans les limites imposées par le Traité."[65]

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[62] James v. United Kingdom, (1986) 8 EHRR 123, para 46.

[63] Caroline Picheral, L'ordre public européen : droit communautaire et droit européen des droits de l'homme (2001).

[64] R v. Pierre Bouchereau, Case 30-77, Rec. 1977 p. 1999, paras 35 and 34.

[65] Case 41/74, Yvonne Van Duyn v Home Office, [1974] E.C.R. 1337, at para 18. The official English text of this passage in the judgment reads: "the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty." It will be noted that the

68. The cases indicate a strong general tenor. Tribunals allow considerable latitude to governments in making broad economic and social policy decisions, provided these have a legitimate aim. This latitude is further extended if the government acts to deal with a national emergency, where public order and personal safety as well as the wider health of the nation are threatened, and the restrictive measures do not concern criminal procedure or police actions against personal liberty or free political expression.

VI. Necessity Precludes Wrongfulness in Customary International Law, and the Wrongfulness Precluded would properly include acts not in conformity with specific investor-protection rules in the Argentina-Chile Bilateral Investment Treaty

69. I have so far been addressing the proper interpretation and application of the primary rules of investor protection and state powers in contexts of state actions to manage emergencies and other situations involving public order and to protect fundamental public interests. If, and only if, there is established an apparent breach of these rules, as properly interpreted and applied in context, the question of necessity as a circumstance precluding wrongfulness arises for consideration. I turn now to this issue.

70. Necessity precludes wrongfulness under conditions specified in customary international law. It is well established that the wrongfulness precluded can be a breach of customary international law or a breach of treaty. This has recently been confirmed by the International Court of Justice, and by the United Nations International Law Commission.[66] The doctrine has a long history in customary international law. One of many historical examples is the statement in Herbert Jenner's legal opinion of November 22, 1832, prepared in his capacity as a law officer of the British government:[67]
"In a case, therefore, of pressing necessity, I think it would be competent to the Portuguese Government to appropriate to the use of the Army such Articles of Provisions etc., etc., as may be requisite for its subsistence, even against the will of the Owners, whether British or Portuguese; for I do not

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term "margin of appreciation" appears in the French text, but is rendered in English as "an area of discretion." The focus of analysis should be on the deference warranted, and the specific reasons for deference, not on endeavoring to give a unified definition to the concept of "margin of appreciation."

[66] The leading case is the decision of the International Court of Justice in the Gabčíkovo-Nagymaros Project case (Hungary/Slovakia), ICJ Reports 1997, p. 7, in which the Court notes (p. 63, para 101) that a state of necessity may "be invoked to exonerate from its responsibility a State which has failed to implement a treaty". Also important is the award of the arbitral tribunal in Rainbow Warrior (New Zealand/France, 1990), 20 RIAA p. 217, especially pp. 251-2, para 75.

[67] Reprinted in McNair, International Law Opinions: Selected and Annotated, vol 2 (1956), at pp. 231-2, quotation from p. 232. Other law officers' opinions recognizing necessity as a ground excluding wrongfulness are also reprinted in that volume.

apprehend, that the Treaties between this Country and Portugal are of so stubborn and unbending a nature, as to be incapable of modification under any circumstances whatever, or that their stipulations ought to be so strictly adhered to, as to deprive the Government of Portugal of the right of using those means, which may be absolutely and indispensably necessary to the safety, and even to the very existence of the State."

71. Concerns have rightly been expressed about 'necessity' being invoked by states in the course of committing outrageous abuses, and about lack of analytical sharpness if the category is used in an undifferentiated way as an amorphous catch-all. The concerns about abuses have been greatly ameliorated in contexts where independent third-party assessment is available. Such tribunals are also in a position to make the evaluation of complex sets of legal materials necessary for analytical sharpness in specific legal contexts. The International Court of Justice and the United Nations International Law Commission have both accepted the existence of necessity as a general category of circumstances precluding wrongfulness in circumstances where an act not in accordance with obligations established by an international treaty would otherwise result in a violation of international law.[68]

72. For this purpose, the United Nations International Law Commission's Articles on State Responsibility, which the United Nations General Assembly took note of in Resolution 56/83 of 12 December 2001, provide a useful indication of the current law, although the body of law has developed for more than a century, and the international legal practice includes interpretative materials that are not fully explicated in the necessarily compressed compass of the ILC's Articles and Commentary. Article 25 is the starting point for analysis.[69] I will focus on aspects of the tests formulated in paragraphs 1(a) and 2(b) of Article 25.

73. Article 25(1)(a) was read by an arbitral tribunal in CMS v. Argentina as meaning that "the plea of necessity is 'excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient.'"[70] The Tribunal mentioned in a few words some alternatives to

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[68] Gabčíkovo-Nagymaros Project case (Hungary/Slovakia), ICJ Reports 1997, p. 7, para 101; and ILC Articles (below).

[69] Article 25. "1. Necessity may not be invoked by a State as a ground for precluding wrongfulness of an act not in conformity with an international obligation of that State unless the Act:

(a) is the only means for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity."

[70] CMS v. Argentina, ICSID Case No. Arb/01/8, Award of 12 May 2005, para 324. The Tribunal here quotes from the International Law Commission's Commentary to Article 25.

the measures Argentina took, then commented: "Which of these policy alternatives would have been better is a decision beyond the scope of the Tribunal's task, which is to establish whether there was only one way or various ways and thus whether the requirements for the preclusion of wrongfulness have or have not been met."[71] This approach has the result that, whenever two policy alternatives exist, a state cannot claim necessity whichever policy it chooses, even though both policies might result in conflicts with different private rights and interests guaranteed under international treaties. As virtually every large-scale socio-economic problem can be approached through at least two different policies, the effect would be that necessity can never be invoked in such circumstances. Such a doctrine, if correct, would establish for each state facing a mounting crisis a perverse incentive not to act until all but one of its options had been closed off – whereas aggregate welfare, and the interests of investors, will often be better served by a state taking decisions earlier when it still has options. The CMS Tribunal was likely concerned – and rightly – not to arrogate to itself the role of a government in choosing among competing policies. Conversely, the Tribunal was concerned not to allow a plea of necessity for a policy choice which it could not robustly evaluate, mindful as it was of the long history of abuses of 'necessity' claims in international law. But the Tribunal's solution was not satisfactory and not consistent with customary international law. Customary international law on this issue is more accurately reflected in a series of cases where necessity has been accepted as a plea to justify a particular act, without a detailed inquiry as to other lawful acts that might have been possible. In the French Company of Venezuelan Railroads case, the Tribunal observed that non-payment by the government of funds to the company during the crisis was justified: "The appeal of the company for funds came to an empty treasury, or to one only adequate to the demands of the war budget."[72] The Tribunal did not inquire whether the government had funds that could have been diverted from the war budget to pay the company – the choice made by the government in its allocation of funds during the crisis did not deprive the government of its justification. Similarly, when Bulgaria faced financial difficulties affecting payment of its obligations under the Forests of Central Rhodope arbitral award, the parties accepted that a departure from the original payment arrangements was justified, even though it was not the case that Bulgaria had absolutely no ability to pay and therefore no other options.[73]

74. The phrase 'the only way' in Article 25 can be read in several ways. The only case discussed by the ILC on this point, the Gabčíkovo-Nagymaros case,

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[71] Ibid, para 323.

[72] French Company of Venezuelan Railroads (France/Venezuela), Award of 31 July 1905, 10 RIAA 285, pp. 353-4 (quoting from the ruling of the Umpire, which begins on p. 335). .

[73] A short summary was given by Professor Ago, Yearbook of the International Law Commission 1980, p. 157 (UN doc. A/CN.4/SR.1613, para 14. He draws on League of Nations Official Journal, 15th Year, No. 11 (Pt 1) (November 1934), p. 1432.

provides an illustration. This case addressed a treaty for a unified project involving the building of two dams. In holding that Hungary could have pursued its legitimate environmental and water protection aims without suspending implementation of the treaty with Slovakia, the Court noted specific physical features of the upstream dam works that meant Hungary had the legal and operational capacity unilaterally to protect its interests without suspending the treaty. This was possible partly because a great deal of the building work at the upstream Gabčíkovo end had already been completed. With regard to the downstream dam works, the Court emphasized that Hungary had itself accepted that enhanced water processing was an adequate and practicable solution to water quality problems in the Budapest, so suspension of the works under the treaty was not necessary. In each case, the Court looked carefully and in detail at what the realistic policy options really were.[74] The CMS Tribunal's approach is very different – under this approach, Hungary could not have suspended the treaty on grounds of necessity if any other lawful policy could have been constructed. On this approach, even if the only alternative for the state would have been a policy involving insupportable cost and utter foolhardiness, that would be a sufficient alternative making a necessity plea unjustified, provided only that the alternative policy was lawful. The ICJ clearly did not take this approach.

75. It has occasionally been suggested that an economic crisis cannot constitute a state of necessity. The CMS Tribunal's approach would to a large extent achieve this result. But it is difficult to see such a view as well-founded.

76. I suggest that the challenge of deciding whether a government's socio-economic policy choice meets what has been called (not quite accurately) the 'only way' criterion for a plea of necessity can best be met by introducing a combined proportionality and rational alternative test. A tribunal would assess whether the measures had a legitimate aim (safeguarding an essential interest against a grave and imminent peril), were well-focused measures for the pursuit of that aim, and there was not a manifestly less rights-restricting alternative policy that would have been equally effective and a reasonable choice for the government to make in pursuit of the legitimate aim.

77. I turn now to the requirement in paragraph 2(b) of Article 25 of the ILC Articles, that the state invoking necessity must not have contributed to the situation of necessity. The Tribunal in CMS v. Argentina concluded that, while there were exogenous factors, Argentina had made a 'sufficiently substantial'[75] contribution to it. "The crisis was not the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter."[76] The reasoning given does not set limits of remoteness on,

[74] Gabčíkovo-Nagymaros Project case (Hungary/Slovakia), ICJ Reports 1997, p. 7, paras 49-58.
[75] This phrase is employed in the ILC's Commentary to Article 25.
[76] CMS v. Argentina, ICSID Case No. Arb/01/8, Award of 12 May 2005, para 329.

and nor does it much clarify, the meaning of 'sufficiently substantial'. It thus appears to depart from ordinary legal principles that carry over into customary international law. Almost every economic crisis will have involved government policy in some way. In my view, tribunals faced with these issues must develop robust criteria of causality and remoteness, focusing on the direct and proximate causes of those elements of the state of necessity to which the contested measures were a response. The standard in Article 25(2)(b) aims to prevent a government taking improper advantage of its own conduct. Long-term economic management presents a different situation from the kinds of conduct that is in issue in most controversies about necessity in general international law. A government must continue to manage the economy as best it can, and must be able to make the best reasonable choices for doing that, even if it or its predecessors had made unwise policy decisions earlier. In cases where an economic crisis has occurred, the proper test as to whether the government itself caused the crisis and so should be unable to make a claim of necessity, should be one of bad faith and egregious unreasonableness. That is, if a government has pursued economic policies in good faith, without an aim or intention of precipitating a crisis or disrupting particular legal regimes, and the policies were not egregiously unreasonable choices having regard to economic orthodoxies and understandings prevalent at the time, then reliance on the doctrine of necessity should not be precluded, where an economic crisis results in which the state finds itself required to take urgent action to preserve the economy and the welfare of the affected community.

VII. Conclusion

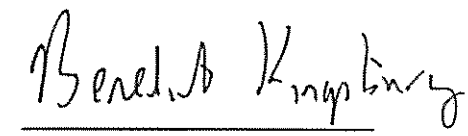
78. This opinion has addressed the core powers of the two states parties to the Argentina-Chile BIT to deal with emergencies and to maintain public order and protect fundamental public interests, as these powers are accommodated within the system of investor protection defined by the BIT. Article 10(4) provides a particular framework and structure for a tribunal in such a case. This opinion has highlighted the insufficiency, as a matter of treaty analysis and application, of simply examining standard arbitral awards, judicial decisions, and writings on expropriation, on fair and equitable treatment, and on the other investor rights provisions found in the BIT. The BIT must be interpreted in light of the powers, responsibilities, and intentions of the states that made it, and in light of the relevant principles of national law and of international law. The BIT itself is embedded in the general structure of international law, including the law on interpretation and on state responsibility. Legal principles and methodologies that are well established in that structure, such as analysis of proportionality, may profitably be used to evaluate the application of the treaty in specific situations.

79. In conclusion, I note that the issues canvassed in this opinion have implications for questions that go beyond one single arbitration alone. The raft of arbitral cases involving emergency-related events in Argentina put into focus a significant problem: to what extent, and how, are the important investor protection provisions in the lattice of bilateral investment treaties reconciled with lawful state emergency and public order powers? In particular, how did the states making BITs which do not have specific provisions excluding emergency measures from the BIT regime (that means, the vast majority of the approximately 2400 existing BITs), intend that very large-scale emergencies be treated by the BITs? In massive emergencies, the government may indubitably be required in the public interest to take measures across the whole economy which it simply could not take if the result would be a series of arbitral decisions in individual cases that in aggregate would make the measures impossibly costly. The broad question -- which every arbitral tribunal must face when dealing with measures having wide-spread effects in a major emergency, even when the specific case before the tribunal is modest in scope -- is whether the proper interpretation of the relevant bilateral investment treaty is that a state breached its own treaty in taking such measures, or that the state must pay compensation on a basis which, once generalized, would mean it could not deal effectively with large-scale emergencies. This question of interpretation relates both to the time of the emergency itself, and to the post-emergency measures the state takes to orchestrate national recovery, measures which may necessarily or properly have to focus on goals other than restoring what may be the un-restorable status quo ante. Each arbitral tribunal may be dealing with only one piece of the mosaic. But commonality arises because each tribunal faces very similar core problems of interpretation of treaties that do not say explicitly how the states parties intended large-scale emergencies, and post-emergency recovery, to be managed. In aggregate, the arbitral tribunals and the bilateral investment treaties represent a vital but incompletely-institutionalized system of governance that must be able to deal with macro-scale problems to be sustainable. Each tribunal operating pursuant to a reciprocal inter-governmental treaty, such as the Argentina-Chile BIT, must consider, in situations where large-scale economic emergency or public order measures may have been involved, whether it is probable that governments entering into such a treaty, on a reciprocal basis, intended to subordinate or did subordinate their own emergency and public order and public interest protection powers to the goal of investor protection. These powers are deeply established in the legal systems of the treaty parties, and are central to the functions of government. The International Court of Justice's above-quoted observation in considering a right of private investors under an Italy-US treaty makes this fundamental general point: "Clearly the right cannot be interpreted as a sort of warranty that the normal exercise of control and management shall never be disturbed. Every system of law must provide, for example, for interferences with the normal exercise of rights during public emergencies and the like."[77]

[77] Elettronica Sicula s.p.a.(ELSI) (United States v. Italy), Judgment of 20 July 1989, ICJ Reports,

Article 10(4) of the BIT, with its requirement that the Tribunal decide in accordance with norms of national law and applicable principles of international law as well as the other norms there mentioned, reinforces the general point that it is essential for a Tribunal to undertake a systematic analysis of the integration into the BIT system of state powers to deal with emergencies, maintain public order, and protect fundamental public interests. These powers are relevant to evaluation of primary obligations under the BIT, of compatibility of specific state measures with those obligations, of claims of necessity, and of issues concerning compensation for losses.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 15, 2006 in New York, NY.



BENEDICT KINGSBURY

1989, 15, para 74.