Chapter 10

The Argentine Crisis and Foreign Investors

A Glimpse into the Heart of the Investment Regime*

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I. OVERVIEW

Actions taken by the Argentine government in response to its 2001 economic and political crisis have resulted in the greatest wave of claims by foreign investors against a single host country in recent history. Of the over forty claims filed to date against Argentina pursuant to bilateral investment agreements (BITs) in the wake of that crisis, a number of arbitral awards have now been issued. These include four involving claims by U.S. investors in Argentina's gas transportation and distribution utilities—CMS, Enron, Sempra, and LG&E (henceforth the *Argentine Gas Sector Cases*). In all four cases, ad hoc tribunals established under the World Bank's International Centre for Settlement of Investment Disputes (ICSID) rules have found Argentina liable for

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** The author testified as an independent legal expert hired by the respective investors in the four cases cited at *infra* note 1, and his views are cited in those arbitral decisions. He was not involved in any capacity in the CMS annulment proceeding cited at *infra* note 3 and is not involved in any pending investor-state claim against Argentina. Although the author's legal opinions in these cases, like other expert opinions filed in these cases, have not been made public by the parties, the author remains free to express his personal views on these matters. The author was also, from mid-1985 through the end of 1987, as an attorney-adviser in the Office of the Legal Adviser within the U.S. Department of State, a principal negotiator for the United States for bilateral investment treaties (BITs). The views expressed here do not necessarily represent the views of that Office or of the United States government.

*** The views expressed do not necessarily reflect those of Shearman & Sterlings, LLP or its clients.

its actions.[1] The damage awards, three of which exceeded $100 million, have been among the highest ever rendered by an ICSID tribunal.[2] The damage award in the CMS case was affirmed in an annulment proceeding.[3] Requests for annulment of the LG&E, *Enron* and *Sempra* Awards are pending.[4]

Although all of these decisions interpret and apply the same treaty, *the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of* 1991 (henceforth the *U.S.–Argentina BIT*),[5] to a strikingly similar set of facts, the five judgments issued to date differ on a number of points, and in particular concerning the interpretation of that treaty's "measures not precluded" (NPM) clause (Article XI).[6] Specifically, although there is significant commonality between the CMS, Enron, and Sempra decisions (which is not surprising, given the overlap in arbitrators),[7] the LG&E Decision on Liability and the CMS Annulment Award differ markedly from the other decisions in

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1 CMS Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005) [hereinafter CMS Award], *at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC504_En&caseId=C4; LG&E Energy Corp. v. Argentine Republic, ICSID Case No. Arb/02/1, Decision on Liability (October 3, 2006) [hereinafter LG&E Decision on Liability], *at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseId=C208; Enron Corp., Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. Arb/01/3, Award (May 22, 2007) [hereinafter Enron Award], *at* http://ita.law.uvic.ca/documents/Enron-Award.pdf; Sempra Energy Int'l v. Argentine Republic, ICSID Case No. Arb/02/16, Award, P 391, September 28, 2007 [hereinafter Sempra Award], *at* http://ita.law.uvic.ca/documents/SempraAward.pdf.
Other pending claims, such as El Paso Energy v. Argentine Republic, ICSID Case No. ARB /03/13, appear to raise comparable issues to those that are addressed here.

2 *Id*. *see also* LG&E Corp. and others v. Argentina, ICSID Case No. ARB/02/1, IIC 295 (2007), July 25, 2007, *at* http://www.investmentclaims.com/IIC_295_(2007).pdf [hereinafter LG&E Damages Award].

3 CMS Transmission Co. v. Argentine Republic, ICSID Case No. Arb 01/08, Decision of the ad hoc Committee on the Application for Annulment, September 25, 2007 [hereinafter CMS Annulment Decision], *at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4.

4 Registered September 19, 2008, March 7, 2008 and January 30, 2008, respectively, details *at* http://icsid.worldbank.org/.

5 Signed November 14, 1991, entered into force October 20, 1994, *at* http://www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf.

6 For text of Article XI *see infra* at 391. As discussed below, at Part B(3)(d), the tribunals also differed in their views of various damages issues. In this regard, *see generally* Kathryn Khamsi, *Damages for Non-Expropriatory Investment Treaty Breach: a Critical Look at the Argentine Gas Sector Cases* (forthcoming).

7 Professor Francisco Orrego Vicuña served as President of the CMS, Enron, and Sempra tribunals. The Honorable Mark Lalonde, P.C., O.C., Q.C., was a member of both the CMS and Sempra tribunals. The remaining member of the CMS tribunal was H.E. Judge Francisco Rezek, who also sat on the LG&E tribunal. The remaining member of the Enron tribunal was Professor Albert Jan van den Berg, who also sat on the LG&E tribunal. The president of the LG&E tribunal was Dr. Tatiana B. de Maekelt. The remaining member of the Sempra tribunal was Dr. Sandra Morelli Rico. The CMS Annulment Committee was composed of Judge Gilbert Guillaume as president, and Judge Nabil Elaraby and Professor James R. Crawford.

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their treatment of Argentina's central defense to the investors' claims, namely that its financial crisis excused it from compensating injured U.S. investors for breach of the *U.S.–Argentina BIT* (Article XI). Only the LG&E panel accepted this defense and excused part of Argentina's liability on this basis. Although the CMS Annulment Committee did not annul the CMS liability decision, it severely criticized it in terms that suggested considerable sympathy with the position taken by the LG&E arbitrators.

The *U.S.–Argentina BIT* is part of a worldwide network of investment agreements. There were 2,608 BITs in place at the end of 2007, concluded among 179 countries, and another 254 regional free trade agreements that include investment provisions (including the North American Free Trade Agreement (NAFTA)), that provide foreign investors with non-discrimination rights (namely rights to national treatment and to most-favored-nation (MFN) treatment) comparable to those extended to traders of goods under the WTO. Most of these investment agreements, including the NAFTA's Chapter Eleven and the U.S.*–Argentina BIT*, go further than the WTO, however. They provide foreign investors additional guarantees not based on the relative treatment extended to national investors, such as absolute rights to "fair and equitable" treatment under international law and to prompt, adequate and effective compensation upon expropriation.[8] In addition, unlike the WTO's purely inter-state dispute settlement system, the *U.S.–Argentina BIT*, like most other investment agreements, provides private foreign investors with direct access to international dispute resolution—namely arbitration under the rules of ICSID, ICSID's Additional Facility, or the UNCITRAL rules. Most international investment agreements thereby empower foreign investors from the state parties—who are effectively the third-party beneficiaries of these interstate compacts—to assume the role of private enforcers of the investment rights contained in such agreements. Although negotiation of such investment agreements began four decades ago, the vast bulk of these agreements have been negotiated since the end of the Cold War. The commitments in these agreements stand in stark contrast to the principles advocated formally by, most prominently, developing countries at the UN General Assembly, under the rubric of a "New International Economic Order" (NIEO).[9]

The *Argentine Gas Sector* Cases play into long-standing controversies between "capital exporting" and "capital importing" states familiar to international lawyers and students of a NIEO. They have served as a Rorschach test of attitudes toward the worldwide network of investment treaties and have often been used as exhibit #1 in more recent critiques of the investment treaty regime. These contemporary critiques parallel those faced by other international regimes or institutions.[10]

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8 *See* Articles II(2)(a) and IV(1), *U.S.–Argentina BIT*.

9 *See* in particular the *Charter of Economic Rights and Duties of States*, G.A. Res. 3281 (XXIX), UN Doc. A/9631 (December 12, 1974), reprinted in 14 I.L.M. 251 (1974); *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3202 (S-VI), 6th Special Sess., Agenda Item 7, U.N. Doc. A/RES/3202 (S-VI) (1974). For an authoritative account of the dramatically changing nature of international investment law given the rise of investment treaties, *see* Andreas Lowenfeld, International Economic Law at 391–493 (2002).

10 *See, e.g.*, José E. Alvarez, International Organizations as Law-Makers, at 630–45 (2005) (discussing "horizontal," "vertical," and "ideological" critiques of international organizations).

As with respect to some critiques of the WTO or the legal dimensions of the IMF's operations, some target the investment regime's "democratic" deficits, that is, the alleged "vertical" disconnects between what states are required to do under investment agreements and what their legislatures or courts are charged with doing at the national level. Other criticisms of the "one-sided" investment agreements are reminiscent of old UN debates over a NIEO. For some, investment agreements reward only capital exporting states and their investors, whereas capital importing states, typically in the South, have no choice but to yield to the power and wealth disparities that such agreements reflect and perpetuate. On this view, the investment regime is built on "horizontal" disequilibria among states that are supposed to be sovereign equals. It is but a short step from this view to the proposition that BITs are, accordingly, contracts of adhesion that ought to be interpreted, where possible, against the interests of their rich drafters. Other critiques suggest that the investment regime, and particularly the way investment disputes are resolved, is ideologically skewed. Thus, some suggest that investor-state arbitral outcomes are merely another manifestation of the "Washington Consensus model" of governance.[11]

The more specific charges made against the investment regime are that it is insensitive to concerns other than those of free trade, that it wrongly trumps legitimate sovereign decisions, that it destabilizes the international legal system by empowering private non-state actors, and that it applies inappropriate private or commercial dispute resolution methods to disputes implicating the public interest. All of these are manifest in the adverse reactions generated by the *Argentine Gas Sector Cases.*[12]

The original CMS multi-million dollar award and the subsequent decisions in *Enron* and *Sempra* are, to some, casebook examples of free traders' insensitivity to legitimate (and vitally necessary) forms of public regulation. Some deride those rulings as callous, one-sided failures to recognize the dire needs of the Argentine people during a "financial collapse of catastrophic proportions."[13] There is considerable sympathy for the outlier arbitral decision in LG&E, and for the criticisms by the CMS Annulment Committee of that first ICSID decision against Argentina.[14] LG&E's finding that the Argentine Decree of Necessity and Emergency of December 1, 2001 was necessary to

See also William Grieder, One World, Ready or Not (1997), Lloyd Gruber, Ruling the World (2000); Susan Marks, *Big Brother is Bleeping Us—With the Message that Ideology Doesn't Matter*, 12 EJIL 109 (2001).

11 *See generally*, Daniel Kalderimis, *IMF Conditionality as Investment Regulation: A Theoretical Analysis*, 13 Soc. & Leg. Stud. 104 (2004).

12 Thus, Gus Van Harten begins his book-length critique of the investment regime, which embraces all of these concerns, by referring to the *CMS v. Argentina* arbitral award. Gus Van Harten, Investment Treaty Arbitration and Public Law, at 1–2 (2007).

13 *See, e.g.*, Burke White and von Staden, Comment on Opinio Juris (*at* http://opiniojuris.org/posts.12011555878.shtml).

14 Many have criticized the Annulment Committee for not going further than it did to annul the CMS decision itself, particularly since it found a "manifest error of law" in its interpretation of the Article XI of the *U.S.–Argentina BIT*. CMS Annulment Decision, *supra* note 3, Para. 130. The Annulment Committee also indicated that if it had been "acting as a court of appeal, it would have to reconsider the Award on this ground." *Id.* Para. 135. It also indicated that the CMS panel decision's application of Article XI was not only "cryptic" but "defective." *Id.* Para. 136.

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"maintain order and control the civil unrest" and was therefore an "essential security interest"[15] appears eminently reasonable to many observers–as does that arbitral tribunal's finding that when a state's economic foundations are "under siege, the severity of the problem can equal that of any military invasion."[16] It seems self-evident to many observers, as it did to the arbitrators in LG&E, that Argentina had "no choice but to act,"[17] that its enactment of its Emergency Law was a "necessary and legitimate measure,"[18] and that in these circumstances Argentina's liability must be "excused," at least for the period that the crisis lasted.[19]

The *Argentine Gas Sector Cases* also appear symptomatic of the tendency for investor-state arbitrators to "second-guess" politically sensitive actions taken by sovereigns. Many are astounded by the idea that three individuals, two of whom are party-appointed, in a case brought by a single foreign investor, who is not entitled even to be considered part of the greater democratic polity of a host state such as Argentina, can question how that government chooses to respond to a serious crisis, especially since, as the LG&E arbitrators put it, international law generally leaves such determinations to "the State's subjective appreciation."[20] There is considerable unease, including among U.S. observers, that investor-state dispute settlement might serve as a license permitting supranational adjudicators to intrude on fundamental questions of "sovereignty" or interfere with sacrosanct matters relating to "domestic jurisdiction."[21]

The criticisms directed at the original CMS arbitral decision as well as those in *Enron* and *Sempra* resonate for those who believe that the investment regime elevates one set of values over the competing values of the rest of international law. Human rights and environmental NGOs and some academics argue that investment treaty

15 *Id.* at Paras. 231, 235 and 237.

16 *Id.* at Para. 238.

17 *Id.* at Para. 239.

18 *Id.* at Paras. 240 and 242.

19 *Id.* at Para. 245.

20 *Id.* at Para. 248. *See generally*, Van Harten, *supra* note 12.

Critics of the investment regime point out that such supranational second-guessing of members' measures to protect their "essential security" is in fact quite unlikely under the WTO regime for a number of reasons, including the fact that WTO dispute settlement, limited to states as claimants, is unlikely to present such opportunities for judicial intervention. *See, e.g.*, Van Harten, *supra* note 12, at 95–102 (enumerating the many features that make investor-state arbitration unique among contemporary forms of international dispute resolution).

21 Indeed, it is probable that some state judges in the United States, who have expressed surprise that their rulings can now be questioned in the course of NAFTA investor-state dispute settlement, would sympathize with the positions taken by the Argentine government in these cases, and especially its contention that only Argentine courts ought to consider such critical questions of public policy. *See, e.g.*, Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 Columbia L. Rev 833 (2007) (citing the "surprise" of the Chief Justice of the Massachusetts Supreme Court that its judgments were subject to "review" under NAFTA investor-state dispute settlement). Controversy over the Argentina cases has even played a role in debates over the wisdom of free trade agreements on the Presidential campaign trail in the United States. *See, e.g.*, Alan Beattie, *Concern grows over global trade regulation*, Financial Times, March 12, 2008.

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obligations are destabilizing insofar as the regime unduly empowers already powerful multinational enterprises, while devaluing states' efforts to give effect to competing non-trade related goals at the national and sub-national levels. Investor-state arbitrations compel governments to engage in protracted and expensive litigation to defend regulatory actions that often could not be challenged under national law (including under the U.S. Constitution's takings clause) or under pre-existing international law.[22] Critiques of the *Argentine Gas Sector Cases* also resonate with those for whom these treaties accord "special rights" to those least deserving of them, whereas leaving without a comparable remedy multilateral investors' much less powerful consumers or employees who are injured by their actions.[23] None of this is a surprise, of course, for those who see BITs as asymmetrical bargains struck along predictable North-South lines.[24]

Criticisms of the *Argentine Gas Sector Cases* dovetail with concerns about the underlying private arbitral mechanisms used. For some, international arbitrations, long used to resolve purely private commercial disputes (such as breaches of contract between two private parties), are ill-suited to settling matters involving fundamental issues of public policy.[25] Public policy issues of such magnitude cannot be settled legitimately, it is argued, through unpredictable, haphazard and potentially inconsistent decisions issued by ad hoc arbitrators drawn only from narrow specialties within international law but ought best be decided by national judges or at least a permanent body

22 *See, e.g.*, Public Citizen, *NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy* (September 2001); *see also* Vicki Been, *Does an International 'Regulatory Takings' Doctrine Make Sense?* 11 N.Y. U. Environ. L.J. 49 (2002). Public Citizen, for example, has suggested that the mere threat of NAFTA investor-state suits comparable to those brought by LG&E, CMS, Enron, and Sempra "chill" legitimate regulatory actions by government. *See* Public Citizen, *supra* note 19. *See also* Santiago Montt, *What International Investment Law and Latin America Can and Should Demand from Each Other*. *Updating the Bello Doctrine in the BIT Generation, 3* Revista Argentina Del Régimen de la Administracion Pública *(2007)*; Van Harten, *supra* note 12.

23 *See, e.g.*, José E. Alvarez, *Critical Theory and the North American Free Trade Agreement's Chapter Eleven*, 28 Inter-American Law Review 303 (Winter 1996–1997); José E. Alvarez, *Foreword: The Ripples of NAFTA*, Foreword to NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects xxi (Todd Weiler ed. 2004); Van Harten, *supra* note 12, at 142.

24 Even before the onslaught of investor-claims a number of commentators had suggested that less wealthy countries needful of foreign capital had been forced, *individually*, to consent to treaties that harm or impoverish them as a group or that make it more difficult for them to fulfill other international commitments (as under the International Covenant on Economic, Social and Cultural Rights). *See, e.g.*, Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. Int'l, L 639 (1998). More radical critics have suggested that these agreements are merely a more diplomatic version of colonial-era capitulation treaties in which the metropole forced non-Western countries to "civilize" along Western models. *See* generally, David P. Fidler, *The Return of the Standard of Civilization*, 2 Chi. J. Int' L. 137 (2001); William Greider, One World, Ready or Not (1997).

25 *See, e.g.*, Van Harten, *supra* note 12, *passim*; Saskia Sassen, *De-Nationalized State Agendas and Privatized Norm-Making*," in Karl-Heinz Ladeur, ed. Public Governance in the Age of Globalization (2004).

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of international judges whose independence and neutrality is assured by lengthy tenure in office.[26] Others worry about the potential for forum-shopping by investors, not only because of the prospect that more than one BIT might be applicable or because of the opportunities accorded by the most-favored-nation clauses of such treaties, but also because investor-state dispute settlement might be used by private investors to address trade issues that ought to be handled by the WTO's inter-state dispute settlement mechanism.[27] And worries about the recourse to investor-state arbitration are not limited to scholarly circles. Thus, U.S. television commentator Bill Moyers has criticized the NAFTA's investor-state dispute settlement system for relegating policy disputes to "unaccountable" supranational tribunals operating in secret and closed to other stakeholders.[28]

For international lawyers, the *Argentine Gas Sector Cases* are also illustrative of a narrower legitimacy concern: the risk that investor-state arbitrators will fail to produce consistent international investment law. This preoccupation reflects wider fears of the de-legitimizing consequences of the "fragmentation" of public international law threatened by the growth of discrete specialties within international law and the proliferation of international dispute settlers.[29] This emphasis on consistent law yields predictable prescriptions for reform, such as proposals for generalizable principles of investment law or for greater recourse to common background legal principles.[30] For others, the same goal suggests the need for the establishment of an Appellate Body or a "permanent court" for investment disputes.[31]

For all these reasons, the decisions issued by the arbitrators in the CMS, Enron, and Sempra cases may be intensifying a political backlash against not only the *U.S.–Argentina BIT* but the entire investment regime. They make more understandable why some states appear to be hesitating before committing themselves to more investment agreements or about undertaking further legal reforms to implement the rights of

26 *See, e.g.*, Van Harten, *supra* note 12, at 175–84.

27 *See* Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working*, 59 Hastings L.J. 241 (2007).

28 *See* Bill Moyer's Frontline Report, *Trading Democracy*. *See also* Montt, *supra* note 22 (describing "BIT law" as a tool to undermine the *domaine reservé* of states and as forms of "global constitutional law" and "global administrative law").

29 The various ILC documents relating to fragmentation are *at* http://untreaty.un.org/ilc/guide/1_9.htm. The ILC's work culminated in a report with conclusions: *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Adopted by the International Law Commission at its Fifty-eighth session, 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10, para. 251), *at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf. (reference below), which the GA considered and noted (reference also below). The General Assembly considered and took note of the report and its conclusions: U.N. G.A. Resolution, *Report of the International Law Commission on the Work of its Fifty-eighth Session*, December 18, 2006, U.N. Doc. A/RES/61/34, *at* http://daccessdds.un.org/doc/UNDOC/GEN/N06/496/47/PDF/N0649647.pdf?OpenElement.

30 *See infra* at text accompanying ns. 427–8 (conclusion).

31 *See infra* at text accompanying ns. 429–31 (conclusion).

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foreign investors contained in their existing agreements. They may also help to explain or at least put into context other signs of investment regime backlash, such as Bolivia's May 2007 notice to ICSID announcing its withdrawal from the ICSID Convention,[32] Venezuela's own recent threats to limit ICSID jurisdiction, Ecuador's equally recent denunciation of nine of its own BITs and indication that it will not recognize ICSID jurisdiction over oil, gas, and mining investment disputes,[33] as well as actions by the United States and Canada to limit the scope of investor rights in their future BITs and free trade agreements.[34]

Part Two below examines the results reached in the five *Argentine Gas Sector Cases*. As that Part will illustrate, Argentina's defense of necessity in these cases raises a number of interpretative questions that go to the heart of the *U.S.–Argentina BIT* and the investment regime more generally. These questions include: whether that treaty's "measures not precluded" clause in Article XI was meant to be "self-judging" such that arbitrators have either no jurisdiction to examine the merits of such a claim or can only examine that defense under an extremely deferential standard of review; the interplay between Article XI and customary international law, including the customary defense of necessity; and the meanings of "public order" and "essential security."

In Part Three, we attempt our own answers to these questions, consistent with the application of the traditional rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties[35] and focusing on issues posed by Argentina's defense of necessity. Part C takes as its point of departure a recent article by one of the experts who testified in some of these cases, William W. Burke-White, and his co-author, Andreas von Staden.[36] Burke-White and von Staden contend that the decisions issued

32 *See Bolivia Notifies World Bank of Withdrawal from ICSID, Pursues BIT Revisions*, International Institute for Sustainable Development, Investment Treaty News, May 9, 2007, *at* http://www.bilaterals.org/article.php3?id_article=8221. Bolivia is no longer listed as an ICSID member, *see* List of Contracting States and Other Signatories of the Convention, ICSID/3, *at* http://icsid.worldbank.org/.

33 Juliette Kerr, *Ecuadorian Government Will Not Recognise Arbitration Rulings*, World Markets Research Centre, Global Insight, December 14, 2007. For the text of Ecuador's notification under Article 24(4) of the ICSID Convention, *see* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement9.

34 *See* Céline Lévesque, *Influences on the Canadian FIPA Model and the U.S. Model BIT: NAFTA Chapter 11 and Beyond*, Annuaire Canadien de Droit International 2006, 249; Gilbert Gagné and Jean-Frédéric Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. Int'l Ec. L. 357 (2006); *UNCTAD, De-Mystifying the 2004 United States Model BIT*, Draft, February 25, 2008. *See also* William Burke-White and Andreas von Staden, Reply to Prof. Franck, in Opinio Juris (originally *at* http://opiniojuris.org/); José E. Alvarez, The *Evolving Foreign Investment regime*, ASIL IL Post, *at* http://www.asil.org/ilpost/president/pres080229.html.

35 Adopted May 22, 1969 and opened for signature May 23, 1969, entry into force January 27, 1980 in accordance with Article 84(1), 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

36 William W. Burke-White and Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Va. J. Int'l, L 307 (2008).

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by the original CMS arbitral tribunal and by the arbitrators deciding the *Enron* and *Sempra* cases were insufficiently sensitive to the actual bargain struck by the United States and Argentina in their treaty. More specifically, they argue that NPM provisions such as Article XI of the *U.S.–Argentina BIT* are distinct from customary defenses such as necessity and constitute *lex specialis*;[37] that the United States and Argentina intended Article XI of their BIT to be "self-judging;"[38] that Article XI's "essential security interests" ordinarily include states' economic interests and, consistent with notions of residual sovereignty, merit "broad interpretation;"[39] that non-self-judging NPM provisions ought to be subject to deferential standards of review such as the European Court of Human Right's (ECtHR) "margin of appreciation;"[40] that "implicitly self-judging" NPM provisions, such as Article XI of the *U.S.–Argentina BIT*, merit the most deferential standard of review—that is, merely consideration of whether the clause is invoked in "good faith;"[41] and that in most cases, successful invocation of an NPM provision will absolve states of international responsibility towards investors, since these provisions preclude the applicability of the entire treaty, meaning liability can only arise for harm incurred after the underlying crisis has ceased.[42]

Our conclusions in Part Four are starkly different from those reached by Burke-White and von Staden. Specifically, we conclude that Article XI of the *U.S.–Argentina BIT*: is not "self-judging" or subject to a "good faith" standard of review (Part III.B); should be interpreted in light of the customary defense of necessity, meaning that the party invoking Article XI bears the difficult burden of proving the elements of that affirmative defense (Part III.C); should not be presumed to apply to economic crises (Part III.D); and does not ordinarily excuse the obligation to provide reparation even when it is properly invoked (Part III.E). Accordingly, we contend that the legal conclusions reached by (if not the precise reasoning of) the original CMS panel and the arbitrators in *Enron* and *Sempra* are correct under the *U.S.–Argentina BIT*.

The Conclusion revisits some of the broader legitimacy concerns raised in this Overview in light of our conclusions in Part Three. We agree with those critics of the investment regime that the interpretative questions raised by the *Argentine Gas Sector Cases* have a great deal to tell us about what the investment regime is, and about its relationship with the rest of international law. But our analysis of those cases suggests that the legitimacy deficits of the investment regime may be both easier and more difficult to ameliorate than its defenders and critics appear to believe. The regime's legitimacy deficit may be easier to fix insofar as some of the underlying concerns seem overstated. We suggest that this may be the case with respect to worries over inconsistent investment law or concerns that arbitral awards do not take any account of the legitimate regulatory concerns of states. At the same time, we believe that the regime's genuine legitimacy concerns may require something more than finding more competent

37 *Id.* at 322.
38 *Id.* at 338 and 381–6.
39 *Id.* at 314.
40 *Id.* at 368–70.
41 *Id.* at 376–81.
42 *Id.* at 386–9.

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dispute settlers to apply common interpretive principles. Fixing the regime may require fixing the substantive law that it applies.

II. CMS, LG&E, ENRON AND SEMPRA vs. ARGENTINA: AN OVERVIEW OF THE DECISIONS

A. The facts

The facts giving rise to these disputes were practically identical.[43]

In the late 1980s, Argentina privatized a number of the country's utilities, a process initiated by its 1989 State Reform Law.[44] Argentina took these actions, as is further discussed below, in the wake of a previous economic crisis and as part of its attempt to overcome that crisis. Other reforms included passage of the 1991 Convertibility Law, which provided for the convertibility of the Argentine currency, pegged to the U.S. dollar through an implementing decree.[45] Among the entities privatized was Gas del Estado S.E., Argentina's natural gas transportation and distribution monopoly. Argentina's 1992 Gas Law established the legal framework for this privatization.[46] That law set out the regulatory structure of the newly privatized sector, and created industry regulator Ente Nacional Regulador del Gas (ENARGAS). Gas del Estado S.E. was divided into two transportation companies and eight distribution companies. Each of these companies was issued a license under the Gas Law.[47] Large percentages of the shares of these companies were then sold to consortia of private investors. The claimants in all these cases eventually acquired shareholdings in these entities.[48]

Under the Gas Law, ENARGAS was mandated to set transportation and distribution tariffs at levels that were "fair and reasonable" but would still permit a "reasonable rate of return."[49] Under the law, its implementing regulations,[50] and the licenses, investors benefited from a number of what the tribunals referred to as "stabilization" guarantees, measures, or mechanisms. Tariffs were to be set for five-year periods, at the end of which they would be reviewed and adjusted. Investors had a right to calculate tariffs in U.S. dollars and then convert them to Argentine pesos at the time of billing.[51] They had

43 *See generally* CMS Award, *supra* note Para. 1, at 53–67; CMS Annulment Decision, *supra* note 3, at Paras. 30–40; LG&E Decision on Liability, *supra* note 1 at Paras. 34–71; Enron Award, *supra* note 1, at Paras. 61–79; Sempra Award, *supra* note 1, at Paras. 82–92.

44 Reform of State Law No. 23.696 of August 1989.

45 Law No. 23.928 of March 1991; Decree No. 2128/91.

46 *Ley del Gas,* Law No. 24.076 of May 1992.

47 Basic Rules of the License were approved within a model license for natural gas transportation and distribution. *Reglas Básicas de la Licencia*, adopted by Decree No. 2255/92 on December 7, 1992.

48 CMS Award, *supra* note 1, at Para. 58; LG&E Decision on Liability, *supra* note 1, at Para. 52; Enron Award, *supra* note 1, at Paras. 47–54; Sempra Award, *supra* note 1, at Paras. 83 and 88–92.

49 CMS Award, *supra* note 1, at Para. 132–3 and 179.

50 Adopted on September 28, 1992 by Decree No. 1738/92.

51 CMS Award, *supra* note 1, at Paras. 136–8 and 161.

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a right to a semi-annual tariff review based on the U.S. Producer Price Index (PPI).[52] The Government could not rescind or modify the licenses without the consent of the licensees.[53] The tariff system was not to be subject to further control, and in the event of such control, the Government was to compensate the licensees fully for any resulting losses.[54]

During the 1990s, the ten privatized natural gas transportation and distribution companies made substantial investments in Argentina, and the tariff system operated smoothly.[55] By the late 1990s, however, a new economic crisis had begun to develop. Thanks to deflation in Argentina, coupled with inflation in the U.S., absent agreement on a new arrangement between Argentina and the gas companies, the PPI adjustments originally contemplated would have translated into significantly increased rates for consumers. As a result, the Argentine government met with the licensees to discuss a postponement of the adjustment and the parties eventually agreed to a six-month postponement of the scheduled PPI adjustment in January 2000.[56] In July of that year they agreed to a further two-year postponement.[57] In the wake of a ruling by an Argentine Court of Appeal enjoining further tariff adjustments, ENARGAS announced in November 2001 that no further adjustments to tariffs would be made.[58]

Argentina's crisis deepened in late 2001. Poverty and unemployment increased dramatically, creating social unrest. By the end of 2001, the government was experiencing difficulties repaying its foreign debt. As Argentines feared default and immobilization of bank deposits, they were making massive withdrawals from their accounts. In response, in December 2001, the government issued a decree known as the "Corralito," restricting bank withdrawals and prohibiting international currency transfers.[59] Ensuing violent public demonstrations led to the resignation of President De la Rúa and his Cabinet at the end of December 2001, and a succession of four other presidents followed within two weeks.[60]

Argentina passed an "Emergency Law" in January 2002.[61] This law abolished the currency board that pegged the Argentine peso to the dollar under the 1991 Convertibility Law, which resulted in a severe devaluation of the peso.[62] It also terminated the right of privatized public utilities, including gas distribution and transportation companies, to

52 CMS Award, *supra* note 1, at Para. 144; LG&E Decision on Liability, *supra* note 1, at Para. 53.

53 CMS Award, *supra* note 1, at Para. 145; LG&E Decision on Liability, *supra* note 1, at Para. 41.

54 CMS Award, *supra* note 1, at Para. 145; LG&E Decision on Liability, *supra* note 1, at Para. 53.

55 LG&E Decision on Liability, *supra* note 1, at Para. 52; Enron Award, *supra* note 1, at Paras. 58–9; Sempra Award, *supra* note 1, at Para. 100.

56 CMS Award, *supra* note 1, at Para. 60; Enron Award, *supra* note 1, at Para. 64; Sempra Award, *supra* note 1, at Para. 101.

57 Agreement embodied in Decree No. 669/00 of June 17, 2000. CMS Award, *supra* note 1, at Para. 61.

58 CMS Award, *supra* note 1, at Paras. 62–3; LG&E Decision on Liability, *supra* note 1, at Paras. 61–2; Enron Award, *supra* note 1, at Paras. 67–8; Sempra Award, *supra* note 1, at Paras. 102–03.

59 Decree No. 1570/01, December 1, 2001.

60 *See generally*, LG&E Decision on Liability, *supra* note 1, at Para. 63.

61 *Public Emergency and Foreign Exchange System Reform Law*, Law No. 25.561, enacted January 6, 2002.

62 CMS Award, *supra* note 1, at Para. 65.

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tariffs calculated in dollars and according to the U.S. PPI. Tariffs were also redenominated in pesos at the rate of one peso to the dollar.[63] The Emergency Law required renegotiation of agreements to adapt them to the new exchange system.[64] The government ordered ENARGAS in March 2002 to discontinue all tariff reviews and to refrain from adjusting tariffs in any respect.[65]

Dr. Néstor Kirchner took office as President on 25 May 2003.[66] Since then, Argentina's economy has grown steadily.[67] As of mid-2007, the licenses of the respective claimants in these cases had not been successfully renegotiated.[68] Although the Argentine executive and the licensees launched various attempts to implement an increase in natural gas and electricity tariffs, these initiatives were challenged by consumer groups and others and have been blocked by injunctions issued by Argentine courts.[69]

B. The basic claims

CMS, LG&E, *Enron* and Sempra, all U.S. corporations, brought claims against Argentina pursuant to the *U.S.–Argentina BIT*. All four claimed that they had been given binding assurances by the Argentine government that tariffs would be calculated in U.S. dollars, that semi-annual adjustments in accordance with the variation of the U.S. PPI and review of tariffs every five years would occur, and that their licenses would not be rescinded or modified without their respective consents.[70] All four maintained that the measures taken by Argentina violated these commitments, and therefore constituted violations of the following BIT provisions: Article II(2)(a) (guaranteeing "fair and

63 *Id*. According to the LG&E Decision on Liability, this was effected by Presidential Decree No. 214 of February 3, 2002, not the Emergency Law. LG&E Decision on Liability, *supra* note 1, at Paras. 66–7.

64 CMS Award, *supra* note 1, at Para. 66. The modalities for this renegotiation were set out in Decree No. 293/02, February 14, 2002. LG&E Decision on Liability, *supra* note 1, Para. 66.

65 Resolution No. 38/02, issued on March 9, 2002.

66 LG&E Decision on Liability, *supra* note 1, at Para. 70.

67 Enron Award, *supra* note 1, at Para. 222.

68 The Enron tribunal observed that:

> The renegotiation process has succeeded in respect of a number of public utility contracts and sectors, notably among them the gas producers, but has not made much progress in the gas transportation and distribution industry, except for one contract with a gas provider (GASBAN), signed in July 2005.

(Enron Award, *supra* note 1, at Para. 74.)

After the Enron Award, on April 26, 2007, two of the gas distribution companies of which Sempra was a shareholder signed a Memorandum of Understanding for the Adjustment of License Agreement for Distribution of Natural Gas with Argentina. This agreement requires abandonment of claims by the companies and their shareholders, and Sempra refused to do so. (Sempra Award, *supra* note 1, at Paras. 452–8.)

69 LG&E Decision on Liability, *supra* note 1, at Para. 69; CMS Award, *supra* note 1, at Para. 66; Enron Award, *supra* note 1, at Para. 76.

70 CMS Award, *supra* note 1, at Paras. 85–6; LG&E Decision on Liability, *supra* note 1, at Paras. 41; Enron Award, *supra* note 1, at 88; Sempra Award, *supra* note 1, at Para. 85.

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equitable treatment," "full protection and security" and treatment no "less than that required by international law"); Article II(2)(b) (barring "arbitrary" or "discriminatory" measures); Article II(2)(c) (the "umbrella clause" providing a guarantee by the state that it would "observe any obligation it may have entered into with regard to investments"); and Article IV(1) (ensuring compensation for direct or indirect expropriations or measures "tantamount" to expropriation).[71]

In all four cases, Argentina responded that the applicable governing law under the ISCID Convention was its own, not international law.[72] Argentina also disputed that it had given the investors the specific assurances that they each claimed. It argued that the legal and regulatory framework governing the gas licenses guaranteed only a fair and reasonable tariff, and the other guarantees claimed by the investors were in fact contingent on the Convertibility Law remaining in force.[73] Argentina therefore denied breaching any provisions of the *U.S.–Argentina BIT*, and argued that, in any case, its responsibility for any such breach was precluded on the basis of necessity, under Argentine law, customary international law and Article XI of the *U.S.–Argentina BIT*.[74]

C. The decisions

The four tribunals diverged with respect to the question of governing law. Three of the four arbitral tribunals (CMS, Enron, Sempra) ruled that, under the ICSID Convention, the dispute was governed by both Argentine and international law.[75] Those tribunals therefore went on to analyze, in significant detail, why Argentina's actions breached Argentine law. They canvassed and rejected legal defenses to Argentina's actions based on Argentine law of necessity or *force majeure*, before they considered the alleged violations under the BIT.[76] The fourth, LG&E, did not consider Argentine law with respect to these issues.[77]

As is discussed in greater detail below, there was very little divergence among the four, however, with respect to the interpretation of the substantive guarantees provided in the BIT as applied to these facts. All four arbitral panels found that the claimant investors had benefited from the above noted "stabilization" guarantees and that these had been breached by the Argentine measures. As further discussed below

71 CMS Award, *supra* note 1, at Para. 88; LG&E Decision on Liability, *supra* note 1, at Para. 72; Enron Award, *supra* note 1, at Para. 87; Sempra Award, *supra* note 1, at Para. 94.

72 CMS Award, *supra* note 1, at Paras. 112–14; LG&E Decision on Liability, *supra* note 1, at Para. 81; Enron Award, *supra* note 1, at Paras. 203–04; Sempra Award at Paras. 233–4.

73 CMS Award, *supra* note 1, at Para. 91; Enron Award, *supra* note 1, at Para. 90; Sempra Award, *supra* note 1, at Para. 96.

74 CMS Award, *supra* note 1, at Para. 99; Enron Award, *supra* note 1, at Para. 93; Sempra Award, *supra* note 1, at Para. 98.

75 CMS Award, *supra* note 1, at Paras. 116–17; Enron Award, *supra* note 1, at Paras. 206–09; Sempra Award, *supra* note 1, at Paras. 245, 238 and 240. Compare LG&E Decision on Liability, *supra* note 1, at Paras. 98–9.

76 *See infra* at notes 159–64 and accompanying text.

77 *See* LG&E Decision on Liability, *supra* note 1.

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(Part B(1)(a)), all four panels found that Argentina had breached Article II(2)(a) by failing to accord claimants "fair and equitable treatment."[78] All four found that the Argentine measures violated Article II(2)(c)'s umbrella clause.[79] And with the exception of the LG&E tribunal's finding of discrimination, all four ruled against the claimants' other BIT claims.[80] For its part, the CMS annulment decision did not disturb the substantive findings of breach found by the original CMS award except with respect to that panel's finding of violation of the umbrella clause.[81]

A significant source of disagreement among these tribunals was with respect to the treatment of Argentina's claimed defense under Article XI of the BIT or under the doctrine of necessity under customary international law. Article XI of the *U.S.–Argentina BIT* provides as follows:

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

Article 25 of the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission in 2001 and subsequently adopted by the UN General Assembly (the "*ILC Articles*"),[82] which Argentina and the claimants agreed reflected the relevant rule of customary international law, provides:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
>   (a) is the only way 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."

As is further addressed below, there was considerable disagreement among the arbitrators about whether the measures adopted by the Argentine government could be defended as a response to the crisis faced by that country under Article XI of the BIT or under the customary doctrine of necessity.

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78 *See infra* at notes 84–6 and accompanying text.

79 *See infra* at notes 87–90 and 92, and accompanying text.

80 *See infra* at notes 93–102 and accompanying text.

81 *See infra* at note 91 and accompanying text.

82 International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries*, U.N. G.A. Doc. A/56/10, Ch. V (2001).

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The LG&E tribunal ruled that Argentina could legitimately rely on Article XI of the BIT and that Article 25 of the *ILC Articles* "support[ed]" this conclusion.[83] It found, as a result, that Argentina did not owe claimants any compensation for the period of the crisis.

The CMS, Enron, and Sempra tribunals ruled, on the other hand, that Argentina could not rely on either Article XI or the customary defense of necessity codified in Article 25 to excuse itself from liability, even for the period of its crisis. Further, although the Enron and Sempra decisions were virtually identical in their rationales, those tribunals' interpretations of Article XI and its relationship with the customary international law defense of necessity diverged from the original CMS tribunal on a number of points and were also at odds with the award in LG&E and with the opinions expressed by the CMS Annulment Committee. That Committee severely criticized (but did not annul) the original CMS tribunal on this question and offered, *in dicta*, a different interpretation of Article XI from that found in any of the four arbitral tribunals.

That said, it does not appear that these substantive differences with respect to the defense of necessity explain the differing damages ultimately awarded to the respective claimants. Although the damages awarded by the CMS, Enron, and Sempra tribunals were, as might be expected, significantly larger than those awarded to LG&E, it appears that much of the difference was due to differing findings among the tribunals with respect to whether to award lost future profits and not due to their differing conclusions on the viability of Argentina's defense of necessity. The decisions are addressed in more detail below.

1. The substantive treaty obligations All four tribunals were in agreement that the measures taken by Argentina breached the fair and equitable treatment standard set out at Article II(2)(a) of the *U.S.–Argentina BIT*. Relying, among other things, on the language in the preamble to the *U.S.–Argentina BIT*, the tribunals generally agreed that a "stable legal and business environment" was an essential element of fair and equitable treatment[84] and that the Argentine measures entirely transformed and altered the legal and business environment under which the investments were made.[85] All the tribunals also affirmed that that standard seeks to protect the investor's legitimate or fair expectations and that these expectations were breached.[86]

The tribunals also agreed that Argentina had breached the requirement under Article II(2)(c) of the *U.S.–Argentina BIT* to "observe any obligation it may have entered into with regard to investments."[87] The CMS tribunal found that although

83 LG&E Decision on Liability, *supra* note 1, at Para. 245.

84 CMS Award, *supra* note 1, at Para. 274; LG&E Decision on Liability, *supra* note 1, at Para. 124; Enron Award, *supra* note 1, at Para. 260; Sempra Award, *supra* note 1, at Para. 303.

85 *See, e.g.*, CMS Award, *supra* note 1, at Para. 275.

86 CMS Award, *supra* note 1, at Para. 281; CMS Annulment Decision, *supra* note 3, at Para. 85; LG&E Decision on Liability, *supra* note Para. 1, at Paras. 130 & 132–8; Enron Award, *supra* note 1, at Paras. 267–8; Sempra Award, *supra* note 1, at Paras. 303–04.

87 CMS Award, *supra* note 1, at Para. 303; LG&E Decision on Liability, *supra* note 1, at Para. 175; Enron Award, *supra* note 1, at Para. 277; Sempra Award, *supra* note 1, at Para. 314.

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"purely commercial" aspects of a contract would not be protected by this umbrella clause,[88] none of the measures complained of qualified as such, since these "all related to government decisions."[89] It pointed, in particular, to the breach of the stabilization clauses in the license.[90] The CMS Annulment Committee criticized the tribunal with respect to this conclusion because it had failed to address how CMS, a minority shareholder of licensee TGN, could enforce the latter's contractual entitlements under the license. The CMS Annulment Committee therefore annulled that tribunal's finding of umbrella clause breach.[91] By contrast to the CMS Award, the LG&E, *Enron* and *Sempra* awards did not ground their respective findings of breach of the umbrella clause on Argentina's breach of the investors' licenses. Those tribunals found, instead, that the guarantees made to the claimants, including under the Gas Law, its regulations, and the licenses, constituted "obligations with regard to investments," despite the lack of privity, because the investors had been induced to make their investments by such assurances.[92]

All four tribunals rejected allegations that the measures taken by the Argentine government constituted measures "tantamount to expropriation" under Article IV (1) on the basis that the claimants had failed to prove that they had suffered "substantial deprivation."[93] The allegation of direct expropriation, made by *Enron* and *Sempra* but not by CMS and LG&E, was also rejected on the basis that there had been no permanent transfer of property.[94]

The four tribunals all dismissed claimants' allegations of arbitrary treatment within the meaning of Article II(2)(b) of the *U.S.–Argentina BIT*, and all but the LG&E tribunal dismissed allegations of discrimination within the meaning of that article. The CMS tribunal found that the treaty's protections against discrimination and arbitrary action related to fair and equitable treatment but only to the extent the Argentine measures continued beyond the period of the crisis; it did not address these as distinct standards.[95] The LG&E tribunal opined that discriminatory treatment could be shown by either discriminatory intent or effects against foreigners but that "arbitrary" measures required a showing of "willful disregard of due process of law."[96] Although it found that claimants had proven discrimination against the gas sector contrary to Article II(2)(b),[97] it concluded that Argentina's measures had not been shown to have

88 CMS Award, *supra* note 1, at Para. 299.
89 CMS Award, *supra* note 1, at Para. 301.
90 CMS Award, *supra* note 1, at Para. 302.
91 CMS Annulment Decision, *supra* note 3, at Paras. 89–97.
92 LG&E Decision on Liability, *supra* note 1, at Para. 175; Enron Award, *supra* note 1, at Paras. 275–7; Sempra Award, *supra* note 1, at Paras. 310–14.
93 CMS Award, *supra* note 1, at Paras. 262–4; LG&E Decision on Liability, *supra* note 1, at Para. 200; Enron Award, *supra* note 1, at Paras. 245–6; Sempra Award, *supra* note 1, at Paras. 283–4.
94 Enron Award, *supra* note 1, at Para. 243; Sempra Award, *supra* note 1, at Paras. 280–2.
95 CMS Award, *supra* note 1, at Paras. 290–95. Interestingly, the CMS tribunal contemplated the possibility that to the extent the Argentine measures extend beyond the period of the crisis and continues to differentiate between gas producers and other public utilities, that differentiation could sustain a finding of discrimination. CMS Award, *supra* note 1, at Paras. 293–4.
96 LG&E Decision on Liability, *supra* note 1, at Paras. 146 & 157.
97 LG&E Decision on Liability, *supra* note 1, at Paras. 147–8 and 267.

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been taken in "simple disregard of the law" and were therefore not arbitrary.[98] The *Enron* and *Sempra* tribunals found that "discrimination" required a showing of "capricious, irrational or absurd differentiation in the treatment accorded to the claimants as compared to other entities or sectors" and this had not been shown.[99] They ruled that the Argentine measures were not "arbitrary" since it was not proven that some measure of "impropriety" was manifest and, further, that the measures were not arbitrary insofar as "the Government believed and understood [them to be] the best response to the unfolding crisis."[100] Allegations made by the claimants in CMS and LG&E that Argentina applied the measures in a discriminatory fashion contrary to a different guarantee in the BIT, Article IV(3), were also rejected.[101]

Article II(2)(a)'s guarantee of full protection and security was addressed only in the *Enron* and *Sempra* awards. Both found that lack of protection had not been established by the claimant.[102] None of the tribunals addressed whether the distinct guarantee of "treatment no less than that required by international law," contained in Article II(2)(a) of the *U.S.–Argentina BIT*, or the guarantee at Article X entitling investors to any better rights secured by "international legal obligations" or national law, was breached.

2. Argentina's defense of necessity All the arbitrators appeared to agree on at least four points: that Article XI was not "self-judging" but required the tribunal itself to determine whether the clause could be invoked;[103] that "essential security" under that BIT clause could include "major economic crises" or "major economic emergencies;"[104] that Article 25 of the Articles of State Responsibility reflected the relevant rules under customary law;[105] and that a separate necessity defense benefiting Argentina could not be read into Article IV(3).[106] As addressed in detail below, they differed on

98 LG&E Decision on Liability, at Para. 162.

99 Enron Award, *supra* note 1, at Para. 283; Sempra Award, *supra* note 1, at Para. 319.

100 CMS Award, *supra* note 1, at Paras. 290–95; LG&E Decision on Liability, *supra* note 1, at Paras. 147–48, 158, 161 and 267; Enron Award, *supra* note 1, at Paras. 281 & 283; Sempra Award, *supra* note 1, at Paras. 318–20.

101 CMS Award, *supra* note 1, at Paras. 375–376; LG&E Decision on Liability, *supra* note 1, at Para. 244.

102 Enron Award, *supra* note 1, at Para. 287; Sempra Award, *supra* note 1, at Para. 324.

103 CMS Award, *supra* note 1, at Para. 373; LG&E Decision on Liability, *supra* note 1, at Para. 212; Enron Award, *supra* note 1, at Para. 332; Sempra Award, *supra* note 1, at Para. 385.

104 CMS Award, *supra* note 1, at Paras. 359–60; LG&E Decision on Liability, *supra* note 1, at Paras. 237–38; Enron Award, *supra* note 1, at Para. 332; Sempra Award, *supra* note 1, at Para. 374.

105 CMS Award, *supra* note 1, at Para. 315, 317; CMS Annulment Decision, *supra* note 3, at Para. 121; LG&E Decision on Liability, *supra* note 1, at Para. 245; Enron Award, *supra* note 1, at Para. 303; Sempra Award, *supra* note 1, at Para. 344.

106 Article IV(3) provides:

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

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many other interpretative questions concerning the scope of Argentina's claimed defense, however.

First, the CMS, Enron, and Sempra tribunals essentially equated Article XI with the customary international law defense of necessity. The LG&E tribunal appeared to treat them as distinct defenses but found that the latter supported its conclusion that Article XI excused Argentina's liability. The CMS Annulment Committee treated them as distinct defenses.

Second, although all the tribunals agreed that the customary rule on necessity was accurately set out in Article 25 of *ILC Articles*, they differed in how they applied that rule. The LG&E tribunal was significantly more deferential to Argentina than the other three tribunals and was the sole tribunal to uphold Argentina's defense under both Article XI of the BIT and customary international law.

Third, the decisions differed in their understanding of the effect of a successful invocation of either Article XI or the customary defense of necessity. The LG&E tribunal found that successful invocation of the defense meant that Argentina was not liable for damages suffered by the investor during the period of the crisis. The CMS Annulment Committee, *in dicta*, appeared to agree. The CMS, Enron, and Sempra tribunals all indicated, on the other hand, that they still would have required Argentina to compensate the claimants, even had they accepted Argentina's defense.

The tribunals' treatment of Argentina's "emergency" defense under its own national law is further described below.

A. THE RELATIONSHIP BETWEEN ARTICLE XI AND THE DEFENSE OF NECESSITY UNDER CUSTOMARY INTERNATIONAL LAW The CMS tribunal stated that the defenses under customary international law and the treaty were "one fundamental issue."[107] Although it did not explicitly state that Article XI of the treaty incorporates customary international law requirements, this appeared to have been its view—for instance, it addressed two of the requirements in Article 25 of the *ILC Articles*—that necessity not be precluded by the obligation in question, and that there be no serious impairment of the essential interest of another state—in the context of its treaty discussion.[108] This was also the Annulment Committee's reading of the decision.[109]

Although the Annulment Committee did not annul the CMS Award on this finding, it noted two "errors of law." The Committee indicated the CMS arbitrators had erred in

Only the *Enron* and *Sempra* tribunals explicitly addressed this claim. *See* Enron Award, *supra* note 1, at Para. 320 ("only meaning of Article IV(3) is to provide a minimum treatment to foreign investments suffering losses in the host country") & 321 ("would not allow derogation from rights under the Treaty . . . Even less so can it be read as a general escape clause"); Sempra Award, *supra* note 1, at Para. 362 ("only purpose of Article IV(3) is to provide a minimum level of treatment to foreign investments suffering losses in the host country . . . only in respect of measures which the State 'adopts in relation to such losses'") and Para. 363 (does not allow derogation from Treaty rights and "Even less so can it be read as a general escape clause").

107 CMS Award, *supra* note 3, at Para. 308.

108 *Id.* at Paras. 353–8.

109 CMS Annulment Decision, *supra* note 3, at Paras. 124 and 127.

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failing to distinguish between Article XI and the defense of necessity under customary international law, indicating that the first was a rule of primary obligation whereas the second, at least in the view of the ILC, was a secondary obligation. "Article XI is a threshold requirement," noted the Annulment Committee, "if it applies, the substantive obligations under the Treaty do not apply. By contrast, Article 25 is an excuse which is only relevant once it has been decided that there has otherwise been a breach of those substantive obligations."[110] Further, the Annulment Committee found that the two defenses are "substantively different" and merit separate treatment. Although Article XI covers "necessary" measures without qualification, the customary international law defense is subject to four explicit conditions.[111]

Second, the Annulment Committee found that, however the state of necessity is understood, the arbitrators should not have avoided considering, as a distinct question, the meaning and consequence of Article XI on its own terms. The Annulment Committee argued that if necessity is understood to mean that its invocation results in there being no *prima facie* breach, it would be a primary rule of international law. Since Article XI is also a primary rule of international law, the customary defense of necessity would be overridden by Article XI as *lex specialis*. If, on the other hand, the state of necessity at customary international law is understood to address only responsibility, as it was understood by the ILC, it is a secondary rule of international law. On such an understanding, according to the Committee, the tribunal should first have addressed whether Argentina's actions were excused under Article XI. It argued that only if the tribunal had first concluded that there was a breach of the primary rules of obligation because Argentina's measures were not within Article XI and were otherwise in violation of the BIT, should it have considered necessity as a secondary rule possibly excusing Argentina's wrongful act.[112]

Like the Annulment Committee, the LG&E tribunal also appeared to treat Article XI and the customary defense of necessity as distinct defenses but since it decided that the evidence indicated that Argentina's conduct was excused under both, the distinction was not particularly significant. That tribunal rejected the argument that Article XI required proof that the Argentine measures were the "only means" to respond to the crisis.[113] At the same time, it also found that Article XI "refers to situations in which a State has no choice but to act," but in which the state "may have several responses at its disposal to maintain public order or protect its essential security interest," and found that the provisions in Argentina's Emergency Law that adversely affected the claimants were "a legitimate way of protecting its social and economic system."[114] That tribunal determined that Argentina's enactment of its Emergency Law "was a necessary and legitimate measure"[115] and that "Claimants have not provided any reason as to why such measure would not provide immediate relief from the crisis."[116] But the LG&E

110 *Id.* at Para. 129.
111 *Id.* at Para. 130.
112 *Id.* at Paras. 133–4.
113 LG&E Decision on Liability, *supra* note 3, at Para. 239.
114 *Id.* at Para. 239.
115 *Id.* at Para. 240.
116 *Id.* at Para. 242.

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tribunal also recognized that the customary defense of necessity, codified in Article 25 of the ILC's Articles of State Responsibility, requires a demonstration that the state's measures are the "only way" to respond to a crisis but found that Argentina's economic recovery package was "the only means to respond to the crisis."[117]

The *Enron* and *Sempra* Awards came to the same result as the CMS Award, but by a more explicit route. The Enron Award found that, since Article XI does not define essential security, it is "necessary to rely on the requirements of state of necessity under customary international law," as outlined in Article 25, and thus the treaty "becomes inseparable from the customary international law standard insofar as the conditions for the operation of the state of necessity."[118] Similarly, the Sempra Award found Article XI to be "inseparable from the CIL standard insofar as the definition of necessity and the conditions for its operation are concerned, given that it is under customary law that such elements have been defined."[119] Both decisions specifically reject the argument that Article XI is *lex specialis* because the treaty does not clearly indicate this was its intent.[120]

B. THE APPLICATION OF THE REQUIREMENTS FOR NECESSITY UNDER CUSTOMARY INTERNATIONAL LAW The CMS, Enron, and Sempra tribunals all found that the cumulative requirements of the customary necessity defense, reflected in Article 25 of the *ILC Articles*, had not been satisfied.[121] Although the LG&E tribunal was more generous to Argentina in its application of the criteria for necessity under customary international law, it is unclear whether those arbitrators would have found Argentina's breaches excused on customary grounds alone.[122]

The tribunals differed on the question of whether an "essential interest" of Argentina was at stake or whether that state faced a need to safeguard itself against a "grave and imminent peril." The *Enron* and *Sempra* tribunals required that the crisis compromise "the very existence of the State and its independence so as to qualify as an essential interest."[123] They found that the crisis, albeit severe, did not meet this standard since "[q]uestions of public order and social unrest could be handled as in fact they were . . . under the constitutional arrangements in force."[124] With respect to "grave and imminent peril," they found that "[w]hile the government had the duty to prevent the worsening of the situation and could not simply leave events to follow their own course, there is no convincing evidence that the events were out of control or had become unmanageable."[125]

117 *Id.* at Paras. 250 and 257.
118 Enron Award, *supra* note 1, at Paras. 333–4.
119 Sempra Award, *supra* note 1, at Paras. 375–6.
120 Enron Award, *supra* note 1, at Para. 334; Sempra Award at Para. 378.
121 CMS Award, *supra* note 1, at Para. 331; Enron Award, *supra* note 1, at Para. 313; Sempra Award, *supra* note 1, at Para. 346, and *See also* at Para. 355.
122 LG&E Decision on Liability, *supra* note 1, at Paras. 245, 258 & 262.
123 Enron Award, *supra* note 1, at Para. 306; Sempra Award, *supra* note 1, at Para. 348.
124 Enron Award, *supra* note 1, at Para. 306; Sempra Award, *supra* note 1, at Para. 348.
125 Enron Award, *supra* note 1, at Para. 307; Sempra Award, *supra* note 1, at Para. 349.

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The LG&E tribunal appeared to adopt a somewhat different interpretation of the requirements of the defense of necessity under customary law. It found that "economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests."[126] A threat to the state's essential interest, according to the LG&E tribunal, means less than a threat to the state's existence, as the latter is protected by self-defense.[127] It found on the facts presented to it that Argentina's essential interests had been threatened by a "serious and imminent danger" established on the basis of objective evidence.[128]

It is unclear what standard the CMS tribunal applied, or indeed whether it found that an "essential interest" of Argentina had been threatened. It stated that "the issue is to determine the gravity of the crisis."[129] It found "the crisis was indeed severe," but not that "wrongfulness should be precluded as a matter of course under the circumstances."[130] The CMS tribunal was equally cryptic on the question of whether the crisis constituted a "grave and imminent peril." It found that, although the "situation was difficult enough to justify the government taking action to prevent a worsening of the situation and the danger of total economic collapse," "neither does the relative effect of the crisis allow here for a finding in terms of preclusion of wrongfulness."[131]

The CMS, Enron, and Sempra tribunals all interpreted the "only means" requirement at Article 25(1)(a) as excluding the defense of necessity if any other means were available to the government. Engaging in an inquiry into the *specific measures* adopted, all three found that Argentina's response to the crisis failed to meet this standard. None, however, identified the other means that would have been available, the *Enron* and *Sempra* tribunals expressly declining a request to do so as inappropriate.[132] The LG&E tribunal, by contrast, assessed the measures Argentina had taken generally, in their totality. As noted, it indicated that "an economic recovery package was the only means to respond to the crisis," and that an "across the board response was necessary, and the tariffs on public utilities had to be addressed." Assessing these measures as a package, it found that Argentina had satisfied the "only means" requirement.[133]

The CMS, Enron, and Sempra tribunals all found that no essential interest of the international community as a whole was impaired, the *Enron* and *Sempra* tribunals further specifying that the international community's interest in the matter was of a general kind.[134] The LG&E decision did not address whether the interests of the international community would be impaired.

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126 LG&E Decision on Liability, *supra* note 1, at Para. 251.

127 *Id.* at Para. 252.

128 *Id.* at Paras. 253, 257.

129 *Id.* at Para. 319.

130 *Id.* at Para. 320.

131 *Id.* at Para. 322.

132 CMS Award, *supra* note 1, at Paras. 323–4; Enron Award, *supra* note 1, at Para. 308; Sempra Award, *supra* note 1, at Para. 350.

133 LG&E Decision on Liability, *supra* note 1, at Para. 257.

134 CMS Award, *supra* note 1, at Para. 325; Enron Award, *supra* note 1, at Para. 310; Sempra Award, *supra* note 1, at Para. 352.

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The CMS, Enron, and Sempra tribunals found that the question of whether the essential interest of another state (here, the United States) would be impaired should be assessed in the context of its consideration of Article XI of the BIT, since the interest in question arose from the BIT. All three determined in that context that the essential interest of the United States would not be impaired. The reasoning in this regard rested on the United States' evolving views on whether essential security should be self-judging—explicitly in the *Enron* and *Sempra* Awards, and implicitly in the CMS Award.[135] The LG&E tribunal also found that no other state's essential interest was impaired.[136]

The CMS, Enron, and Sempra tribunals addressed a further consideration in relation to Article 25(1)(b) not stemming from its text—namely, the interests of the investor. All three found that although the essential interests of investors are affected by the invocation of Article XI, the necessity plea was "not precluded on this count."[137] The relevance of the essential interest of the investors was not addressed in the LG&E decision.

In relation to the requirement at Article 25(2)(a) that the international obligation in question not preclude the use of the defense, the LG&E tribunal found that the "inclusion of an article authorizing the state of necessity in a BIT constitutes the acceptance . . . of the possibility that one of them may invoke the state of necessity."[138] Although the CMS, Enron, and Sempra tribunals said they would address this requirement in their discussion of Article XI,[139] they did not explicitly return to this point. In their later discussion of Article XI, however, they both found that, given that the object and purpose of the treaty is to be applicable in situations of economic difficulty, that exception should be read restrictively.[140] The CMS Award implicitly found that the object and purpose of the treaty did not preclude necessity, although necessity was precluded in the case before it: "A severe crisis cannot necessarily be equated with a situation of total collapse. And in the absence of such profoundly serious conditions it is plainly clear that the Treaty will prevail over any plea of necessity."[141] The CMS Annulment Decision did not address this specific finding.[142]

In relation to the requirement at Article 25(2)(b) that the state not have contributed to the situation of necessity, once again the LG&E tribunal differed from the others. The LG&E decision, in finding this requirement satisfied, made two findings—that the *claimants* had not proven that Argentina has contributed to the state of necessity, and that the "attitude adopted by the Argentine Government has shown a desire to

135 CMS Award, *supra* note 1, at Paras. 357–8; Enron Award, *supra* note 1, at Para. 341; Sempra Award, *supra* note 1, at Para. 390.

136 LG&E Decision on Liability, *supra* note 1, at Para. 257.

137 CMS Award, *supra* note 1, at Para. 358; Enron Award, *supra* note 1, at Para. 342; Sempra Award, *supra* note 1, at Para. 391.

138 LG&E Decision on Liability, *supra* note 1, at Para. 255.

139 Enron Award, *supra* note 1, at Para. 310; Sempra Award, *supra* note 1, at Para. 352.

140 Enron Award, *supra* note 1, at Para. 331; Sempra Award, *supra* note 1, at Para. 373.

141 CMS Award, *supra* note 1, at Para. 354.

142 CMS Annulment Decision, *supra* note 3, at Para. 133.

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slow down by all the means available the severity of the crisis."[143] The CMS, Enron, and Sempra tribunals, by contrast, all found that the crisis was not due to exogenous factors alone and that there had been a "substantial contribution" by various Argentine administrations to the situation of necessity.[144]

C. THE EFFECT OF ESTABLISHING THE DEFENSE OF NECESSITY All tribunals were in agreement with the principle that the defense of necessity operates only to preclude wrongfulness as long as the situation persists, as is contemplated at Article 27(a) of the *ILC Articles*.[145] They differed, however, on the effects this principle has on the obligation to provide compensation for loss. All four tribunals turned for guidance to Article 27(b) of the ILC Articles, which provide that the invocation of necessity is "without prejudice to . . . [t]he question of compensation for any material loss caused by the act in question."

The CMS Award held that "necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed," relying on, among other things, Article 27.[146] The *Enron* and *Sempra* Awards took essentially the same position.[147] In all three, this aspect of the award was *obiter dicta*, given that the tribunals had not found the conditions of necessity or of Article XI to have been satisfied. The CMS and Sempra tribunals also indicated that the crisis Argentina faced would, nonetheless, be considered in the quantification of damages and, although it did not say it would do the same, the Enron tribunal appeared to take the crisis into account in its calculation of damages.[148]

The Annulment Committee also criticized the "obiter dicta" of the CMS tribunal.[149] It noted that Article 27 was not relevant to the question of whether compensation is due when Article XI applies, as the principle in Article 27 only "covers cases in which the state of necessity precludes wrongfulness under customary international law."[150] Given that the tribunal had not found a state of necessity, Article 27, in its view, should never have come into play. Rather, the tribunal "should have considered what would have been the possibility of compensation under the BIT if the measures taken by Argentina had been covered by Article XI." It found the answer to that question "clear enough": "Article XI, for so long as it applied, excluded the operation of the substantive

143 LG&E Decision on Liability, *supra* note 1, at Paras. 256–7.

144 CMS Award, *supra* note 1, at Para. 329 (finding that Argentine government policies and their "shortcomings significantly contributed to the crisis and the emergency"); Enron Award, *supra* note 1, at Para. 312; Sempra Award, *supra* note 1, at Para. 354.

145 CMS Award, *supra* note 1, at Paras. 379–382; LG&E Decision on Liability, *supra* note 1, at Para. 261; *see also* Paras. 230, 261, 263 and 265; Enron Award, *supra* note 1, at Para. 343; Sempra Award, *supra* note 1, at Para. 392.

146 CMS Award, *supra* note 1, at Para. 388; *see also* at Paras. 390 and 392.

147 Enron Award, *supra* note 1, at Para. 345; Sempra Award, *supra* note 1, at Para. 394.

148 CMS Award, *supra* note 1, at Para. 356; Sempra Award, *supra* note 1, at Para. 346 and *see* Enron Award, *supra* note 1, at Paras. 407 and 414.

149 CMS Annulment Decision, *supra* note 3, at Para. 145.

150 *Id*.

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provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period."[151]

The CMS Annulment Committee also noted that "Article 27 itself is a "without prejudice" clause, not a stipulation" of damages,[152] the suggestion being that the tribunal should not have relied on Article 27 as in any way determinative on the question of whether damages were owed even where necessity comes into play to preclude wrongfulness.

This was also the position of the LG&E tribunal.[153] It found that Argentina was "excused under Article XI from liability for any breaches,"[154] and that although the "protections afforded by Article XI have been triggered in this case, and are sufficient to excuse Argentina's liability . . . satisfaction of the state of necessity standard . . . supports the Tribunal's conclusion."[155] As such, it found that "damages suffered during the state of necessity should be borne by the investor."[156] However, that tribunal did find Argentina liable for damages caused by the treaty violations that were not attributable to the period of the crisis. It also ruled that the end of the Argentine crisis was not to be determined by the repeal of the Emergency Law, which had yet to occur at the time of award (and indeed still has yet to occur[157]), but when Dr. Kirchner assumed office.[158]

3. Argentine domestic law All of the awards, and the CMS Annulment Committee, considered Argentine law—notably, the various tariff stabilization guarantees—as a matter of fact relevant to the question of whether treaty standards were breached. Although the CMS, Enron, and Sempra tribunals also analyzed separately and in significant detail why Argentina was in breach of its domestic legislation, and why domestic defenses such as necessity were not available,[159] the LG&E tribunal did not.

The CMS, Enron, and Sempra tribunals all canvassed a number of potential excuses and other legal mechanisms that might be engaged by the crisis under Argentine domestic law, but rejected the applicability of all of them. These included the concepts of necessity and *imprévision*, as well as *force majeure*[160] and unjust enrichment.[161]

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151 *Id.* Para. 146.

152 *Id.* Para. 147.

153 LG&E Decision on Liability, *supra* note 1, at Para. 260 (stating that Article 27 "does not attempt to specify in what circumstances compensation would be payable. . . . the Tribunal's interpretation of Article XI . . . provides the answer").

154 *Id.* Para. 229; *see also id.* Para. 261.

155 *Id.* Para. 245.

156 *Id.* Para. 264.

157 In December 2007, the Argentine Senate passed a seventh extension of the law through 2008. (*Argentine Senate Extends Economic Emergency Rule*, Reuters News, December 13, 2007.)

158 LG&E Decision on Liability, *supra* note 1, at Para. 227–30.

159 CMS Award, *supra* note 1, at Paras. 200–46; Enron Award, *supra* note 1, at Paras. 127–67 & Paras. 210–32; Sempra Award, *supra* note 1, at Paras. 100–96.

160 CMS Award, *supra* note 1, at Para. 227; Enron Award, *supra* note 1, at Para. 218; Sempra Award, *supra* note 1, at Para. 246.

161 CMS Award, *supra* note 1, at Para. 220.

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All three tribunals considered the defense under domestic law arising from a "state of emergency" or "necessity" against the principles articulated in a 2003 Argentine Supreme Court decision.[162] According to that Court, an emergency measure must meet three requirements in order to provide a defense. It must be limited in duration, provide a remedy and not permanently mutate contractual rights, and be reasonable. The *Enron* and *Sempra* awards canvassed all of these requisites and determined that none of them were met.[163] The CMS award rejected the claim as well, but appeared to have addressed explicitly only the second requirement.[164]

All three tribunals were prepared to consider, as a matter of law, that the events might fall within one or more of the provisions of the Argentine Civil Code, including the concept of *imprévision*, under which judicial intervention would have been permissible to re-equilibrate investment terms despite the various stabilization guarantees.[165] The three tribunals eventually rejected the applicability of these concepts as a matter of fact, though, given the history behind the stabilization guarantees and the BIT.

The CMS tribunal found that the measures in the Emergency Law failed to meet an "essential condition" of *imprévision*—namely, that they have been taken to address a situation that was not foreseeable. Argentina had argued that the tariff charged reflected both devaluation and country risks, thereby admitting that the risk of currency devaluation "was foreseeable and actually foreseen."[166] The Enron tribunal was influenced by similar considerations:

> . . . if the major features of the whole regulatory regime put in place under the privatization were based on taking cover against all kind of risks inspired by the economic history of the country and the instability of the 1980s, including country risk and devaluation, it is in itself indicating that the parties were quite aware of the dangers ahead.[167]

That tribunal concluded that: "It would then make no sense if when the dangers materialized, as they did, the protection envisaged would not operate."[168]

The CMS, Enron, and Sempra tribunals were all prepared to accept that Argentina needed to take measures in order to respond to the crisis but concluded that Argentina had failed to adhere to the contractual adjustment mechanism to which it had agreed but had instead acted unilaterally. The CMS tribunal canvassed at some length the "pertinent mechanisms" for addressing the crisis in the license and under Argentine law, concluding that, as the "necessary adjustments could be accommodated within the structure of the guarantees" made to CMS, unilateral action by Argentina was "unnecessary."[169] The Enron Tribunal acknowledged that the dramatic change to

162 Provincia de San Luis c. P. E. N.—Ley 25561, Dto. 1570/01 y 214/02 s/ amparo, Judgment, Argentine Supreme Court, March 5, 2003.

163 Enron Award, *supra* note 1, at Paras. 218–25 & 293; Sempra Award, *supra* note 1, at Paras. 247–56 & 330.

164 CMS Award, *supra* note 1, at Para. 217.

165 *See e.g.*, Enron Award, *supra* note 1, at Para. 214.

166 CMS Award, *supra* note 1, at Para. 225. *See also id*. at Paras. 134 and 137.

167 Enron Award, *supra* note 1, at Para. 216.

168 *Id*.

169 CMS Award, *supra* note 1, at Paras. 228–38.

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economic conditions that occurred in Argentina could have "a profound effect on the economic balance of contracts and licenses,"[170] accepted that adjustment might be appropriate as a consequence,[171] but noted that "the real problem underlying the claims" was that Argentina had acted unilaterally.[172] It found that under the regulatory framework "if tariffs ceased to be fair and reasonable, the regulatory framework provided for specific adjustment mechanisms, tariff reviews on periodic basis and even the possibility of an extraordinary review."[173] The Sempra Tribunal even appears to have been prepared, if the implementation of the contractual review mechanism would have taken some time, to accept that the government might have taken unilateral measures "pursuant to a limited time schedule while reviews were carried out."[174]

None of these decisions specifically addressed Article X of the BIT, which affirms investors' protections under existing national law and gives them the benefit of those protections to the extent greater than the BIT itself.[175] As all three tribunals determined that Argentina had no valid excuse under both national law and the BIT, presumably the arbitrators believed such discussion was unnecessary.

4. Remedies The CMS, Enron, and Sempra tribunals all went on to determine the amounts owed by Argentina to the claimants by virtue of the breaches found, whereas the LG&E tribunal left this to be determined in a next phase of proceedings.[176] The approach taken to the determination of Argentina's liability by the CMS, Enron, and Sempra tribunals was essentially the same. The LG&E tribunal, once again, differed substantially—not only in its approach to the measure of compensation, but also in its rejection of lost future profits as too uncertain to compensate.

All four tribunals agreed that the applicable standard for reparation was that set out in the *Chorzow Factory Case*[177] and codified at Article 31 of the *ILC Articles*,[178] namely

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170 Enron Award, *supra* note 1, at Para. 143.

171 *Id.* at Para. 104.

172 *Id.* at Para. 144.

173 *Id.* at Para. 143. *See also* CMS Award, *supra* note 1, at Paras. 228–38; Sempra Award, *supra* note 1, at Paras. 259–60.

174 Sempra Award, *supra* note 1, at Para. 261.

175 But as discussed above at II(C)(3), the CMS, Enron, and Sempra decisions on applicable choice of law led those three tribunals to extensive discussions of Argentina national law, particularly with respect to Argentina's defense of necessity.

176 LG&E Decision on Liability, *supra* note 1, at Para. 267(e); LG&E Damages Award, *supra* note 2.

177 *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Permanent Court of International Justice Proceeding, Merits 1928, P.C.I.J. Series A. No. 17, at 47 ("Chorzow Factory"). *See, e.g.*, CMS Award, *supra* note 1, at Para. 400 (citing Chorzow Factory case).

178 Article 31 provides:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

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that compensation must "wipe out the consequences" of the illegal act and, therefore, the standard of compensation is measured by the "loss suffered."[179]

All four tribunals noted that the *U.S.–Argentina BIT*, which specifically refers to fair market value as the measure of compensation in cases of expropriation, does not prescribe a measure of compensation where other guarantees within that treaty are breached.[180] The CMS, Enron, and Sempra tribunals nonetheless determined that fair market value was the appropriate measure to be applied in the case before them, given the "cumulative nature" of the breaches (CMS and Enron tribunals), the "important long-term losses" (CMS tribunal) or the similarity between a breach of the fair and equitable treatment standard and indirect expropriation (*Enron* and *Sempra* tribunals).[181] As such, these three tribunals decided that the loss to be compensated was the difference between the fair market value of claimants' shareholdings assuming Argentina had not taken its offending measures compared to their value after the offending measures. Argentina sought annulment of the CMS Award's application of the fair market value measure, arguing that it was contradictory for the tribunal to have found no expropriation and yet apply the expropriation standard.[182] The CMS Annulment Committee rejected this argument and appeared to agree with the CMS tribunal's rationale for opting for fair market value.[183]

The LG&E tribunal, on the other hand, rejected the fair market value measure.[184] It did so for various reasons, including because, in its view, the measure of damages for wrongful acts should be different from that for compensation for lawful expropriation.[185] Instead, the LG&E tribunal indicated that the appropriate measure of damage was the "actual loss" incurred by the investors "as a result" of Argentina's wrongful acts, and determined that this damage could be measured by the loss of dividends.[186]

In order to calculate the fair market value measure, the CMS, Enron, and Sempra tribunals all applied the discounted cash flow (DCF) method.[187] However, the three

179 CMS Award, *supra* note 1, at Para. 402; LG&E Damages Award, *supra* note 1, at Para. 45; Enron Award, *supra* note 1, at Paras. 359 and 379; Sempra Award, *supra* note 1, at Paras. 400–1.

180 CMS Award, *supra* note 1, at Para. 409; LG&E Damages Award, *supra* note 2, at Para. 30; Enron Award, *supra* note 1, at Para. 359; Sempra Award, *supra* note 1, at Para. 403.

181 CMS Award, *supra* note 1, at Paras. 409–10; Enron Award, *supra* note 1, at Paras. 359–63; Sempra Award, *supra* note 1, at Paras. 403–4.

182 CMS Annulment Decision, *supra* note 3, at Para. 152.

183 CMS Annulment Decision, *supra* note 3, at Para. 154.

184 LG&E Damages Award, *supra* note 2, at Para. 32.

185 *Id.* at Para. 38.

186 *Id.* at Para. 45.

187 CMS Award, *supra* note 1, at Paras. 411, 416 & 421; Enron Award, *supra* note 1, at Paras. 385 & 389; Sempra Award, *supra* note 1, at Para. 416. That said, the Enron Award used the actual price paid in a sale by the claimant of its shares rather than the DCF approximation in determining the actual fair market value of its shareholdings (at Para. 389). Similarly, the Sempra Award used the terms of an MOU signed by licensees and Argentina in determining the actual fair market value (at Paras. 452–8).

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tribunals adjusted the amounts of the various variables used by the respective claimants in their respective DCF calculations, and therefore came to different views on the quantum of damages owed as compared to those put forward by the respective claimants.[188] Most notably, for present purposes, the CMS, Enron, and Sempra tribunals found that certain of the variables that the claimants had used in their calculation of what might have been the value of their holdings absent the offending measures did not adequately take into account the effect that the crisis would have had on that value. For instance, both the CMS and Sempra tribunals found that the claimants had not sufficiently factored into their DCF calculation the decrease in demand for gas that would have resulted from the crisis.[189] For its part, the Enron tribunal found that the assumptions as to tariff adjustments made by claimants in their calculations were "not a realistic scenario in a crisis context" and therefore modified these assumptions.[190] That tribunal also appeared to modify the tariff base and the cost of capital assumptions for the same reason.[191] In these respects, the economic impact of the Argentine crisis on the investors was taken into consideration in determining the damages actually caused by the treaty breaches, and therefore in determining compensation, even though those tribunals refused to find that this crisis constituted an excuse under the *U.S.–Argentina BIT*'s Article XI.

The LG&E tribunal, in applying the lost dividends measure of damages, imposed a high standard of proof on the investors, insisting that they needed to prove future losses with "certainty."[192] That tribunal ultimately found that the future loss to LG&E was speculative.[193] It set the date of February 28, 2005, the last date of hearings and evidence in the proceeding, as the date beyond which lost dividends had not been proved, and therefore awarded no damages for projected lost dividends after this date. Also, as contemplated in the LG&E Decision on Liability (discussed above at II.C.2.C), no compensation was awarded for damages (including lost dividends) attributable to the period of necessity,[194] which the tribunal had determined began on December 1, 2001 and ended with the election of President Kirchner on April 26, 2003.[195]

In the end, CMS was awarded $133.2 million in compensation, rather than the $261.1 million it had claimed,[196] a determination that was not affected by the

188 *See* generally CMS Award, *supra* note 1, at Paras. 444–6 (regarding demand for gas), 447 and 456–7 (regarding future tariffs), 449 (regarding the exchange rate), 450 (regarding equity discount rates) and 458–62 (regarding operations and maintenance expenditures); Enron Award, *supra* note 1, at Paras. 408–10 (regarding tariff base) and 411–13 (regarding the cost of capital); Sempra Award, *supra* note 1, at Paras. 418–28 (regarding the asset base), 429–37 (regarding the and discount rate), 438–45 (regarding tariff increases) and 446–9 (regarding consumption effect).

189 CMS Award, *supra* note 1, at Paras. 444–6; Sempra Award, *supra* note 1, at Paras. 446–9.

190 Enron Award, *supra* note 1, at Para. 414.

191 *Id.* Para. 406–7.

192 LG&E Damages Award, *supra* note 2, at Paras. 51 and 89.

193 LG&E Damages Award, *supra* note 2, at Para. 90.

194 LG&E Damages Award, *supra* note 2, at Para. 61.

195 LG&E Decision on Liability, *supra* note 1, Para. 230.

196 CMS Award, *supra* note 1, at Paras. 468 and 396, respectively.

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Annulment Decision.[197] Enron was awarded $106.2 million, rather than the amounts it had claimed, or rather the spectrum of possible such amounts, which appear from the award to have ranged from $278,722,689 to $543,809,030 based on different valuation methods and dates.[198] Sempra was awarded $128,250,462 rather than the $209.38 million it had claimed.[199] LG&E has been awarded $57.4 million,[200] rather than the $248 million originally claimed (excluding interest and costs).[201]

What is striking is that by far the greater part of the difference between amounts claimed and awarded in LG&E as compared to the much larger sums awarded in CMS, Enron, and Sempra is attributable to the LG&E tribunal's decisions on the relevant measure and valuation of damages, rather than its finding on the applicability of Article XI or the defense of necessity. Based on the LG&E tribunal's calculations, the quantum of lost profits attributable to the period of emergency, that is, for the period between December 1, 2001 and April 26, 2003, not awarded to LG&E, was only $28.8 million.[202]

III. AN ANALYSIS OF ARTICLE XI OF THE *U.S.–ARGENTINA BIT*

Customary international law, as set out in article 31 of the *Vienna Convention on the Law of Treaties*, requires that treaty provisions 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."[203] That article also permits treaty interpreters to have recourse to, among other things, "any relevant rules of international law applicable in the relations between the parties."[204] "Recourse may be had to supplementary means of interpretation," according to article 32 of the *Vienna Convention*, "including the preparatory work of the treaty and the circumstances of its conclusion," only in order to "confirm" this interpretation, or to determine the meaning of a provision if the ordinary tools of interpretation yield a meaning that is obscure or a "manifestly absurd or unreasonable" result.[205] Before moving to an analysis of various aspects of Article XI, therefore, Part III(A) below will review the object and purpose of the *U.S.–Argentina BIT*, as well as the circumstances of its conclusion.

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197 CMS Annulment Decision, *supra* note 3, at Para. 160.

198 Enron Award, *supra* note 1, at Paras. 450 and 351, respectively.

199 Sempra Award, *supra* note 1, at Paras. 482 and 406, respectively.

200 LG&E Damages Award, *supra* note 2, at Para. 108.

201 LG&E Decision on Liability, *supra* note 1, at Para. 74; LG&E Damages Award, *supra* note 2, at Para. 15. This was the figure put forward on the discounted cash flow calculation of fair market value. It is somewhat unclear what LG&E's submissions were in regard to loss amounts on the lost dividends measure. At one point in the award, a figure of $271 million is given, whereas in another part of the award, figures totaling $265.2 million are given. *Id.* at Paras. 70 and 18, respectively.

202 LG&E Damages Award, *supra* note 2, at Para. 108.

203 Vienna Convention, *supra* note 35, Article 31(1).

204 Vienna Convention, *supra* note 35, Article 31(3)(c).

205 Vienna Convention, *supra* note 35, Article 32.

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The *U.S.–Argentina BIT* needs to be understood in light of the history of both of its parties. The treaty itself, whose text is, except for its Protocol, identical to that of the 1987 U.S. Model BIT Text, needs to be understood in light of the origins of that Model and the history of the BIT program of the United States. The *U.S.–Argentina BIT* was negotiated against the backdrop of well-known public positions taken by the United States with respect to the meaning of its 1987 Model Text, its prior BITs, and Friendship, Commerce and Navigation Treaties (FCNs) previously concluded by the United States. It was also concluded in light of high profile public positions taken by Argentina's leaders shortly before and after concluding the *U.S.–Argentina BIT* in reaction to Argentina's checkered history with respect to the treatment of foreign investors. As discussed below, the publicly available evidence strongly indicates that, at the time the *U.S.–Argentina BIT* was concluded, both parties to that treaty sought to affirm through ratification well-known understandings of the extensive investor protections provided under the 1987 U.S. Model Text. The evidence also indicates that by ratifying that treaty Argentina was, in conformity with established U.S. BIT policy, attempting to send a clear signal to both existing and prospective investors from the United States that it was renouncing its former practices with respect to their treatment, including its former refusal to countenance international arbitration and espousal of the Calvo Doctrine. This account strongly supports the proposition that the *U.S.–Argentina BIT* was intended to forestall exactly the type of necessity defense raised by Argentina in these cases.

A. The object and purpose of the *U.S.–Argentina BIT*

The principle that aliens and their property were "generally subject to at least equality of treatment with nationals of the taking state" was unchallenged for centuries.[206] Since most states protected private property for aliens and for their nationals equally under their own law, it was generally assumed that alien property was inviolable and subject to fair compensation under international law no less than the property of nationals.[207] This notion began to be seriously challenged in the twentieth century in the wake of political, economic, and other crises, and even revolutions, in places such as Russia and Mexico.

As is well known, Western states never formally accepted the legality of Russian revolutionary decrees, which repudiated contracts with foreign investors, nationalized alien properties, and refused payment of public debt. And although the United States came relatively late to the negotiation of BITs, it took the lead in attempting to protect the rights of foreign investors. The foundation of the U.S. BIT program, launched in the late 1970s, was laid in diplomatic exchanges between the United States and Mexico much earlier in the century. From 1910, in the wake of serious political and economic turmoil in that country, Mexico began taking actions that adversely affected the properties of, among others, U.S. investors. These actions, which included de facto

206 Lowenfeld, *supra* note 9, at 392.

207 *Id*.

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expropriations of agrarian land, were taken in the midst of a series of political crises of the first magnitude, and indeed often over periods in which it was difficult to tell which Mexican governmental authorities were in charge. Yet the Mexican measures were the subject of famous diplomatic exchanges between then United States Secretary of State Hull and the government of Mexico in 1938. This diplomatic correspondence included, of course, Hull's famous proclamation that international law had long provided for the payment of prompt, adequate, and effective compensation in cases of expropriation of alien property—a formula which the United States has affirmed as a principle of customary international law on every occasion since. In defense of its measures, Mexico invoked the writings of nineteenth-century Argentine jurist Carlos Calvo, who had argued that alien investors could enjoy no greater rights in the place where they had invested than the host state's own nationals. Mexico argued that its measures (the suspension of its agrarian debt) affected Mexicans and aliens equally and was not discriminatory.[208] Further, the Mexican foreign minister argued to Hull that the "political, social, and economic stability and the peace of Mexico" had required it to take its measures against U.S. investors,[209] that these measures had been "necessary," and had been inspired by "legitimate causes and the aspirations of social justice."[210] Hull rejected all of these contentions, noting that it was incompatible with international law to assert that governments are relieved of their international obligations because of "contradictory municipal legislation" or because "its financial or economic situation makes compliance . . . difficult."[211]

In the wake of Mexico's and others' challenges to what the United States regarded as established principles of state responsibility to aliens, the United States revised its model FCN treaty.[212] The U.S. had concluded FCN treaties since its earliest days as a nation. After World War II, however, the United States revised these agreements to more clearly provide for the rights of investors and not merely traders of goods. Accordingly, the new FCNs explicitly included provisions reflecting U.S. views of what it believed were traditional customary norms protecting aliens' rights to contract sanctity and property.[213] The United States, like other Western countries that turned their attention to better forms of protection for their investors abroad in the wake of

208 *Id.* at 400.

209 *Id.* at 399.

210 *Id.* at 401.

211 *Id.*

212 As this history suggests, the United States and its FCN treaty parties have never considered the inclusion of rights enjoyed by aliens under customary international law in a treaty a superfluous act. Although it is true that in theory customary international law would be sufficient to protect the interests of U.S. aliens abroad, it appears that the United States believed that concluding a treaty that so provides was in and of itself useful, not only as an explicit affirmation by both states of what the law requires but because a treaty, including the FCNs' state-to-state dispute settlement clause, provides at least one forum in which such disputes can be resolved.

213 *See, e.g.*, Lowenfeld, *supra* note 9, *id.* at 391, who suggests that Western nations' views of the duty to compensate aliens upon expropriation was derived from a "general principle of law—for instance, the 1789 Declaration of the Rights of Man and the Citizen." Article 17 of that Declaration provides: "Property being an inviolable and sacred right, no one may be deprived

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World War II, was well aware that such treaty guarantees were most needed during periods of crisis, and even violence, in the states hosting foreign investors. The new investment protections included in the United States' post-World War II, or "modern," FCN treaty were intended to enable treaty-based claims for redress which, like those during the Mexican revolution, often arose in the most acute form in the course of interstate and civil conflicts, including economic upheaval or revolution. Like later attempts by the United States to affirm via treaty what it considered to be customary doctrines of state responsibility vis-à-vis aliens (including under its BITs), these efforts were motivated by the many expropriations and other contract breaches of the twentieth century that had generated the most resistance to traditional legal liability, namely harm to aliens occasioned in the context of often momentous political struggles for self-determination and occurring either immediately preceding or shortly after these nations achieved independence.[214]

The U.S. BIT program, which began with negotiations with Singapore in the late 1970s, was built on the provisions of its post-World War II FCNs. The United States' modern FCN—drafted, as noted, to deal with contentions raised by "revolutionary" regimes such as Mexico and Soviet Union—included precursors to all the substantive guarantees contained in the *U.S.–Argentina BIT*, namely investor rights to national and MFN treatment, requirements for "equitable" treatment and treatment no less favorable than that provided by international law, rights to compensation upon expropriation, and guarantees precluding currency restrictions that would impede the free transfer of capital. As is further discussed below, the U.S. also choose to include in its new BITs a version of the "measures not precluded" clause originally contained in its FCNs but narrowed in scope to suit its new treaty's investment protection goal. The U.S. also added to familiar FCN provisions other guarantees for its investors, drawn from bilateral investment protection agreements (BIPAs) that had been concluded by a number of European states, particularly Germany and Switzerland, since the late 1950s.[215] Most significantly, the United States took an important step to enhance the rights of alien investors by adding a crucial enforcement device made possible by developments such as the emergence of the ICSID Convention. It incorporated a treaty-based guarantee to enable foreign investors to have direct access to international arbitration against the host state for any violation of the BIT. The first

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of his property except when public necessity, lawfully established, so requires, and on condition of just and prior compensation."

214 Of course, investor-state disputes arising from severe economic or political crises have also emerged long after a state has achieved independence. This is certainly the context in which many investor claims arose in the wake of the Iranian revolution, for example. Many of these claims were ultimately settled, including by applying the U.S.–Iran FCN, in the Iran–U.S. Claims Tribunal. *See also* Himpurna California Energy Ltd. v. PT. (Pesaro) Persuahaan Listruik Negara, Final Award (May 4, 1999)(claims arising from government measures taken in the context of the economic crisis leading to dramatic devaluations of the Indonesian rupiah which began in the second half of 1997).

215 Kenneth Vandevelde, United States Investment Treaties: Policy and Practice, at 29 (1992). As Vandevelde indicates, the U.S. was a relative latecomer to negotiating bilateral investment agreements as between 1962 and 1972 the Federal Republic of Germany had negotiated 46 BIPAs and Switzerland had entered into 27. *Id.* at 19.

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U.S. Model BIT made public, in the early 1980s, was therefore, like the *U.S.–Argentina BIT*, an amalgamation of provisions drawn from prior U.S. FCN practice as well as "improvements" drawn from European BIPAs.

Like the original FCN text on which it was based, the new model BIT agreement intentionally and deliberately relied upon what the United States argued to the world was binding customary international law. As is further discussed below, the U.S. model was replete with references to customary international law (as well as other sources of investor protections such as those stemming from a host state's law or the investor's contract with the host state). These references served two principal purposes: (1) to affirm the United States' view of what customary international law required and (2) to permit investors to assert these traditional rights, along with new rights under the BIT, in investor-state dispute settlement. Accordingly, the United States did not see these provisions as superfluous, especially since by inserting customary norms into a BIT the United States was ensuring that foreign investors from both states would have a forum to assert their rights. To this end, the U.S. Model treaty, including the *U.S.–Argentina BIT*, recognized that investor-state dispute settlement would extend not only to investor rights "created" by the BIT but also to those the treaty "conferred" on investors (such as those under customary international law).[216] It was also the hope of the United States that the resulting applications of BIT guarantees, including those affirming customary law, would over time provide the evidence of state practice that would serve to reinforce U.S. views of customary international law rights applicable to alien investors.

As the chief architects of the U.S. model BIT text upon which the *U.S.–Argentina BIT* was built have indicated in their accounts of the history of the program, and as the United States repeatedly indicated to the Senate throughout the 1980s when submitting these treaties for its consent to ratification, and, as the text of that treaty itself confirms, the object and purpose of U.S. Model BITs of this period was to protect the rights of foreign investors as well as to affirm customary international law obligations relating to such protection which had, at least since the claims of the Mexicans and the Russians at the turn of the century, been questioned.[217] The United States opted for a specific investment protection treaty in the early 1980s because of a felt need to buttress the law, after nearly years of attacks, particularly in forums such as the UN General Assembly.[218]

As Kenneth Vandevelde, one of the early U.S. BIT negotiators, would later explain, U.S. BIT negotiators took a relatively "uncompromising stance" at least during this period with respect to BIT negotiations.[219] Accordingly, the United States was candid with its prospective BIT parties that concluding a U.S. BIT would not guarantee an increase in incoming FDI flows or necessarily produce tangible benefits such as

216 *See U.S.–Argentina BIT*, art. II (1).

217 *See, e.g.*, Vandelvelde, *supra* note 215, at 7–22; Hearing before the Committee on Foreign Relations, United States Senate, First Session, September 10, 1993 (S.Hrg. 103–292)(BITs with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania), at 6 and 21; Hearing of August 4, 1992 at 15–17.

218 Vandelvelde, *supra* note 215, at 7–22.

219 *See*, *e.g.*, *id.* at 25 and 31–35.

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higher employment.[220] U.S. negotiators were quite clear that the U.S. BIT was not designed to promote economic development or employment as such but was intended to achieve one clear purpose: to protect foreign investment.[221] Thus, although the preamble of the *U.S.–Argentina BIT* identifies the hoped for goals of increased investment flows and economic development, nothing in it or in the rest of the treaty suggests that the investor rights conferred were conditioned on the emergence of such benefits. The relatively narrow object and purpose of the U.S. BIT was also made clear by what that treaty did not contain. As Vandelvelde has indicated, at least during the 1980s, U.S. BIT negotiators resisted including in its BIT investment promotion devices (such as mutual guarantees of tax holidays) sometimes sought by treaty partners.[222] The U.S. model treaty was built on the premise that the guarantees given in that treaty with respect to investors of either state party—the essence of a treaty whose text belied its title by stressing the "protection" of foreign investment over its explicit "promotion"—were indispensable "minimum standards" for countries that sought to commit themselves to a stable investment environment, the rule of law, and genuine liberalization of investment flows.[223] The U.S. position, publicly affirmed to prospective treaty partners, was that concluding a BIT was mutually beneficial to both parties because it affirmed specific protections for investors that had become threatened both by the practice of some states (e.g., a wave of expropriations in the 1960s and 1970s) and their rhetoric (as in the UN General Assembly or in UNCTAD).

220 *See*, *e.g*., *id.* at 32. Indeed, as the U.S. State Department put it in the Senate hearing addressing the Argentina BIT, the United States was "careful to point out that the existence of a BIT alone will not guarantee increased investment." Hearing of September 10, 1993, *supra* note 217, at p. 22.

221 *See*, *e.g*., Hearing of September 10, 1993, *supra* note 217, at 6–7.

222 Indeed, the State Department letter submitting the *U.S.–Argentina BIT* to the Senate indicated that although "conclusion of a BIT with the United States is an important and favorable factor . . . [it] does not in and of itself result in immediate increase in U.S. investment flows." Message from the President of the United States Transmitting the Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, Signed at Washington on November 14, 1991; and an Amendment to the Protocol Effected by Exchange of Notes at Buenos Aires on August 24 and November 6, 1992, 103rd Congress 1st Session Treaty Doc. 103-2, *at* http://www.bilaterals.org/IMG/html/US-AR_BIT.html [hereinafter *Letter of Submittal*].

223 *See e.g*., Kenneth J. Vandevelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 Columb. J. Transnat'l L. 501 (1998). As Vandevelde also indicates, U.S. negotiators of BITs during this period also did not generally use the prospect of negotiations as a prod to induce prospective BIT parties to change their domestic legislation. As he indicates, the United States believed that a treaty "which was the product of pressure or inducements in other areas could be one to which the BIT partner would be unwilling or unable to adhere in the long run, and thus would not serve the goal of establishing a stable and predictable minimum standard of protection. For these reasons, the United States did not offer to make concessions in noninvestment areas to entice a country to sign a BIT." Vandevelde, United States Investment Treaties, *supra* note 217, at 31–2. The goal of establishing uniform standards led U.S. negotiators during this period to resist making concessions in any BIT. *Id.* at 32–4.

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At the same time, as the world's leading capital exporter and the most ardent defender of customary international law protections for investors, the United States argued to its prospective treaty parties throughout the 1980s that adherence to the U.S. BIT was the clearest signal any country could send about its commitment to protect foreign investors because the U.S. Model BIT was a more potent protector of investor rights than the weaker European BIPAs. Indeed, the typical State Department letter to the U.S. President, replicated in the submittal of the *U.S.–Argentina BIT* to the U.S. Senate, recognizes that "Argentina has signed BITs with several European countries, including France, as well as Canada and Chile" but stresses that the *U.S.–Argentina BIT* is "more comprehensive than these other BITs."[224] Thus, in BIT hearings during this period, the United States repeatedly stressed, as it did to its European allies, that the U.S. Model BIT was "more demanding" and the "most rigorous" in the world because its guarantees for investors "generally exceed those of European countries."[225]

Over the course of the early years of the U.S. BIT program, the United States made small but significant changes in what it regarded as the world's most investor-protective treaty designed to make its Model BIT an even stronger tool to achieve investment protection. Just prior to beginning negotiations with Argentina for a BIT, the United States released what remains today its most investor-protective model text, the 1987 Model Draft.[226]

As is strongly suggested by the fact that the text of the *U.S.–Argentina BIT* is (but for its short and unexceptional Protocol) identical to the 1987 U.S. Model, it would appear that the U.S.–Argentine negotiations with respect to that treaty adhered to the pattern described by Vandevelde's history discussed above. Like other U.S. BIT parties during this period, Argentina accepted the U.S. Model (and presumably U.S. standard explanations for what it meant). As a comparison of the U.S. 1987 Model BIT used to negotiate the *U.S.–Argentina BIT* with the actual text of that 1991 treaty indicates, the United States was not willing to make any concessions with respect to the basic provisions of its model, except with respect to those anticipated in the model itself (e.g., with respect to permitting states to indicate mutually acceptable specific sectors that would not be subject to non-discrimination guarantees). The United States resisted making concessions in the context of its negotiations with Argentina, as with others during this period, not only because these could later be cited as precedents and force it to retreat on investment protections in other treaty negotiations, but also because,

224 Letter of Submittal, *supra* note 222.

225 *See, e.g.*, Hearing of August 4, 1992, at 3, 5, and 22; Hearing of September 10, 1993, *supra* note 217, at 6–7.

226 Vandevelde, *supra* note 215, at 42–43. The most significant change made, vis-à-vis earlier U.S. models, was with respect to the investors' rights to seek arbitration. The 1987 model provides, unlike earlier U.S. model texts, that investors are not bound by any prior contractual commitments in which they agreed to submit their disputes to host states' courts. Under the 1987 model, as under the *U.S.–Argentina BIT*, investors are free to seek international arbitration of any disputes that they have not voluntarily submitted elsewhere. They are not obligated by prior dispute settlement clauses contained in their agreements with the host state. *U.S.–Argentina BIT*, Article VII(2).

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as indicated, the U.S. negotiators argued that many of the U.S. BIT provisions affirmed their oft-stated understandings of customary international law—a position that the United States was simultaneously asserting in such other forums as the United Nations.[227] The "uncompromising" posture of the United States with respect to BIT negotiations during this period means that, absent contrary evidence, the drafting intent of the United States and the history of its BIT program is highly relevant to the interpretation of this treaty.

For the United States, a country that had attempted (with only partial success) to get the UN General Assembly to affirm in 1962 that customary international law (and not only national law) governed the treatment foreign investors received, especially but not only when they were expropriated, and that national courts needed to give way to international arbitration when investors sought that more neutral forum, the negotiation of a BIT afforded it an opportunity to secure, at least bilaterally, such absolute guarantees. As U.S. BIT negotiators in this period have repeatedly indicated, the United States was not about to negotiate these away via treaty or to "balance" investors' rights vis-à-vis the rights of sovereigns, as urged by advocates of a NIEO or the concept of "permanent sovereignty over national resources."[228]

The Sempra and Enron tribunals found that "the object and purpose of the Treaty is, as a general proposition, for it to be applicable in situations of economic difficulty and hardship that require the protection of the internationally guaranteed rights of its beneficiaries."[229] This interpretation appears particularly appropriate to the *U.S.–Argentina BIT*, which was concluded in the wake of what the U.S. Court of Appeals for the Second Circuit called Argentina's century-old "diplomacy of default"—a repeated reliance on proclamations by its government of "emergency" in order to get out of international commitments:

> We note that Argentina has made many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations, as well as through what we might term a diplomacy of default. Argentina's history of defaulting on, or requiring restructuring of, its sovereign obligations has produced a rich literature. After selling bonds on the London stock exchange in the early part of the 1820s, Argentina defaulted on its debt in 1827 (at roughly the same time that other Latin American nations defaulted on their foreign debt), and did not reach a settlement with creditors on the debt until 1857. Argentina again defaulted on its debts in 1890, causing a financial panic in England as Argentina's primary creditor, the London merchant bank Baring Brothers, experienced a liquidity crisis upon Argentina's default. In 1956, Argentina's threatened default led to the creation of the Club of Paris, an international organization established "for the purpose of settling controversies concerning debts that were guaranteed or owed by LDC [Less Developed Country] governments to creditor governments." In 1982, Argentina, along with other Latin American nations, experienced a financial crisis that led it to suspend interest payments on foreign debt and to engage in difficult negotiations with foreign and multilat-

227 *See e.g.*, Vandelvelde, *supra* note 215, at 32.
228 *See* Vandevelde, *supra* note 215, at 7–35.
229 Sempra Award, *supra* note 1, at Para. 373; Enron Award, *supra* note 1, at Para. 331. *See also* CMS Award, *supra* note 1, at Para. 354.

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> eral lenders. According to one commentator, as the Argentinian debt crisis developed between 1983 and 1985, "Argentina emerged as the single most resistant debtor in international finance." Then, in December 2001, Argentina announced that it would impose a moratorium on public sector debt payments-causing the largest default of a foreign state in history. [230]

Argentina concluded its 1991 BIT with the United States shortly after what was then considered the worst economic crisis in its history. That period included hyperinflation, defaults, and forced renegotiations with foreign investors. As the U.S. State Department pointed out when it submitted this treaty to the U.S. Senate, this particular BIT marked an important "milestone" in the U.S. BIT program not only because it marked the repudiation of the Calvo Doctrine by the country that had given birth to it but also because, prior to concluding its BIT with the United States, Argentina had "engaged in the most comprehensive privatization program in its history" and was "implementing other wide-ranging, market-oriented reforms" and the BIT would help secure such efforts.[231]

As evidence presented to the ICSID tribunals makes clear, the United States and Argentina entered into their BIT on the understanding that their compact would mark the end of Argentina's historic penchant for declaring national emergencies, with dire consequences for its adherence to its obligations to alien investors. The United States considered the Argentina BIT a significant step toward eliminating the need for U.S. officials to intercede on behalf of U.S. nationals in that country faced with adverse action taken in the wake of yet another proclamation of emergency. As the U.S. executive branch indicated to the U.S. Senate at the time of U.S. ratification, the *U.S.–Argentina BIT* would avoid the need for such diplomatic interventions since in the future such disputes would be resolved before ICSID.[232]

As numerous statements from high Argentine officials confirm, the intention that adherence to the U.S. BIT would mark a permanent end to the adverse treatment of investors resulting from Argentina's cyclical economic crises and former adherence to the Calvo Clause was shared.[233] As Carlos Menem's formal statement to his Parliament

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230 EM Ltd. et al., v. Republic of Argentina, 473 F.3d 463; 2007 U.S. App. LEXIS 382 (2nd Circ., 2007), *cert. denied*, 2007 U.S. LEXIS 10238 (U.S., October 1, 2007) at 466, n. 2 (citations omitted).

231 Hearing, September 10, 1993, *supra* note 217, at 8 (Statement by Deniel K. Tarullo, Assistant Sec. of State for Economic and Business Affairs).

232 Indeed, the Senate hearing on the Argentina treaty was replete with references to the "precedent" set by Argentina's repudiation of the Calvo Doctrine and embrace of an "absolute" right to international arbitration for investors, *see id.* at 8, 17, 21, 31–32.

233 *See*, *e.g*., Hearing of September 10, 1993, *supra* note 218, at 15 (statement by the President of the National Association of Manufacturers). Such views were also affirmed by Argentine officials. Thus, the Argentine Minister of the Economy Domingo F. Cavallo repeatedly affirmed, as in March and September 1992, that Argentine devaluations of its currency were now "impossible" thanks to changes in the law. *See, e.g*., *Cavallo evalúa su plan*, CLARÍN, March 29, 1992, at 1 and *Duras acusaciones disparó Cavallo contra los dirigentes empresarios*, CLARÍN, September 16, 1992, at 18. Another minister, Luis Maria Riccheri, was quoted in the press as indicating that by ratifying the U.S. BIT, along with investment treaties with other countries, Argentina was seeking to create an environment of "stability and confidence" and that by agreeing to investor-state dispute settlement, Argentina was signaling "a break with the Calvo

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introducing the *U.S.–Argentina BIT* affirmed, the "principal object" of the treaty was to promote genuine and productive investment by accepting certain norms for the treatment of investment that would remain "unalterable" while the treaty was in effect and that would establish a climate of "stability and confidence" to attract investments.[234] His statement, along with contemporaneous statements by other Argentine officials, suggested that by entering into the U.S. and other BITs, Argentina was seeking to reassure foreign investors that this time would be different and that the rule of law, including under Argentine laws under which investors were assured respect for their property and contracts notwithstanding claims of necessity or economic emergency, would now be guaranteed at the international level.[235] To this end, Argentine officials asserted, including in connection with their ratification of the U.S. BIT, that their intent in securing such agreements was to mitigate foreign investors' concerns over non-commercial "political risks."[236]

Neither the claimants nor Argentina in the *Argentine Gas Sector Cases* appear to have introduced any evidence contradicting the abundant public evidence in the record, including statements made by U.S. executive branch before the U.S. Congress, about the meaning of the U.S. BIT. Indeed, as is discussed below, even Argentina's argument in these cases that the treaty's Article XI was intended to be self-judging were based on evidence *stemming from U.S. BIT practice and U.S. negotiating history*.[237] It appears that all parties in these cases relied heavily on evidence from the United States. This is not surprising since the United States was the drafter of the model treaty on which that treaty was based. There was presumably no contrary evidence of a distinct Argentine

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Doctrine, which governed in the country for more than a hundred years and required recourse to Argentine courts." *No se esperan grandes anuncios económicos*, La Nación, November 12, 1991. For his part, then Argentine President Carlos Menem proclaimed that Argentina would "never" give up its current economic model and the "structural transformations" produced in its wake. *See, e.g.*, *Menem: el plan económico se mantendrá a rejatable*, La Nación, September 3, 1992, at 1.

234 *See* Mensaje 204, Carlos Menem to Cámara de Diputados de la Nación, April 30, 1992 (on file with Journal). Much later, in the context of suspending the periodic tariff increases according to the U.S. Producer Price Index, Argentine law itself recognized that "the privatization process and the resulting investments are protected in the applicable legal framework and, specially, in the Agreements for the Reciprocal Protection of Investments subscribed by the Argentine Republic." Decree 669/00, August 4, 2000.

235 *See, e.g.*, the statement by Argentine Chancellor Guido Di Tella on the occasion of the signature of the Argentina–Germany BIT in April 1991, in *Menem firma hoy en Bonn el régimen para inversiones*, Ámbito Financiero, April 9, 1991 ("these agreements are signals that investors watch closely"); statement by Minister Cavallo on the occasion of the signature of the Argentina–UK BIT in December 1990, in *Firma Cavallo acuerdo en Londres*, Ámbito Fianciero, December 11, 1990 ("being a bilateral agreement that can only be modified by the parties, it provides more legal certainty and, on the other hand, it establishes a straightforward system of dispute resolution").

236 *See, e.g.*, Informe by Carlos F. Ruckauf to Cámara de Diputados de la Nación, April 30, 1992 (on file with Journal).

237 *See, e.g.*, Enron Award, *supra* note 1, at Paras. 326 and 329.

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intent (which would presumably be easy for Argentina to acquire) simply because no contrary evidence of intention or object and purpose exists.

B. Article XI is not "self-judging" or subject to a "good faith" standard of review

Argentina argued that Article XI of the *U.S.–Argentina BIT* should be considered to be "self-judging"—that is, that the state parties should be deemed the sole judges of whether measures could be taken under that clause that would otherwise be derogations of the treaty. As is indicated by the *Enron* and *Sempra* decisions, which considered this claim at greatest length, the argument is based on legal arguments made by the United States before the International Court of Justice (ICJ) in 1984–1986, language contained in "measures not precluded" clauses in other U.S. investment agreements concluded after the *U.S.–Argentina BIT* (including Chapter Eleven of the NAFTA and later U.S. BITs), and statements made by the U.S. executive branch before the U.S. Congress with respect to such other agreements. It is not based on any evidence in the text or legislative history of the *U.S.–Argentina BIT* itself. There was no evidence that the negotiators of the *U.S.–Argentina BIT* considered its Article XI self-judging.

The self-judging interpretation is most elaborately argued by Burke-White and von Staden. According to these authors, the United States always assumed that Article XI was to be self-judging, made its position clear in 1986 when it argued to the International Court of Justice (ICJ) that a comparable "essential security" clause in the U.S.–Nicaragua FCN ought to be so read, and has, ever since the ICJ rejected its claim in 1986, become "increasingly explicit" in affirming this "special meaning."[238] To these authors, Article XI is, according to this evidence, "implicitly" self-judging.[239]

This argument, which was rejected in all the Argentina cases discussed here,[240] is untenable on the basis of the text, the history of the U.S. BIT program, or the object and purpose of the *U.S.–Argentina BIT*. It is true that as early as the jurisdictional stage of the *Nicaragua Case*, in 1984, U.S. litigators involved in that case attempted to get that case dismissed on jurisdictional grounds, or at least declared inadmissible, on the basis that the U.S.–Nicaragua FCN did not preclude measures "necessary to protect [state parties'] essential security interests."[241] But, as a veteran U.S. BIT negotiator has indicated in sworn testimony before Congress, this ill-considered contention was only made in the heat of litigation, was made by lawyers not involved in the U.S. BIT program, and was inconsistent with established U.S. government policy through that

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238 Burke-White and von Staden, *supra* note 36, at 381–2.

239 Burke-White and von Staden, *supra* note 36, at 381–6.

240 *See* text and accompany note, *supra* note 103.

241 *See Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1984 ICJ 392 (Decision on Jurisdiction and Admissibility of November 26), Para. 83.

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time.[242] The United States' position in the *Nicaragua Case* was inconsistent, for example, with the position of U.S. lawyers, who, even while the *Nicaragua Case* was being litigated, were relying on an FCN treaty with Iran, not unlike the one at issue in the *Nicaragua Case*, a few blocks away from the ICJ before the Iran–U.S. Claims Tribunal. In that forum, as in all other contexts involving other FCNs, there was no suggestion made by anyone, least of all the United States, that the U.S.–Iran FCN was subject to a self-judging essential security exception.[243]

The United States' position before the ICJ in the *Nicaragua Case* was, in any event, rejected by that Court at the merits stage of that case (in 1986).[244] The ICJ rejected the self-judging claim in the *Nicaragua Case* for the same reasons that the arbitrators did so in the Argentina cases: because neither clause says explicitly that it is self-judging. Five years prior to the conclusion of the *U.S.–Argentina BIT*, a majority of ICJ judges compared the FCN language in its "essential security" clause to a comparable provision in the GATT, and noted that only the latter, which permits a contracting party to take any action "which *it considers necessary* for the protection of its security interests" (emphasis added), can be considered self-judging, since it anticipates that each party can itself make this determination for itself. Article XI, like the FCN clause that inspired it, also lacks the "which it considers" phrase which the ICJ determined made that GATT clause arguably self-judging. Nor has this been the only instance in which the ICJ rejected contentions that a clause with wording comparable to that in Article XI is "not purely a question for the subjective judgment of the party."[245]

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242 *See, e.g.*, Kenneth Vandevelde, *Of Politics and Markets: The Shifting Ideology of the BITs*, 11 INT'L TAX & BUS. LAWYER 159, 172 (1993) [hereinafter Vandevelde, *Of Politics and Markets*]. As he indicates, prior to the Nicaragua Case, the United States had never taken the position that the essential security clause in its FCN treaties was self-judging.

243 There are many reasons for this. Interpreting a treaty or a clause within it as "self-judging" threatens the fundamental rule that international legal obligations, as a matter of international law, prevail over states' national law. *See* Vienna Convention, *supra* note 35, Article 27. Attributing such an unusual special meaning to a treaty also threatens the fundamental principle of *nemo judex in sua causa*. The principle that treaty obligations ought not to be interpreted such as to permit their parties to be judges in their own cause has been repeatedly affirmed by both the PCIJ and the ICJ. *See, e.g.*, Advisory Op. 12 concerning *Interpretation of the Treaty of Lausanne*, PCIJ Rep. Ser. B., No. 12 (1925); Advisory Opinion, *South-West Africa Voting Procedure*, ICJ Rep. 1955, at 68. Indeed, several ICJ judges have suggested that even treaty clauses that are explicitly self-judging in terms of their text are legally ineffective. *See, e.g.*, Judge Spender and Judge Lauterpacht, in *Interhandel (Preliminary Objections)*, ICJ Rep. 1959, at 54–9 and 95–119. In addition, in the context of investor-state dispute settlement, interpreting an investment agreement or a clause within it as self-judging appears to threaten how Article 42(1) of the ICSID Convention has been traditionally interpreted, namely as "according supremacy to international law in the event of any inconsistency with the host State's domestic law." *See* Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica, Award of February 17, 2000, I5 ICSID Rev.—FILJ 169, 191 (2000).

244 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States), 1986 ICJ 14 (Judgment on the Merits of June 27), at 222 and 282 [hereinafter Nicaragua Case].

245 *See also Case Concerning Oil Platforms* (Islamic Republic of Iran v. United States), Judgment on the Merits, November 6, 2003, 42 I.L.M. 1334, Para. 43 [hereinafter *Oil Platforms Case*];

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The subsequent history of U.S. BIT practice that Burke-White and von Staden rely upon, far from supporting the self-judging interpretation of Article XI, undermines it. As might be expected, the 1986 *Nicaragua Case* did not avoid the notice of State Department lawyers or of members of Congress. During subsequent hearings on the first set of U.S. BITs submitted for Senate consideration, in August 1986, the State Department indicated that in light of that decision the United States was "considering whether any future procedural action is necessary" to preserve U.S. rights to protect its essential security.[246] Senator Christopher Dodd, in the course of those hearings, asked whether the ten year termination clause in U.S. BITs needed to be modified to allow parties to terminate the treaties "because of over-riding foreign policy considerations or national security reasons."[247] U.S. officials knew, however, that a self-judging "measures not precluded" clause could eviscerate the investor protections of U.S. BIT, along with its arbitral enforcement guarantee, and in the end, the United States opted to do nothing to alter the text of its "measures not precluded" clause in the 1987 Model BIT then under development.[248] All that emerged from that hearing (and the *Nicaragua Case*) was a Senate "understanding" (which may not have even been conveyed to the respective BIT parties), attached to the first eight U.S. BITs then pending before Congress indicating that "either party may take all measures necessary to deal with any unusual and extraordinary threat to its national security."[249] That understanding, ineffectual as it was, was not attached to subsequent U.S. BITs and does not appear in the *U.S.–Argentina BIT*. These facts suggest, as Vandevelde indicates, that, at least through the time the *U.S.–Argentina BIT* was concluded, the United States had abandoned its ill-considered contention, only made in the "highly charged atmosphere of the *Nicaragua Case*," that the "measures not precluded" clauses in FCN treaties were self-judging.[250] The facts indicate that even when alerted by the ICJ that such clauses would entail the same kind of review as any other clause in the FCN, the United

Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia), 7 ICJ Rep. (1997) at Para. 51 [hereinafter *Gabcikovo-Nagymaros Dam Case*] (finding that a state is not the sole judge of the strictly defined conditions permitting invocation of a state of necessity under international law); *Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 2004 ICJ Rep. 131 at Para. 140 (noting that the state is "not the sole judge" of whether the Article 25 conditions of necessity have been met).

246 José E. Alvarez, *Political Protectionism and United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 Va. J. Int'l L. 1, 38 (1989) [hereinafter Alvarez, *Exon-Florio*].

247 *Id*.

248 As Kenneth Vandevelde would later indicate to the U.S. Senate, a self-judging essential security clause in a BIT: "potentially eviscerates the entire agreement. A treaty which permits a party to take any measure necessary to its essential security interests and which permits that party to be the sole judge of what is necessary to such interests arguably imposes merely illusory obligations on the party." Hearing of August 4, 1992, *supra* note 217, at 73.

249 S. Exec. Rep., No. 32, 100th Cong., 2d Sess. (1988) (Senate Foreign Relations Committee), at 9–11; *see also* Alvarez, *Exon-Florio*, *supra* note 246, at 39.

250 Vandevelde, *Of Politics and Markets*, *supra* note 242, at 172.

States did not, at least through 1991, change the text of the substantially similar clause in its BIT.

Nothing in the plain meaning of the *U.S.–Argentina BIT*, its context or its object and purpose supports the proposition that Article XI is self-judging. The text of Article XI does not differ in any way from the rest of that treaty. That provision is cast in the same objective manner as is the rest of the treaty. There is nothing in Article XI that states or implies that the matters that it addresses will not be, like everything else in the treaty, fully arbitrable as is anticipated by the BIT's investor-state dispute settlement clause and by the general principle that once parties agree to settle their treaty disputes through arbitration, the arbitrators have general *compétence de la compétence* to decide all matters submitted to their jurisdiction.[251] Like every other provision in the BIT, Article XI presumes that its application and meaning will be subject to neutral third-party scrutiny and is not subject to each party's own subjective evaluation.

The need for special language to remove issues from arbitration or to subject them to some special deferential standard not otherwise applicable to the rest of the treaty follows, of course, from article 31(4) of the Vienna Convention on the Law of Treaties which provides that a "special meaning" shall be given to a treaty provision only "if it is established that the parties so intended." The need for such special evidence also follows from the rest of the *U.S.–Argentina BIT* as well as from its object and purpose.[252] A self-judging "measures not precluded" clause would derogate from the stability of the investment legal environment, would make enforcement of any of its clauses derisible, would be inconsistent with the fundamental purposes of U.S. BITs of that period, and would undermine the goals of the U.S. BIT program as described above. As discussed in Part III(A), a particularly salient purpose of the *U.S.–Argentina BIT* was to end the Argentine government's long-standing attempts to be a judge in its own cause when it came to investment disputes occasioned by emergency legislation. That treaty was designed to enable any such prospective disputes to be heard by an impartial review panel that would apply the treaty's own guarantees, as well as those under international law standards and those assured to the investor by the host state. As both state parties to it recognized, the *U.S.–Argentina BIT* constituted a repudiation of the Calvo Clause, including Calvo's notion that foreign investors remains subject to the changing vicissitudes of national law as judged by national courts. Of course, an interpretation that Article XI was (silently) self-judging would make the *U.S.–Argentina BIT* a less useful instrument of investor protection than the traditional customary international law rules governing state responsibility for alien property which recognize no such open-ended discretion for states.

The negotiating history of the *U.S.–Argentina BIT* also refutes the self-judging interpretation. The State Department's letter of submission to the Senate for this treaty uses the standard descriptive language for that treaty as the United States had used with respect

251 For discussion of how international dispute settlers use their *compétence de la compétence* to develop the law, *see* Alvarez, *supra* note 10, at 499–502.

252 For comparable arguments made in connection with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, see Susan Rose-Ackerman and Benjamin Billa, *Treaties and National Security*, 40 N.Y. Univ. J. Int'l L & Pol. 437, at 438–42 and 465 (2008).

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to its 1987 Model text and its earlier BITs. That letter argues that the agreement is "fully consistent with U.S. policy toward international investment."[253] To the extent that BIT varies from the standards that U.S. BITs seek to accomplish, this was carefully noted by that letter and the relevant Senate hearings.[254] Nothing in that letter or in those hearings identified any departure from U.S. policy to make the investment protections contained in the *U.S.–Argentina BIT* fully subject to arbitral review. Indeed, the negotiating history of that treaty suggests the opposite, namely that ratification of this particular U.S. BIT was worth commemorating as a special breakthrough in the U.S. BIT program since it represented an "absolute" commitment to arbitration from the Latin American country that had previously most resisted it.[255] Such a statement would not be a credible description of a treaty that was in fact subject to a sub silentio understanding between the parties that either government could, merely by invoking Article XI, eviscerate that treaty's investor protections by stripping arbitrators of jurisdiction to consider investor claims.

None of the evidence cited in the course of the *Argentine Gas Sector Cases* on this issue involves the *U.S.–Argentina BIT*, its history, or the circumstances of its negotiation or conclusion. There was no contrary evidence from the Argentine side that contradicts in any respect the public statements made by the United States (including to its Senate) about the treaty or the U.S. BIT program in general.

Burke-White and von Staden cite evidence that, in connection with *other* investment agreements concluded after the *U.S.–Argentina BIT*, the United States has stated that some aspects of its "measures not precluded" clause should be seen as self-judging. The (unratified) U.S.–Russia BIT of 1992,[256] for example, includes a protocol that explicitly provides that "the Parties confirm their mutual understanding that whether a measure is undertaken by a Party to protect its essential security interests is self-judging."[257] And the most recent U.S. model BIT text of 2004 has the following "measures not precluded" clause in lieu of what was Article XI of the *U.S.–Argentina BIT*:

> Nothing in this Treaty shall be construed: (1) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or (2) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[258]

Additional evidence cited in support of the self-judging interpretation includes the State Department's clause-by-clause explanation of the meaning of other U.S. BITs

253 *Letter of Submittal*, *supra* note 222.

254 For example, the Letter of Submittal explains that an extra provision was added to address cases of conflict between the *U.S.–Argentina BIT* and the FCN between the two countries dating from 1854. *Id*.

255 *Id*.

256 *Treaty Between the United States of America and the Russian Federation Concerning the Encouragement and Reciprocal Protection of Investment*, signed June 17, 1992, unratified by the Russian Federation.

257 *Id.* at Protocol, 8.

258 *U.S. Model BIT of 2004*, *at* http://www.state.gov/documents/organization/38710.pdf.

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sent to the Senate in August 1992, after conclusion of the *U.S.–Argentina BIT*. At that time the State Department described its "measures not precluded" clause as follows:

> A Party's essential security interests include actions taken in times of war or national emergency, as well as other actions bearing a close and direct relationship to the essential security interests of the Party concerned. Whether these exceptions apply in a given situation is within each Party's discretion. We are careful to note, in each negotiation, the self-judging nature of the protection of a Party's essential security interests.[259]

The short answer to all of this is that although nothing prevents the United States or any country from changing its BIT policies or from changing the text of any particular treaty, each treaty must be interpreted based on its own text and negotiating history and there is no evidence of any such understanding in connection with the *U.S.–Argentina BIT* and no evidence that the United States ever suggested in the course of the Argentine negotiations that Article XI was self-judging.[260] The absence of such evidence is striking since Argentina presumably had access to the government negotiators who negotiated its treaty as well as any relevant documents that would contradict the abundant public record in the United States. There was also evidence presented in each of these tribunals that, contrary to the suggestion made by the State Department's clause by clause analysis in 1992 that such understandings were regularly conveyed to prospective BIT partners, *no* such clarifications were actually made to prospective U.S. BIT partners at least through 1987 (when the U.S.–Argentine negotiations were presumably on the brink of commencing).[261] It was also clear from other evidence presented that the United States was no stranger to attempts, prior to conclusion of the *U.S.–Argentina BIT*, to make some of its other treaties (or clauses within them) self-judging but had done so through explicit language, given the potentially eviscerating effects on dispute settlement.[262]

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259 Description of U.S. Model BIT, August 4, 1992 Hearings, *supra* note 217, at 65.

260 Indeed, it does not appear that even Argentina consistently argued that the United States had always intended to make the measures-not-precluded clause in either its FCNs or its BITs self-judging. As the arbitral decisions indicate, Argentina appeared to make inconsistent arguments on this key question, at times suggesting that the United States always held this view, changed its mind about the meaning of this clause sometime before conclusion of the *U.S.–Argentina BIT*, or purposely engaged in a policy of "strategic ambiguity" on this key question. *See, e.g.*, LG&E Decision on Liability, *supra* note 1, at 209 (discussing Argentina's claim the United States purposely engaged in a policy of "strategic ambiguity" with respect to whether Article XI was self judging).

261 That sworn testimony was presented by one of the authors of the present article based on his experience as a U.S. BIT negotiator through the end of 1987. *See also* Vandevelde, *Of Politics and Markets*, *supra* note 242, at 173 (indicating the absence of any public record of any U.S. BIT partners being so informed at least prior to the negotiation of the U.S. BIT with Russia in 1992).

262 *See*, for example, the United States submission to the ICJ's optional clause in 1946, which included a clause precluding that Court's jurisdiction regarding "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States of America." *Declaration of United States*, August 14, 1946, 26 VIII 46 (Emphasis added). Also, when the United States adhered to the *Convention Against Torture and*

The evidence presented in the *Argentine Gas Sector Cases*, far from leading to the conclusion that Article XI is self-judging, actually suggests that the United States knows how to draft a self-judging exception when it wants to do so, that the United States government had not yet decided to undermine its investors' protections in this fashion at the time when the *U.S.–Argentina BIT* was concluded, and that, consistent with the plain meaning, context, and object and purpose of that particular treaty such an extraordinary interpretation could not be assumed. That evidence also suggests the merits of the standard rule of treaty interpretation under which parties must establish such special meanings, "conclusively" and by "decisive proof."[263] (Of course, to the extent that what was demonstrated in these cases was that the United States, since concluding the BIT with Argentina, has changed its mind about the meaning (or arbitrability) of the some of the measures non precluded, it would be highly inappropriate to apply this change retroactively to the *U.S.–Argentina BIT*.[264])

The evidence of subsequent efforts by the United States to make some of its later investment treaties' "measures not precluded" clauses *partly* "self-judging," *undercuts* Argentina's contention in these cases for a different reason. None of the evidence cited in the course of subsequent U.S. BITs treated a clause like that in Article XI as *in its entirety* self-judging. Even after conclusion of the *U.S.–Argentina BIT*, the United States has *never* suggested that measures necessary to "maintain public order" could ever be self-judging. Thus, even when the United States has chosen, by explicit language, to provide for self-judgment of some measures under a BIT, it has simultaneously narrowed the scope of its "measures not precluded" clause to lessen the potential impact on the underlying investment rights.[265] All the evidence presented indicates that when the United States sought to make measures non-precluded clauses in its other investment agreements self-judging, it only did so with respect to that portion of Article XI dealing with the parties' "essential security interests" and not with respect to the other types of measures covered by that provision.

Other Cruel, Inhuman or Degrading Treatment or Punishment in 1990, the Senate attached to that treaty a proviso requiring the United States to notify all present and prospective parties to that Convention that the treaty would not require action prohibited by the United States Constitution "as interpreted by the United States." *U.S. Reservations, Understandings, and Declaration, Convention Against Torture*, 136 Cong. Rec. S17486-01 (daily ed. October 27, 1990). *See also* Rose-Ackerman and Billa, *supra* note 252, at 460–89 (surveying different "national security" exceptions in various treaties).

263 *See* Sir Humphrey Waldock, Third Report on the Law of Treaties, Yearbook, ILC, 1965, Vol. II, at 57.

264 *See* Enron Award, *supra* note 1, para. 326; Sempra Award, *supra* note 1, para. 368. This would fail to respect the *res inter alios acta* character of treaties and would be inconsistent with the rules of treaty interpretation in the Vienna Convention on the Law of Treaties. This would also appear to be especially inappropriate with respect to a treaty such as the *U.S.–Argentina BIT* which affirms its intention to protect the settled expectations of those who invest pursuant to the guarantees provided in the original treaty. *See* Articles II(2)(1); XIV (3), *U.S.–Argentina BIT*. Of course, the parties could seek to amend their treaty to provide for self-judgment but, subject to termination of the original BIT in accordance with its terms, presumably such amendments would need to respect the rights of existing investors.

265 *See* U.S. Model BIT of 2004, *supra* note 258 (dropping reference to "public order").

Burke-White's and von Staden's contention that the United States had *always* assumed that such clauses should be treated as self-judging in its BITs stands the history of U.S. efforts to protect its investors abroad via customary and treaty law on its head.[266] Their ahistorical contention would mean that the United States intended that all of its prior FCNs with comparable essential security clauses would also have had an implicit self-judging carve-out even though, as discussed, the United States had insisted, at least since the time of claims by Mexico early in the twentieth century, that international law contained no such carve-out, whether in terms of the substantive guarantees owed to foreign investors or with respect to international arbitration. It would mean that foreign investment scholars, former U.S. BIT negotiators who have provided accounts of the development of the U.S. BIT program, and the U.S. executive branch officials who described the *U.S.–Argentina BIT* to the U.S. Senate,[267] all have been wrong in describing those treaties' impact on *strengthening* the protections accorded alien investors.

For these reasons, the contention that the United States made in the Nicaragua and Iran *Oil Platforms Case*s proved, rightly, implausible to all the ICSID arbitrators in the Argentina cases.

All the arbitrators, with the possible exception of those in LG&E,[268] also rightly rejected a second contention, namely that even if Article XI does not serve to render a dispute non-justiciable or inadmissible, its "implicit" self-judging nature permits arbitrators only to examine whether the state party invoking that clause has done so in "good faith."[269] Burke-White and von Staden advocate this deferential standard of

266 The interpretation that Article XI is self-judging implies that, even though the United States used its BITs to affirm the most investor-protective aspects of customary law, on this issue the United States was silently derogating from the customary defense of necessity which, as indicated by the cases cited at note 245, is not subject to such self-judgment. We refute the contention that Article XI is *lex specialis* in Part III(C)(1).

267 For example, Assistant Secretary Tarullo indicated in the course of Senate hearings on the *U.S.–Argentina BIT* that "U.S. BITs are the most rigorous in the world." September 10, 1993 Hearing, *supra* note 217, at 7.

268 LG&E Decision on Liability, *supra* note 1, at Para. 214 (suggesting that even if Article XI were self-judging it would still be subject to "good faith" review).

269 Burke-White and von Staden are driven to this interpretation of what "self-judging" means because of the difficulties with the original U.S. position in the Nicaragua Case. As they acknowledge, self-judgment as meaning lack of jurisdiction or non-admissibility appears to resemble the U.S. "political question" doctrine, a judicially created rule of deference that has never been treated as an accepted general principle of international law or rule of international procedure applicable within international tribunals. Burke-White and von Staden, *supra* note 38, a 376–7. The United States has not had much success when it has tried to invoke such a doctrine before international courts, including in the *Nicaragua Case* itself. *Id.* at 378. More fundamentally self-judgment as non-justificiability appears incompatible with *pacta sunt servanda* altogether. The notion of absolute self-judgment on this (or perhaps any other question of treaty interpretation) is also at odds with such generally accepted principles as arbitrators' *compétence de la compétence* or canons of interpretation that warn against enabling parties to be judges in their own cause. It is also, as is further discussed below, radically at odds with the object and purpose of U.S. BITs, and in particular the *U.S.–Argentina BIT*. The problem though is that to the extent Burke-White's and von Staden's argument about the meaning of Article XI

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review based on (dissenting) Judge Schwebel's view in the *Nicaragua Case*, where he suggested that even a self-judging treaty or clause is subject, consistent with the rules applicable to all treaty obligations, to examination that it is being applied in good faith.

Burke-White and von Staden acknowledge that a "workable standard of good faith review has yet to be fully developed,"[270] and that the paucity of cases on point means that "arbitral tribunals will have to develop their own approaches to whether the good faith requirement has been met."[271] At the same time, Argentina's claims before these tribunals at times suggested that "good faith" review means minimal arbitral scrutiny over the state's decision or the jurisdictional equivalent of satisfying the "straight face" test. The intended standard appears to be a substantively more deferential one than is contained in Article 31 of the Vienna Convention on the Law of Treaties—which anticipates the application of good faith only in the course of determining the plain objective meaning of the text and context of a treaty. Accordingly, Argentina argued that the arbitrators in these cases could only examine whether Argentine government officials *could have* concluded that they faced the kinds of threats anticipated by Article XI but not whether any such threats actually existed or whether the measures taken actually responded to the underlying threats.[272] Burke-White and von Staden sometimes imply that they mean a comparably deferential standard, as when they contend that the good faith test "avoids a tribunal's second-guessing of government policy choices for which ad hoc tribunals may be poorly positioned."[273] At other times, they suggest that good faith review is analogous to "rational basis" scrutiny applied by U.S. courts applying U.S. constitutional law.[274]

To the extent "good faith" review is conducted only with respect to clauses that are meant to be self-judging, the conclusion reached above—that Article XI is not intended to be self judging—necessarily involves rejecting this standard. This was implicit in the conclusions reached by the CMS, Enron, and Sempra tribunals. Those tribunals appear to have rightly determined that just as the traditional rules of treaty interpretation require special evidence to have a treaty clause be interpreted as self-judging, those rules also insist on special evidence to render a treaty clause subject only to some substantively deferential "good faith" review.

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turns on the *United States' intentions* and is grounded in what it did in 1986 and since, it is inconsistent with that argument to propose that Article XI requires "good faith" review. The United States did not make that argument in the *Nicaragua Case*; it argued that only it could judge what was in its essential security interests not ICJ judges. To this day, it is not clear that when the U.S. explicitly makes these or other treaty clauses "self judging," it intends this to accord international adjudicators the discretion nonetheless to examine whether the United States is invoking this in good faith.

270 Burke-White and von Staden, *supra* note 36, at 378.

271 *Id.* at 378–9

272 Burke-White and von Staden suggest, for example, that it would not be in good faith for a state to claim a security threat from a "possible alien landing." *Id*. at 380.

273 *Id.* at 381.

274 *Id.* at 380 ("good faith review involves a determination of whether there was a rational basis for the state's invocation of the [measures not precluded] clause"). *See also id.* at 381 (suggesting that arbitrators can still review the "honesty" and "reasonableness" of governmental action).

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The arbitral tribunals did not see the need to discuss the question of whether even if good faith review is not warranted by the text of the *U.S.–Argentina BIT*, this deferential review should otherwise be applied because it is normatively desirable. Although we also have no need to resolve this question, it is not at all clear that, as Burke-White and von Staden claim, it would be desirable for investment arbitrators to apply such a basis of review without explicit textual warrant (and hopefully a clearer statement of the kind of deferential standard intended). We question whether any special deferential standard of review with respect to the application of Article XI actually corresponds to the expectations of either those governments who enter into investment protection agreements or of those who invest in reliance on such treaty guarantees. Given the uncertainties about what precisely is meant by a standard of only "good faith" review, arbitrators who opt for it without explicit textual warrant are in uncharted waters and might be accused, as by a subsequent ICSID annulment body, of exceeding their legal mandate. Moreover, to the extent this standard of review examines only the "bona fides" of government officials, such review might be deemed *more* offensive than one that considers the good faith of sovereigns only as one factor (along with other indicia) to give effect to what the treaty parties sought to achieve (as does Article 31 of the Vienna Convention).

Finally, Burke-White and von Staden's argument that good faith review is more respectful of national institutions closer to the ground presumes that BITs, such as the *U.S.–Argentina BIT*, sought to avoid supranational scrutiny of national institutions. As discussed, the history of the U.S. BIT program is very much about enabling denationalized dispute settlement when investors demand it. As noted, that treaty explicitly enables investors to forego national courts (or even previously agreed dispute settlement clauses) in favor of international arbitration because national courts have not always been unbiased in their treatment of foreign investor claims. U.S. BITs circa 1991 do not subject this remedy to anything comparable to the International Criminal Court's principle of complementarity or even the European Court of Human Rights' requirement of exhaustion of local remedies. Indeed, as noted, the *U.S.–Argentina BIT* goes one step further: it permits investors, at their option, to abrogate prior commitments to go to local courts. Second-guessing national institutions when investors think this is necessary to protect their rights is very much what such treaties are about. It would certainly be odd for international investment adjudication to shy from such "second-guessing," especially when the ICJ has done exactly this in every case in which necessity has been raised before it.[275]

The next part refutes the contention that deferential standards of review are otherwise justified because this is what "necessary for" in Article XI requires.

275 *See* text and accompanying note, *supra* note 245. It is not even clear that the ostensibly "self-judging" essential security exception in the GATT's Article XXI is subject to the highly deferential "good faith" review that Burke-White and von Staden appear to advocate. *See* Rose-Ackerman and Bella, *supra* note 252, at 462–8 (reviewing GATT cases).

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C. What is "necessary"?

As discussed in Part II(C)(2), the arbitrators in the CMS, Enron, and Sempra cases turned to customary international law, and specifically its defense of necessity codified by Article 25 of the *ILC Articles*, to interpret what "necessary for" means in Article XI of the *U.S.–Argentina BIT*. They therefore required Argentina to show that its measures were the "only means" available *and* that it did not "substantially contribute" to the crisis that precipitated its measures. The arbitrators in LG&E hedge on this question but the ICSID Annulment Committee in CMS, albeit *in dicta*, contends that this was incorrect. The debate is essentially over whether Article XI means to displace relevant customary international law or, in more formal terms, is meant to be *lex specialis*.

Burke-White and von Staden refer to the approach of the arbitrators in the CMS, Enron, and Sempra cases as the most restrictive interpretation of "necessary for." Like all the arbitrators who addressed these cases, they acknowledge that the restrictive interpretation applied in those cases would have been proper if the customary law of necessity applied. [276] But Burke-White and von Staden argue, as did Argentina, that customary law has been displaced by the *lex specialis* of Article XI. They argue that a more proper inquiry would have been whether Argentina's measures were the "least restrictive alternative" (as is suggested by U.S. constitutional law or GATT practice) or whether Argentina's measures were within its "margin of appreciation" (as would have been asked by the European Court of Human Rights).

As Burke-White and von Staden also appear to acknowledge, the terms of Article XI—notably, "necessary for," "essential security," and "public order"—do not define themselves and have to be drawn from the application of the traditional rules of treaty interpretation, including the wider context of the treaty and its object and purpose.[277] In this section we conclude that the efforts by the CMS, Enron, and Sempra tribunals to read Article XI as consistent with the customary defense of necessity adhere to the text, object and purpose, and context of the *U.S.–Argentina BIT* and are consistent with the history of the U.S. BIT program.

1. Article XI is not lex specialis, and therefore Article 25 should apply The contention that Articles XI of the *U.S.–Argentina BIT* and Article 25 of the ILC's Articles of State Responsibility mean different things or that the first necessarily displaces the second is premised on the difference in wording between those two provisions. It is true, as suggested by the CMS Annulment Committee, that Article 25, unlike Article XI, refers to situations of "grave and imminent peril," "essential interests" of states (and not "essential security interests"), the essential interests of not only states but of the "international community as a whole," and most significantly includes preconditions

276 Burke-White and von Staden also appear to acknowledge that a state like Argentina would find it exceedingly difficult to surmount the high standards of the traditional necessity defense (or the equally insurmountable standards of *force majeure* or distress). Burke-White and von Staden, *supra* note 36, at 320–4.

277 As the Enron tribunal put it, the meaning of terms like "essential security" "must be searched for elsewhere." Enron, *supra* note 1, Para. 333. *See also* Sempra, *supra* note 1, at Para. 375.

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to asserting the defense of necessity not evident in the text of Article XI. The crucial question is what are we to make of these differences. Our argument here is that interpreting Article XI as *lex specialis* is anachronistic insofar as it fails to consider carefully the history of both the ILC's efforts and the concerns of those who put this particular version of the measures not precluded clause into U.S. BITs.

At the outset, we reject the contention, suggested by some, that the U.S. BIT (or the *U.S.–Argentina BIT* in particular) generally constitutes a *lex specialis* regime, at least if the intent is to suggest that such treaties are self-contained and do not relate to the rest of public international law.[278] As discussed in our Part III(A), U.S. BITs, like the earlier FCNs, were drafted against the backdrop of customary international law, including especially the rules of state responsibility to aliens, and intentionally sought to incorporate and reaffirm that law. Nor is it the case that general international law, including general principles of law, has come to be relied upon in the interpretation of investment agreements only when their texts specially incorporate such law by their express terms (as occurs with respect to Articles II(2)(a) or X of the *U.S.–Argentina BIT*).[279] As is made clear by our Part III(A), the *U.S.–Argentina BIT*, like the United States' earlier FCNs, was intended to be read, as both article 31(3)(c) of the Vienna Convention on the Law of Treaties and article 42(1) of the ICSID Convention affirm, in light of relevant rules of international law.

That the wording of Article XI of the *U.S.–Argentina BIT* is not identical to that of Article 25 of the ILC does not of itself indicate an intent to oust the applicability of the underlying customary excuses of necessity, distress, or force majeure. It is important to keep in mind that, as discussed in Part III(A) above, the text of Article XI, although contained in a 1991 treaty, originated in clauses drafted as far back as FCNs of the post World War II period, long before the ILC even set out to codify its rules on state responsibility. Arguments that rely on differences of wording between the completed version of Article 25 circa 2001 and Article XI circa 1991 to conclude that the latter sought to displace relevant customary law ignore the uncodified state of customary international law with respect to the relevant customary defenses at the time the original NPM clause, identical to that in the *U.S.–Argentina BIT*, was initially inserted into the U.S. BIT in the early 1980s.[280] At that time, the text that became Article 25 was still unfinished, remained in draft, and was lacking in completed commentaries.

278 *Compare ADC and ADC and ADMC v. Hungary*, ICSID/ARB/03/16, Award, October 2, 2006, para. 481 ("there is general authority for the view that a BIT can be considered as *lex specialis*") to T. Gazzini, *The Role of Customary International Law in the Protection of Foreign Investment*, 8 Jour. World Investment & Trade 691 (2007) (arguing that investment treaties and customary international law continuously and intensely interact).

279 *See, e.g.*, *AAPL v. Sri Lanka*, (1990), 106 ILR, at 440, Para. 41 (BITs have to be applied within the framework of "the various general rules and principles of international law not specifically referred to in the Treaty itself). *See also* Campbell McLachlan QC, *Investment Treaties and General International Law*, 57 ICLQ 361, at 381 (2008) (discussing the interpretation by the Swiss Foreign Office that even BITS which do not have an express reference to the international minimal standard of treatment of aliens are intended to incorporate that standard).

280 Cf. CMS Annulment Award, *supra* note 3, Paras. 129–30; McLachlan, *supra* note 279, at 390. Of course, the mere failure to mention customary international law in Article XI is not

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In the early 1980s, when the U.S. BIT program began, the ILC was just releasing its set of draft articles on state responsibility, including a preliminary version of Article 25 (which underwent modification as late as 1999 and 2001). The United States, like most states, could not assume that the ILC efforts to codify the rules governing state responsibility would be completed any time soon or that the ILC's precise black letter articulation of Article 25 would find acceptance. Indeed, at that time, and even much later when the ILC released its Draft Articles, no one knew whether these rules would be submitted to an international conference of states charged with hammering out a multilateral treaty on the subject—as had been the case for most of the ILC's prior codification efforts, including with respect to the law of treaties. As late as 1991 arbitral tribunals had expressed doubts about the reach of the "controversial" doctrine of necessity and the adequacy of the concrete proposals then pending before the ILC to codify it.[281] Article XI appears to be the United States' attempt to include a general cross-reference to customary international law defenses, particularly necessity, which had been by the 1980s articulated in a number of cases but not yet codified.[282] Indeed, there was evidence presented to the tribunals in the *Argentine Gas Sector Cases* that U.S. BIT negotiators routinely told prospective BIT partners familiar with European BIPOs that contained no NPM clause that the United States included such a clause out of an excess of caution in order to affirm customary rights that it was confident all states, including Europeans, intended to protect and which it assumed were also safeguarded under relevant national laws.[283]

Prior to and even during the ILC's lengthy codification efforts, states, academics, and arbitral tribunals routinely intermingled the customary defense of necessity, originated by Grotius, with other doctrines intended to affirm the principle of the self-preservation of states, such as self-defense and *force majeure*, or distress, which permits state action to save lives.[284] Although today the distinctions among the customary defenses are precisely defined in the ILC's Articles 23 (*force majeure*), 24 (distress),

probative of an intent to derogate from that law. There is a plethora of investment arbitral decisions rendered to date where regular recourse is made to the backdrop rules of general international law, including custom and general principles, as intended by articles 31(3)(c) of the Vienna Convention on the Law of Treaties and Article 42(1) of the ICSID Convention.

281 *See, e.g.*, Andrea J. Bjorklund, *Emergency Exceptions: State of Necessity and Force Majeure*, *in* Oxford Handbook of International Investment Law, at 15, n. 92 (Peter Muchlinski et al., eds. 2008)(citing arbitral decisions in *Lafico and Burundi* and in the *Rainbow Warrior*).

282 Indeed, as acknowledged by the CMS Annulment Committee, both CMS and Argentina conflated Article XI and the customary international law defense of necessity. CMS Annulment Committee, Award, Para. 123. Interestingly, that Committee does not consider the evidence that may have led both sides to agree on this critical point.

283 Sworn testimony by José E. Alvarez. *See also* Vandevelde, *supra* note 215, at 222–7 (stating that the United States' measure's non precluded clauses were intended to safeguard the United States' abilities to protect public health and safety as well as take measures in pursuit of its essential security interests, whether in war or in peace, as under the International Economic Powers Act (IEEPA)).

284 Bjorklund, *supra* note 281, *passim*. *See also* Roberto Aguirre Luzi, *BITs & Economic Crises: Do States have carte blanche?, in* Investment Treaty Arbitration, at 166–9 (T.J. Grierson Weiler ed. forthcoming 2008).

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and 25 (necessity), this was not always the case. As Andrea Bjorklund indicates, *force majeure* was included along with necessity in the earliest ILC drafts and even as late as 1979, *force majeure* and fortuitous event were often used interchangeably and were sometimes confused with the doctrine of necessity.[285]

What has been clear, at least since 1958, when Professor Garcia Amador presented his third report on State Responsibility to the ILC, was that necessity was potentially the broadest of the traditional defenses, as it permitted volitional action by a state (unlike *force majeure*) that extended beyond the saving of lives (unlike distress) and precluded the wrongfulness of action even though it was not in reaction to another state's initial wrongful act (unlike self defense).[286] It was also clear, at least by that time, that necessity was a broader concept than self-preservation and protected a broader set of a state's "essential interests." How broad those interests were, however, were not clear. As that report indicates, the potential breath of the "essential interests" that might be implicated by that defense necessitated its other requisites: namely that necessity must respond to a "grave and imminent peril" that threatens a vital state interest, that the state must not be able to counteract the peril by other means, and that the state must not have contributed to the peril.[287] At the time the United States was developing its first model BIT, state comments to the ILC were still dealing with the potentially expansive interpretation of what constituted a state's "essential interest" for purposes of codifying the defense.[288] Roberto Ago's Eighth Report to the ILC, completed on the brink of the United States initiation of its BIT program in 1980, suggested some concern with the potentially overbroad nature of the "essential State interest" implicated by necessity and to this end that report indicated that this must be a vital interest such as political or economic survival.[289] At the same time, the 1980 version of what would ultimately become the ILC's definitive statement of the defense of necessity indicated that a state invoking this exception needed to show that its act "is the only way for the State to safeguard an essential interest *of the state* against a grave and imminent peril" (emphasis added).[290] The italicized qualifying words in what was then Article 33(1)(a) led to some ambiguities: would necessity not be available to deal with grave and imminent threats to a state's nationals (and not merely the state itself)?[291]

285 Bjorklund, *supra* note 281, at 12.

286 Bjorklund, *supra* note 27, at 7–8 (citing Amador's Third Report).

287 *Id.* at 8. Indeed, this respects Grotius' original caution about the exceptional nature of this plea and the potential for its abuse, as Grotius himself indicated that necessity must be restricted to instances involving an interest that was "essential" or "even vital" to a state. *Id.* at 5.

288 *See, e.g.*, *id.* at 9 (noting state comments from 1982 to 1998).

289 *Id.* at 16.

290 *Report of the International Law Commission on the Work of its thirty-second Session*, UN GAOR Supp. No. 10, reprinted in 2 Y.B. Int'l L. Comm'n 34, UN Doc. A/CN.4/SER.A/1980/ Add. 1 (Part 2), Article 33 (1)(a).

291 The 1980 Commentaries suggested that such interests would be included since "the existence of grave and imminent danger to the State" encompassed dangers to "some of its nationals, or simply to human beings." *Id.* Commentary, Article 33, para. 23. As indicated, this clarification had not, however, yet been made clear than Article 33 itself. Only later did the ILC drop the misleading qualifier "of the state" from the final version of Article 25(1)(a).

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Also, would "essential interests" not include a state's act taken to safeguard the essential interests of the international community as a whole and in particular actions taken in accordance with Security Council decisions?[292]

It is against this backdrop that we need to consider whether Article XI's threefold demarcation among measures to maintain public order, to protect essential security interests, and to restore international peace and security and its other textual distinctions from the ILC's Article 25 were intended not only to articulate distinct preconditions to invoking the defense of necessity but to oust the applicability of the customary necessity defense altogether. Our view is that the terms used by Article XI are consistent with the still somewhat uncertain state of the law on the defense of necessity at least in 1980, and with an intent by the drafters of this NPM clause to distill the holdings of cases that were inspiring the ILC itself in codifying the defense of necessity.

Viewed in an accurate historical context, the threefold division within Article XI is consistent with the customary defenses of *force majeure*, distress, and particularly necessity. That Article's three triggering grounds were intended to address security threats posed by (1) internal outbreaks of disorder (that is a threat to "public order" posed by civil war or riots) (2) external security threats that could imperil the very existence of the state ("essential security interests"), and (3) certain threats to the international community of states. As is further explained in our Part III (D) *infra*, the reference to "public order" makes clear that the defense of necessity applies (as does the defense of distress) in cases where a state needs to take action to defend lives in the course of public disorders. The reference to "essential security interests" seems intended to embrace those interests of states that pose a grave and imminent threat to its existence, particularly external military threats posed by other states.[293] And Article XI's reference to the need to fulfill "obligations with respect to the maintenance or restoration of international peace or security" encompasses actions states must take in response to decisions by the UN Security Council.[294] The need to clarify, through the reference to "public order," that the defense of necessity (and not only the defenses of distress or *force majeure*) permits action to save lives makes sense at a time when, as noted above, there was some question about whether the "essential interests" of states included such acts. Similarly, an express reference to Security Council measures to maintain and restore international peace and security makes sense at a time when there was some doubt about whether the defense of necessity extended only to a state's own "essential interests" but not those owed to the international community under the UN Charter. Although, to be sure, the three prongs of Article XI appear to focus on physical threats to security, and not, for example, the environmental threats that some judges or arbitrators have recently suggested are also embraced by the defense of

292 The ILC's Commentaries much later made clear that Article 25(1)(a), like Article 25(1)(b), would encompass the interests of "the international community as a whole." Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Commentary, Article 25, Para. 2; Article 25, Para. 15.

293 *See also* Part III.D *infra*.

294 As is affirmed in the Protocol to the *U.S.–Argentina BIT*, Para. 6.

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necessity, this was not an unusual perspective given debates even in 1980 about what "essential interests" ought to be embraced by the defense of necessity.[295]

The fact that Article XI does not include some of the pre-conditions to using necessity that would later be included in the final version of Article 25 (released in 2001) is not indicative of an intent to derogate from defenses that all states assume usually apply to any treaty. It may only indicate that the BIT's drafters thought they need not spell out that measures are scarcely "necessary" if alternatives to them exist. They may also have thought that they need not spell out that a state that has contributed to the underlying crisis is not in a position to invoke the defense of necessity—since this would have been the outcome of the application of the doctrine of estoppel or unclean hands in any case. And the other preconditions ultimately spelled out in the ILC's final Article 25 may scarcely have seemed relevant in the context of an investment promotion treaty.[296] It is also anachronistic to assume, as the CMS Annulment Committee does,[297] that the negotiators of U.S. BITs (and prior FCNs with comparable NPM clauses) had, long before the ILC completed and released its Articles of State Responsibility, not only readily absorbed the implications of the ILC's distinctions between "primary" or "secondary" rules of international law but had sought to replicate these (*sub silentio*) in these treaties.

Of course, there is nothing in the text of Article XI that suggests that it was intended to be read as an exception to the ordinary rule of treaty interpretation requiring consideration of any relevant rules of international law, including presumably the defense of necessity.[298] Interpreting Article XI in light of these customary rules is also consistent with the ILC's own Commentaries, which indicate that a mere difference in wording between a treaty clause and a general rule of international law does not in itself imply

295 Whether a contemporary interpreter of a provision like Article XI would come to such a conclusion is not so clear. Consider the application of the *ejusdem generis* principle (a phrase in sequence should be read in context with the phrases preceding it). It might be argued today that to the extent Article XI anticipates Security Council action as permitting "measures" otherwise precluded by the treaty, it should be relevant that the Council has on occasion ordered such actions to respond to threats posed by something other than a military threat posed by one state against another, such as human rights violations. If the contemporary actions of the Security Council are considered a proper guide, Article XI's scope might be considerably more expansive than perhaps originally intended by its negotiators—whose view of the scope of Security Council actions (circa 1991) might have been considerably more circumscribed.

296 Thus, Article 25 requires proof that a state's action "does not seriously impair an essential interest of the State or States toward which the obligation exists, or of the international community as a whole." Not surprisingly, the *Enron* and *Sempra* tribunals found these pre-conditions scarcely relevant in the BIT context.

297 CMS Annulment Decision, *supra* note 3, Para. 133–134.

298 Further, much is made of the use of the term "shall not preclude the application of measures" in Article XI of the *U.S.–Argentina BIT*, and whereas Article 25 of the ILC Articles is a "circumstance precluding wrongfulness." *See, e.g.*, Gabriel Bottini, *Protection of Essential Interests in the BIT Era*, in Weiler, *supra* note 284, at 148. Yet these expressions have been used interchangeably in previous arbitral awards. For instance, *in dicta* of the Annulment Committee in Patrick Mitchell v. Democratic Republic of Congo in relation to the measures-not-precluded clause in the U.S.–Zaire BIT, Decision on the Application for Annulment of the Award, ICSID Case No. ARB/99/7, 2006 WL 4491472 (APPAWD), November 1, 2006.

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an intention to exclude the latter or make the treaty rule *lex specialis*.[299] Moreover, the defense of necessity is surely one of those fundamental rules of international law, such as exhaustion of local remedies, that requires very specific evidence of derogation.[300]

The *lex specialis* interpretation of Article XI is also belied by the object and purpose and context of that treaty. The *U.S.–Argentina BIT*, like prior U.S. FCNs and other contemporaneous U.S. BITs, is replete with explicit references to securing alien investors all the existing protections of customary international law. It sought not to undermine customary international law protections for alien investors but to reaffirm them, consistent with long-standing U.S. views of the rights traditionally accorded aliens under the law of state responsibility. The *U.S.–Argentina BIT*'s references to or incorporation of customary international law also include Article II(2)(a)'s guarantees of "fair and equitable treatment" and "full protection and security." As a number of tribunals have recognized, these references have given new life to hoary principles of state responsibility to aliens such as "denial of justice" and the "international minimum standard."[301] Another BIT guarantee, the investors' rights to "effective means of asserting claims and enforcing rights" contained in Article II(6) of the *U.S.–Argentina BIT*, and the investors' right to "prompt review" of disputes involving expropriation (Article IV(2)), also appear to be grounded in, and are likely to be interpreted in light of customary principles such as denial of justice and the international minimum standard. Scholars and arbitrators have suggested that these treaties' attempt to protect the "legitimate expectations" of investors is itself embedded in customary international standards as well as general principles of law.[302] Moreover, at least some of the terms used to define investors' rights to compensation upon expropriation in Article IV(1), such as "public purpose" and "due process of law" are intended to be read with a customary international gloss, as a number of arbitral tribunals have affirmed.[303]

In addition, two BIT provisions affirm an important general principle underlying all the investor rights provided: namely that investors shall be entitled to, under the U.S. BIT, the *better* of any rights to which they are entitled under customary international

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299 J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Test and Commentaries (2002) [hereinafter ILC Commentaries], at 307, Para. 4 (commentary to Article 55)(stating that "For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.")

300 *Compare* Loewen Group Inc. v. USA (Award), 7 ICSID Rep. 421 at 475 (2003) (incorporating a requirement to exhaust local remedies in the context of the NAFTA's Investment Chapter, at least where the claim is based on actions taken by local courts, even though that treaty otherwise renounces the requirement of exhaustion).

301 *See* OECD, *Fair and Equitable Treatment Standard in International Investment Law, Working Papers on International Investment*, No. 2004/3 (September 2004). *See also* J. Paulsson, Denial of Justice in International Law (2005); McLachlan, *supra* note 279, at 375–83.

302 *See generally*, OECD, *Fair and Equitable Treatment Standard in International Investment Law*, *supra* note 301. *See, e.g.*, SPP v. Egypt, ICSID Case No. ARB/84/3, 3 ICSID Rep. 189, 82–3 (award) (May 20, 1992) ("certain acts of Egyptian officials . . . created expectations protected by established principles of international law").

303 *See, e.g.*, McLachlan, *supra* note 279, at 381.

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law, national law, or the BIT itself. Thus, Article II(2)(a) of the *U.S.–Argentina BIT* provides that: "Investment . . . shall in no case be accorded treatment less than that required by international law" and Article X explicitly provides that the BIT shall not derogate from national law or international legal obligations "that entitle investments or associated activities to treatment more favorable than that accorded by [the BIT] in like situations." It is no small irony then that the provision immediately preceding Article XI expressly gives investors the benefit of the customary international law defenses that some believe Article XI removes. Of course, there is nothing in the text of Article XI that necessarily derogates from general international law—whether the customary defense of necessity, the general principle of law that parties cannot benefit from their own wrong, the general principle codified in Article 27(b) of the ILC Articles of State Responsibility, or the general principle that those who invoke an affirmative defense from a treaty obligation bear the burden of proof. It is also true, as was affirmed by the European Court of Human Rights in the *Neumeister* case, that interpretations that a provision is *lex specialis* are heavily disfavored in a case in which such an interpretation would be "incompatible with the aim and object of the treaty."[304] Unfortunately, none of the tribunals involved in the *Argentine Gas Sector Cases* considered the interplay between Articles II(2)(a), X, and XI and the tribunal in LG&E as well as the CMS Annulment Committee ignored the object and purpose of the *U.S.–Argentina BIT* altogether when addressing the interpretation of Article XI.

Interpreting Article XI as a primary rule that effectively denies the application of any of the investor rights in the rest of the *U.S.–Argentina BIT* (as is suggested by the CMS Annulment Committee)[305] would also create an absurdity of Article IV(3) of the BIT. Article IV(3) provides investors with the better of national or most favored nation treatment should a state compensate anyone for losses incurred "owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance, or other similar events." These are precisely the kinds of events that are most likely to trigger a state's invocation of Article XI. If we were to take the CMS Annulment Committee's interpretation seriously and successful invocation of Article XI trumps all the rights in the BIT, investors' rights under Article IV(3), like all other BIT guarantees, would be rendered inapplicable in the very circumstances in which they were intended to arise.

If Article XI were a primary rule or *lex specialis*, it would also mean, as Burke-White and von Staden acknowledge, that the nine out of ten investment agreements (of the thousands concluded before and after the *U.S.–Argentina BIT*) that lack such a comparable clause (and would therefore be subject to the customary defense of necessity) would be far *more protective* of investors' rights than is the U.S. Model BIT of 1987.[306] If this view was correct, the European BIPAs, dismissed as weaker vehicles

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304 *See* ILC Commentaries, *supra* note 299 (citing Neumeiter case). Accordingly, in that instance, the Court took into account the general rule under international law in applying the specific clause in the European Convention, as did the CMS, Enron, and Sempra tribunals.

305 CMS Annulment Decision, *supra* note 3, at Para. 129.

306 *Compare BG Group plc v. Argentina*, UNCITRAL Award, December 24, 2007, at Paras. 367–412 (interpreting U.K.–Argentina BIT, which did not contain an "essential security" clause, as possibly incorporating customary defense of necessity but finding that Argentina could not successfully

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for investor protection than the U.S. BIT even in the State Department letter submitted to the Senate for the *U.S.–Argentina BIT*, were in fact much stronger vehicles for investment protection than anyone, including the U.S. and Argentina, investment scholars, and BIT negotiators from around the world, had ever assumed.[307] It would mean that the principal advocate of strong protection for alien property, a country that engaged in "gunboat" diplomacy to protect its investors, affirmed the Hull Rule and customary law in defense of investor compensation, and devised a more investor protective FCN in the wake of twentieth century challenges, in fact changed its position when it was ostensibly turning to an even "stronger" vehicle for investor protection—namely, U.S. BITs. It would mean that Argentina's leaders, who looked to the U.S. BIT to reassure investors with respect to the political risks of investing in their country and who were told that by ratifying the U.S. BIT they were sending the strongest possible signal of a commitment to uphold investment rights, were wrong about what that treaty required of each party and about the stability of the investment climate thereby produced by its ratification.

There was no evidence presented in the *Argentine Gas Sector Cases* to support this counter-narrative. On the contrary, there was evidence presented that, to the extent the meaning of clauses like Article XI was ever discussed among prospective U.S. treaty partners (at least through 1987), U.S. negotiators suggested that the "measures not precluded" clause was inserted into the earliest U.S. Model BITs out of an "excess of caution" and for the same reasons the United States had inserted other references to customary law throughout its BIT, namely to affirm the applicability of assumed background principles, including in investor-state dispute settlement.[308]

The CMS, Enron, and Sempra correctly drew upon the well-known canon of interpretation, recognized by numerous arbitral tribunals and the ICJ itself, that fundamental rules of customary international—including defenses like *force majeure*, distress, or necessity—should not be presumed inapplicable unless the relevant treaty excludes their application by explicit provision.[309] Those tribunals' interpretation of "necessary," which relies on the most relevant rules of international law on point, is the most consistent with

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satisfy the requisites of that necessity defense). *See also* Rose-Ackerman and Billa, *supra* note 252, at 443–51 (arguing that customary defenses such as necessity normally apply when a treaty is silent).

307 *See, e.g.*, Jeswald W. Salacuse and Nicholas P. Sullivan, *Do BITs really work: an evaluation of bilateral investment treaties and their grand bargain*, 46 Harvard J. Int'l. L 67 (2005); *see also supra* at Part III.A.

308 *See supra* at Part III.A. and text and accompanying note 282.

309 *See, e.g.*, Sempra Award, *supra* note 1, at Para. 378; Elettronica Sicula S.p.A. (U.S. v. Italy*)*, 1989 ICJ 15 (July 20), para. 112 (tacit repudiation of an "important principle of customary international law not favored; need words "making clear an intention to do so"). *See also* Amoco Int'l Finance Corp. v. Iran, July 14, 1987, Iran–United States Claims Tribunal Rep. 189 (1987) para. 50; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, (1971), Advisory Op., 1971 ICJ 16, 47 (June 21), para. 96; The Loewen Group, Inc. & Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3, June 26, 2003, 42 ILM 811 (2003), 7 ICSID Rep. 442 (2005), para. 160. Interestingly, the LG&E Award did not disagree. It applied

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that treaty's other provisions and the general principle of effectiveness (which encourages interpretations that best advance the purpose of treaties). This interpretation is the least likely to inspire criticisms of judicial activism, since any of the suggested alternatives, such as Burke-White and von Staden's "least likely alternative" or "margin of appreciation," have, as we discuss in the next section, no demonstrable treaty basis and would involve a novel departure from established law. These arbitrators' reliance on the requirements of the customary necessity defense would not have surprised the drafters of the U.S. Model BIT or presumably the negotiators of the *U.S.–Argentina BIT*.

To be sure, some of the arbitrators, particularly in CMS, were less than clear in articulating how they reached this interpretation. Most notably, and as discussed above,[310] the CMS tribunal failed to explain why it was interpreting Article XI in light of customary international law, stating merely that the defenses under customary international law and the treaty were "one fundamental issue."[311] What those arbitrators should have said was that they were turning to the underlying customary necessity doctrine that inspired the ILC; and they should have explained as well why this was appropriate in interpreting the laconic words in Article XI. The *Enron* and *Sempra* arbitrators were a bit more precise in this respect. They were more careful about recognizing that the starting point must, of course, be the text of Article XI. They specifically disagreed with Argentina's *lex specialis* interpretation and indicated that since Article XI did not define what it meant by "necessary," the customary international law defense of necessity was the "relevant rule of international law."[312]

The CMS arbitrators' failure to articulate their reasoning explains some of the underlying criticisms of the CMS Annulment Committee. At the same time, that Annulment Committee, which included one of the principal authors of the ILC's final codification efforts, erred, with all due respect, in relying on the false authoritativeness of those efforts.[313] In trying to interpret whether Article XI was seeking to derogate from customary law, those Committee members should have been more attentive to the uncodified state of the defense of necessity at the time the *U.S.–Argentina BIT* was negotiated and not on the mere fact that the black letter formulation of that defense was not replicated word for word in Article XI. Instead, that Committee, applied mechanically and anachronistically the black letter rules in the ILC's Article 25 (released in 2001), even though they were dealing with a treaty concluded in 1991 and, specifically, with a NPM clause that was a part of the original 1982–1983 U.S. Model BIT that was in turn inspired by language in a "general exceptions" clause included in post-World War II U.S. FCNs.

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both Article XI and the customary defense of necessity without suggesting that the former was *lex specialis*.

310 *Supra* at text accompanying notes 107–9.

311 CMS Award, at Para. 308.

312 Enron Award, *supra* note 1, at Paras. 333–4; Sempra Award, *supra* note 1, at Paras. 375–8.

313 To be sure, as David Caron has explained, the CMS Annulment Committee was hardly unique in accepting at face value the ILC's articles of state responsibility as authoritative. *See* David Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AJIL 857 (2002).

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Contrary to what the CMS Annulment Committee suggests, the arbitrators in the CMS case (or in the later *Enron* or Sempra cases) did not commit a "mistake of law" in interpreting "necessary" in light of the ancient equitable norms reflected in the traditional defense of necessity. The CMS, Enron, and Sempra arbitrators correctly drew from the black letter of the ILC's Article 25 the essential elements of the relevant customary defenses that in all likelihood inspired the drafters of what became Article XI of the *U.S.–Argentina BIT*. They also correctly drew from the underlying rules of international law the proper burden of proof that applies to such affirmative defenses, concluding that the burden for proving such defenses rests on the party that invokes them.[314] They correctly found that placing the burden on Argentina to make the case for its defense of necessity was also practicable and fair since only Argentina, and not a private investor, undertook the original decision to reject all other alternative courses of action, had access to the data concerning the probable underlying causes for the economic crisis, and was therefore in the position to satisfy the requisites of the defense of necessity.[315]

These arbitrators' decisions on this point also respected other relevant international law rules, consistent with the demands of article 31(3)(c) of the Vienna Convention on the Law of Treaties. By imposing on Argentina the burden of proving that the measures that it took were the "only way" to deal with the underlying crisis, the arbitrators gave effect to the well-established principle of effectiveness whereby treaty interpreters are urged to interpret treaties whenever possible in ways that give effect to their object and purpose and not frustrate that purpose.[316] They also used the requisites of the necessity defense to affirm the fundamental equitable rule that parties should not be permitted to benefit from their own wrong—which is, after all, the basis for the demand that those

314 On burden of proof, *see*, *e.g*., Bin Cheng, General Principles of Law 326, 332 (1953); Mojtaba Kazazi, Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals (1996). The burden of proof regarding defenses such as necessity might also be drawn from *pacta sunt servanda* itself, that is, a general principle discouraging parties from derogating from their treaty obligations. To the extent the arbitrators in LG&E imposed some or all of the burdens of proving necessity (or the requisites of Article XI), *see* part II(C)(2), this would appear to be an error of law. Although some critics have taken the CMS, Enron, and Sempra tribunals to task for failing to elaborate precisely what alternative courses of action Argentina could have taken or for failing to indicate how precisely Argentine actions contributed to the underlying emergency, it is not clear that the tribunals needed to say anything more than what they did say on these points: namely that considering the considerable expert opinions offered by both sides, they were not convinced that Argentina had satisfied its burden of proof on these issues.

315 Examples of prior arbitral decisions imposing the burden of proving an affirmative defense on the party that asserts it are legion. *See*, for example, Loewen Award of June 26, 2003, *supra* note 300, at Paras. 213–17. Note that even if one agrees with the CMS Annulment Committee that Article XI is *lex specialis*, that in and of itself is no reason to presume that the burden of proving the requisites of Article XI is anything other than that which is imposed on other affirmative defenses under customary international law. Article XI does not address which party bears the burden of proof.

316 For discussion of the ICJ's use of the principle of effectiveness in interpreting the UN Charter, *see* Alvarez, *supra* note 10, at 109–41 (2005).

invoking necessity did not "substantially contribute" to the underlying crisis.[317] It is not clear why, even assuming the CMS Annulment Committee was correct in saying that Article XI was intended to oust the applicability of the defense of necessity, that provision should be presumed to derogate from these other general principles of law.[318]

Reliance on such international law principles to interpret what "necessary for" in Article XI means is also consistent with relevant ICJ practice. In both the *Nicaragua* and the *Oil Platforms Case*s, involving the comparable "essential security" clauses in FCN treaties that inspired Article XI of the *U.S.–Argentina BIT*, the ICJ found that the requirement that measures be "necessary" to protect a party's essential security interests imposed a distinct and heavy burden on the party seeking to rely on an "essential security" clause. In the *Nicaragua Case*, the Court found U.S. pronouncements of necessity to be insufficient. In the *Oil Platforms Case*, the Court found that the United States had failed to sustain its burden of proof to show that it satisfied the criteria of necessity and proportionality.[319]

The ICJ arrived at this conclusion by importing customary international law notions—in those cases, the principles relating to self-defense—in order to interpret the NPM clauses as issue,[320] and specifically, the meaning of "necessary" in those clauses.[321] Thus, the ICJ in Oil Platforms reasoned:

> . . . under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (Article 31, 3(c)). The Court cannot accept that Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court by Article XXI, paragraph 2, of the 1955 Treaty.[322]

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317 On this issue alone, the public record of apparent admissions against interest made this hurdle a formidable one for Argentina. Thus, Argentina's then President wrote the following in the Financial Times of July 2, 2002: "In the case of Argentina, no one bears more of the blame for the crisis than Argentina itself. We spent more than we earned; we failed to complete the full cycle of economic reforms; and we tied ourselves to the most productive economy in the world without building our own productivity . . . Argentina's crisis is largely home grown." Eduardo Duhalde, *Argentina Regrets*, Financial Times, July 2, 2002.

318 For an elaboration of the use of general principles of law in the interpretation of investment agreements, *see* McLachlan, *supra* note 279, at 395–401.

319 *Oil Platforms Case*, *supra* note 245, Para. 76–7.

320 Nicaragua case, *supra* note 244, Paras. 224, 282. *Oil Platforms Case*, *supra* note 245, at Para. 40 (holding that: "when Article XX, paragraph 1(d), is invoked to justify actions involving the use of armed force, allegedly in self-defence, the interpretation and application of that Article will necessarily entai1 an assessment of the conditions of legitimate self-defence under international law").

321 Nicaragua case, *supra* note 244, Paras. 224, 237, 282; *Oil Platforms Case*, *supra* note 245, at Paras. 73 and 76.

322 *Oil Platforms Case*, *supra* note 245, at Para. 41.

Some authors suggest that the order in which the ICJ approached the questions that it addressed in *Oil Platforms* shows that that court treated the NPM clause in the FCN as a primary rule overruling customary international law.[323] We disagree. It is true that the court addressed the question of the meaning of the NPM clause prior to the issue of whether a substantive breach of the FCN occurred. But, as indicated by the quotation from the ICJ presented above, this suggested interpretation is inconsistent with what the court said. Further, the ICJ explicitly explained that it dealt with the matter of self-defense first because this was the central preoccupation of the diplomatic exchanges and the subsequent pleadings between the parties.[324] The ICJ, which at no time categorized the NPM clause in the FCN as a "primary" rule, may also have addressed that issue first because, as some of the judges indicated in their separate opinions, this ordering "pierc[ed] the veil" of the dispute and went to its "political relevance."[325] It is also a bit misleading to rely on the precise order in which the court dealt with this issue insofar as that ordering was criticized in no fewer than five separate concurring opinions.[326]

Burke-White and von Staden acknowledge that these ICJ decisions are consistent with the CMS, Enron, and Sempra interpretations of what "necessary for" means in Article XI, but they attempt to distinguish them on the basis that they involve the use of force. This is not a satisfactory answer for three reasons. First, in neither instance did the ICJ suggest a clear distinction between the necessity defense under the essential security clause of the FCN and the customary rules applicable to self-defense, or base its ruling exclusively on the latter. Second, the basis of the court's jurisdiction, at least in the *Oil Platforms Case*, was only the U.S.–Iran FCN treaty, and therefore, as a matter of jurisdiction, the court in that case could only have been applying the "essential security" clause in that treaty.[327] Finally, as the ILC Commentaries to Article 25 indicate, the origins of the rules applicable to self-defense first articulated in the *Caroline* incident of 1837 "really involved the plea of necessity at a time when the law concerning the use of force had a quite different basis than it now has."[328] Even assuming

323 Bottini, *supra* note 298, at 149; Tarcisio Gazzini, *Necessity in International Investment Law: Some Critical Remarks on* CMS *v* Argentina, 28 J. Energy & Nat'l Resources L. (2008, forthcoming) (arguing that "the ICJ construed [the NPM clause] . . . as a primary rule," citing 33, whereas the ICJ refers to the NMP as a "defense" at 33, and states that the NPM clause "does not afford an objection to admissibility").

324 *Oil Platforms Case*, *supra* note 245, at Paras. 37–8.

325 *Oil Platforms Case*, *supra* note 245, Declaration of Judge Ranjeva, at Para. 3 ("la Cour a percé le voile du différend") and Para. 4 ("percement du véritable cœur du différend") and Separate Opinion of Judge Simma, at Para. 3, respectively.

326 *Oil Platforms Case*, *supra* note 245, Separate Opinion of Judge Higgins, at Para. 2; Separate Opinion of Judge Parra-Aranguren, at Para. 13; Separate Opinion of Judge Kooijmans, at Para. 3; Separate Opinion of Judge Buergenthal, at Paras. 5, 13 and 17; Separate Opinion of Judge Owada, at Paras. 5–16.

327 *Oil Platforms Case*, *supra* note 245, Para. 38–40, 42.

328 ILC Commentaries, *supra* note 299, at 196. *See also* Ian Johnstone, *The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-Terrorism*, 43 Col. J. Transnat'l L. 337, at 344 (2005) (noting that the Caroline principle "may be rooted more

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the ICJ cases on point were principally about the use of force and not about the meaning of a bilateral "essential security" clause, they are hardly inapposite to determining the meaning of the very doctrine—necessity—that gave rise to relevant restrictions on both the resort to the use of force and the necessity defense.

2. Deploying a "least restrictive alternative" or "margin of appreciation" standard is inconsistent with Article XI Burke-White and von Staden argue that the "least restrictive alternative" approach developed by the GATT and WTO panels offers perhaps the best middle ground for balancing the legitimate expectations of both states and investors."[329] They note that this test also "stems . . . from U.S. constitutional practice."[330] Even assuming both of these statements are correct, imposing such an interpretation gloss on Article XI requires something more than analogies to either U.S. constitutional law or the use of such a standard by WTO dispute settlers—especially since the "least restrictive alternative" rule is not connected to any principle of international law that is relevant to interpreting the *U.S.–Argentina BIT*.

To the extent we are correct in concluding that Article XI needs to be read in light of the customary international law defense of necessity and is not *lex specialis*, it is evident that there is no room for an alternative test of necessity, such as the least restrictive alternative. But even those who reject our contention in Part III(C)(1) above, need to explain why measures taken that are only the "least restrictive" of a number of possible alternatives, are, under the plain terms of Article XI, really "necessary" to deal with the types of crises enumerated by that Article.

To assume that Article XI ought to be read as consistent with any of the levels of scrutiny familiar to U.S. constitutional law—from "rational basis," "intermediate," or "strict" levels of scrutiny—requires doctrinal and conceptual leaps that are unjustified by the strict terms of Article XI (quite apart from the customary international law gloss that we believe that clause merits). There is simply no evidence in the text of the *U.S.–Argentina BIT* or the history of that treaty or of the U.S. BIT program generally to suggest an intent to import such a U.S.–centric concept into an international compact intended for reciprocal application. And although drawing from WTO practice at least has the merits of using a standard that is in use internationally, rather than the law of only one of the BIT parties, there is no particular reason to assume that the drafters of the *U.S.–Argentina BIT* (or U.S. BITs generally) intended to make such a connection to modern WTO law, particularly when the NPM clause was first inserted into the U.S. Model BIT in the early 1980s.

There are also distinctions between the relevant BIT and GATT clauses that should give us pause about the effort to import a GATT-type least restrictive alternative standard into Article XI. As the ICJ noted in the *Nicaragua Case*, there are significant differences between Article XXI of the GATT and the measures-not-precluded clause in FCNs that inspired Article XI. Article XXI includes the "which it considers"

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firmly in the doctrine of necessity than in self-defense and citing D.W. GRIEG, INT'L L. 886 (1976)).

329 Burke-White and von Staden, *supra* note 36, at 348.

330 *Id.* at 346.

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language that arguably renders Article XXI self-judging. This language, crucially absent from Article XI of the *U.S.–Argentina BIT*, affects not only how that clause is interpreted and by whom but its substantive content. A self-judging measures-not-precluded clause like that of the GATT has a different, and far more sovereignty-protective content than that of Article XI (or the customary rule of necessity).

Further, the famous preambular injunction contained in Article XX, conditioning certain claims of exceptions to the GATT Covered Agreements that members may claim are "necessary" to protect certain regulatory interests, is absent from the *U.S.–Argentina BIT*. This preambular language has dramatically affected the degree of deference WTO dispute settlers accord to GATT Contracting Parties under that clause and in all likelihood has subtly affected what those dispute settlers consider to be "necessary." That preamble insists that any such measures not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" or be a "disguised restriction on international trade." When GATT cases suggest that the word "necessary" in Article XX needs to be read as part of a continuum extending from "indispensable" at one end to "making a contribution to" at the other,[331] this surely has something to do with the fact that that provision anticipates a continuum among regulatory measures requiring a judgment as to the degree to which a measure might be a form of trade protectionism.

Article XX of the GATT is grounded in a balancing test that is absent from the text of the *U.S.–Argentina BIT*'s Article XI. Article XI suggests an on/off switch; either a measure is "necessary" for the stipulated reasons or it is not. Nothing in it suggests the balancing test implied in the preamble of the GATT's Article XX, in the self-judging nature of the GATT's Article XXI, or in the lengthy laundry list of exceptions contained in the rest of Article XX (which presumably extend beyond the usual customary law defenses). The other WTO analogies made by Burke-White and von Staden are similarly inapposite.[332]

Burke-White's and von Staden's alternative interpretation, that the European Court of Human Right's "margin of appreciation" doctrine should be imported as a "template" to be used in NPM cases, is equally untenable.

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331 *See, e.g.*, *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT-DS161/AB/R, WT/DS169/AB/R, Report of the Appellate Body (December 11, 2000), Para. 161.

332 Consider Article 2(2) of the SPS Agreement and its interpretation which they cite as support for the "likely bargain states would have struck between the protection of investment and the protection of the health of their citizens." Burke-White and von Staden, *supra* note 36, at 363. That provision stipulates that "[m]embers shall ensure that any sanitary or physosanitary measure is applied *only to the extent* necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence. . . ." (Emphasis added.) This provision also anticipates a balancing between competing interests not contemplated by the text of Article XI. For all these reasons, we disagree with the conclusions of the arbitrators in Continental Casualty Co. and Argentina, ICSID Case No. ARB/03/9 (September 5, 2008), ICSID Case No. ARB/03/9, suggesting that "necessary" in Article XI of the U.S.–Argentina BIT needs to be interpreted in light of the GATT and WTO case law interpreting Article XX of the GATT rather than the customary international law defense of necessity. *Id.* at Paras. 192–5 (indicating that under the WTO, a measure is not necessary if a less restrictive alternative is reasonably available.)

The ECtHR's "margin of appreciation" is a standard of supervisory review that, in the words of R. St. J. Macdonald, contains a "context dependent" spectrum of intensity with respect to judicial scrutiny, ranging from "total deference (amounting to unreviewability at one extreme) through less deferential standards to the most stringent standard of justification at the other."[333] The textual basis for the "margin of appreciation" rests on a number of provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms that permit state restrictions on some rights to the extent these are "necessary in a democratic society,"[334] and if the actions are taken, for example, "in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."[335]

Burke-White and von Staden argue that this doctrine should be used in NPM cases, such that the "principal task" of the tribunal should be "to determine the appropriate boundaries of the margin of appreciation and, hence, respondent state's freedom of action."[336] The margin of appreciation is, it appears, presented by these authors both as a substantive standard and a procedural one. It is a procedural standard in that it is a standard of review.[337] It is also, and perhaps more importantly, a substantive standard, in that it is to be used as an alternative to, among other possible standards, the far less deferential customary international law requisites for the defense of necessity.[338] (Burke-White and von Staden are not suggesting that comparable deference is owed to states in determining the applicability of the customary defense of necessity.) As with respect to their proposal that Article XI triggers "good faith" review, Burke-White and von Staden are less than clear in articulating what substantively their proposed "margin of appreciation" standard would entail.[339]

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333 R. St. J. Macdonald, *The Margin of Appreciation*, in R. St. J. Macdonald, et al., ed. The European System for the Protection of Human Rights, at 84 (1993).

334 *See* European Convention on Human Rights and Fundamental Freedoms, Articles 8 (right to respect for privacy and family life), 9 (freedom of thought, conscience, and religion), 10 (freedom of expression), 11 (assembly and association); Protocol I, art. 1 (protection of property).

335 *See id.* Article 10(2).

336 Burke-White and von Staden, *supra* note 36, at 374.

337 *Id.* at 368–76.

338 *Id.* at 343–48.

339 The factors relevant to the breadth of this margin are variously identified by those authors as being the "language employed in defining the nexus requirement," *id.* at 371, the "character of the permissible objectives asserted," *id.* at 375, and the "level of state interference with investor rights." *Id*. They argue that assessing the character of permissible objectives would mean the highest deference for determinations in relation to such subjective determinations as those relating to "public morality," the lowest deference for such "technical" or "objective" determinations as those relating to "public health," and in between for determinations relating to "security." *Id.* at 375 and 404–05. Why public morality is more subjective than security is not explained or supported. They do not discuss how the other factors would apply or how the laconic text of Article XI leads to such conclusions. Nor do they discuss how their analysis would apply to the *U.S.–Argentina BIT*, or the interference with investor rights found in the Argentine cases. They do, though, state that the LG&E Tribunal, in suggesting that its review of Argentina's measure

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The ICJ has rejected the argument that a margin of appreciation, or deference of the type advocated by Burke-White and von Staden, should be afforded in evaluating claims of necessity, both in the context of FCN treaties and BITs.[340] But quite apart from adherence to ICJ precedent, there are solid reasons why importing this standard into Article XI is inappropriate. These, discussed below, (1) relate to possible problems with the margin of discretion doctrine itself, (2) stem from the different goals of the two treaty regimes at issue, and (3) risk duplicating other forms of "balancing" that are already emerging in the interpretation of the substantive investment rights.

The margin of appreciation doctrine has drawn considerable criticism. Because it accords judges considerable discretion and has sometimes led to differing results in comparable factual situations, some have contended that the doctrine threatens the rule of law because of (1) its lack of clarity in what adjudicators are entitled to consider relevant, (2) its unpredictability in application, and (3) its uneven and inconsistent treatment of comparably situated states. Jeffrey Brauch, for instance, argues that the doctrine as used by the ECtHR violates many of Lon Fuller's key elements of the rule of law, undermines the principal functions of human rights law by failing to limit executive power, deploys "slippery" variables (e.g., "acceptable," "good faith," "legitimate aims") that are never adequately defined and change from case to case, is subject to (*sub silentio*) modifications over time that come without warning, and lead to seemingly random or standard-less decisions. He concludes that its use makes it difficult for

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"does not significantly differ" from a good faith review, "takes an approach somewhat closer to the margin of appreciation doctrine." *Id.* at 397.

340 *See Oil Platforms Case*, *supra* note 245, at Para. 73 (stating that "the requirement of international law that measures taken avowedly in self-defense must have been necessary for that purpose is strict and objective, leaving no room for a 'measure of discretion' ") and Para. 76 (referring to the fact that there was no evidence that the U.S. complained to Iran of the military activities on the platforms, among other things, in finding that the acts were not "necessary"); *Id*. Separate Opinion of Judge Higgins, at Para. 48 (stating that the "Court should next have examined—without any need to afford a 'margin of appreciation'—the meaning of 'necessary'"); Separate Opinion of Judge Simma, at Para. 11 ("the requirement of international law that action taken avowedly in self-defence must have been necessary for that purpose, is strict and objective, leaving no room for any 'measure of discretion' "). Siemens A.G. v. The Argentine Republic, Award, February 6, 2007, ICSID Case No. ARB/02/8, *at* http://ita.law.uvic.ca/documents/Siemens-Argentina-Award.pdf), at Para. 354 (stating, in the context of its damages discussion, that "Article I of the First Protocol to the European Convention on Human Rights permits a margin of appreciation not found in customary international law or the Treaty.")

Yuval Shany argues, based on the statement of the ICJ in the *Gabcikovo-Nagymaros Dam Case* that the respondent "*is not the sole judge* of whether [the necessity] conditions have been met," that the ICJ "accepted the theory that the state concerned retains some degree of judgment—though certainly not exclusive judgment—over the question of whether the conditions of necessity have been met," and thereby "[b]y implication" espoused the margin of appreciation. *Toward a General Margin of Appreciation Doctrine in International Law?*, 16(5) Eur. J.Int'l. L 907, 934 (2005). Leaving aside the question of whether this implication is correct, it is clear that the ICJ did not adopt the margin of appreciation in the substantive sense argued by Burke-White and von Staden. As is clear from the passage relied upon by Shany, the ICJ was applying the requirements of necessity at customary international law—those set out in the precursor to Article 25 of the ILC Draft Articles. *Gabcikovo-Nagymaros Dam Case*, *supra* note 245, Para. 51.

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people to plan their affairs, encourages the view that the European Court is a "black box" "unshackled" by law, and is often a "substitute for coherent legal analysis of the issues at stake."[341] Eyal Benvenisti suggests that the margin of appreciation suggests a "moral relativism" that is simply at odds with the notion that human rights are universal, encourages national institutions to resist external review, and "reverts difficult policy questions back to national institutions, in complete disregard for their weaknesses."[342]

Whether or not these criticisms are warranted in the context of the European human rights regime, they serve notice that use of this doctrine in the context of the *U.S.–Argentina BIT* may be inconsistent with many of that treaty's goals, namely to protect the legitimate expectations of investors, uphold predictable and stable rules of law, and add greater precision to the some of vague guarantees contained in relevant customary international law. These criticisms also suggest that importing the margin of appreciation would not, as argued by Burke-White and von Staden, have the "benefit of helping structure the expectations of all actors in the international investment system."[343]

There are also significant differences between the European human rights regime and the *U.S.–Argentina BIT*. As with Burke-White's and von Staden's attempts to draw analogies to WTO law, their resort to the margin of appreciation doctrine loses sight of these distinctions.[344]

The textual trigger for the margin of appreciation doctrine, namely a demand that European judges consider what is "necessary *in a democratic society*," hints at one crucial distinction. As both defenders and critics of the margin of appreciation acknowledge, that doctrine responds to what binds the European members of this regime, namely their *common democratic systems of government*.[345] Accordingly, the doctrine achieves two distinct goals of the European human rights system: first, finding and applying standards that the European nations have in common with one another, and second, finding and applying standards that democratic nations, particularly in Europe, share. These goals respond to a central purpose of the European Convention

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341 Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 Colum. J. Eur. L. 113 (2004–05).

342 Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U.J. Int'l. L & Pol. 843, 853 (1999).

343 Burke-White and von Staden, *supra* note 36, at 405.

344 For a general discussion of how many scholars ignore the institutional differences among various venues for addressing investment disputes, *see* Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AJIL 475 (2008). Ratner comes to many of the same conclusions about the applicability to international investment arbitration of the European human rights regime as we do here. *Id.* at 496–501.

345 This is also highlighted by the Preamble of the European Convention on Human Rights, which reminds us that "the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law." Preambles of investment agreements, of course, contain no such reminders.

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of Human Rights: to consolidate democracy within Europe by locking in certain substantive rights and to use the advance of human rights to promote European unity.[346]

As is well known, probably the most important aspect of the margin of appreciation is the determination of whether there is a "consensus" among the democracies of Europe about a particular practice. This consensus test is applied to determine whether (or how) particularly (but not exclusively[347]) European democracies would balance the respective rights that have been abrogated in the same way as the state under review. The test may also be applied to determine whether there is a European consensus with respect to the substance of the rights under review. Determining whether there is a European democratic consensus may also prove relevant to determining the relative weights of the rights being balanced.[348] The margin of appreciation doctrine is arguably justified then because the European Convention demands that its judges determine "what is necessary in a democratic society" and this requires them to examine how other European democracies would handle the same question. Deploying the margin of appreciation in the course of deciding human rights disputes is characteristic of the ECtHR and few (if any) other human rights bodies.[349]

Secondly, the European margin of appreciation doctrine is premised on specific notions of European federalism and subsidiarity that are absent from the *U.S.–Argentina BIT* or most investment treaties. As both critics and defenders of the margin of appreciation doctrine point out, deference to sovereign powers relies at least in part on these common democratic values. The European Convention's requirement that national remedies first be exhausted before state action can be challenged before the European Court also reflects the values of federalism and deference to democratic national polities. Such deference is absent from other regimes that apply to states with vastly differing political systems (e.g., that apply to both democracies and non-democracies), and that do not have broader integrative goals of bringing the states' respective political systems closer together. The notions of deference to sovereign authority and subsidiarity that Burke-White and von Staten find so attractive in the margin of appreciation appear as inextricably connected to that regime's common democratic membership and integrative ethos as is that regime's requirement of exhaustion of local remedies.[350]

The notions of subsidiarity that underlie the margin of appreciation are harder to imply in the BIT context. The *U.S.–Argentina BIT*, as noted, contains no exhaustion of local

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346 *See, e.g.*, Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 56 Int. Org. 217 (2000).

347 But, as Brauch points out, in a few cases the ECtHR has also inquired as to the practices of other democracies outside Europe. Brauch, *supra* note 341, at 144.

348 As the Court put it in *Muller v. Switzerland*, for example, it was relevant to consider that "freedom of expression constitutes one of the essential foundations of a democratic society . . ." Cited in Brauch, *supra* note 341, at 134.

349 As Benvenisti indicates, few other dispute settlers, even among those applying human rights norms, have resorted to this doctrine. Benvenisti, *supra* note 342, at 844. There is therefore little prospect that anyone can claim that the margin of appreciation is some kind of general principle of law or a general principle of common international procedure available to investor-state arbitrators.

350 *See* Ratner, *supra* note 344, at 500. As Ratner indicates, it may be that a "key purpose of the European Convention was to consolidate democracy in Europe." *Id*. at 496 (citing Andrew Moravcsik).

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remedies requirement and indicates, to the contrary, that national law and national remedies need to give way, *at the option of the investor*, to international guarantees and to an international arbitral forum. Neither that treaty as a whole nor its Article XI is premised on an assumption that national governmental authorities are in a better position to protect the rights that it enshrines.[351] Indeed, a major goal of this treaty is to enable alien investors to avoid, at their option, presumptively biased national courts.

The other rationales that underlie the European margin of appreciation doctrine are also arguably more difficult to apply in the U.S. BIT context. U.S. BITs intentionally avoid assuming anything about the governmental attributes of prospective treaty parties.[352] These treaties emphasize the free market and the protection of a select class of individuals and entities, alien investors. Although both U.S. BITs and the European Convention attempt to correct for some of the systemic deficiencies of national government by permitting recourse to supranational adjudication, the similarities between the two regimes end there. U.S. BITs operate on the assumption that alien investors, who are by definition not part of national political processes to the same extent as voting members of the national policy, need international protection from protectionist governments, who are apt to act against their interests in part because of this very lack of political access.[353] U.S. BITs are narrow tools to correct one particular problem, namely the inability or unwillingness of some states to protect aliens' rights to their property and to contract. The European human rights system addresses more general deficiencies of democracies and not the rights of alien investors nor the risks of political protectionism as such.[354]

A treaty like the *U.S.–Argentina BIT* does not confer on its dispute settlers a general license to consider the rights of fellow democracies. It is not premised on finding a "consensus" among a particular set of like-minded states, either with respect to how they define investor rights or how they "balance" the rights of investors vis-à-vis the needs of the sovereign. Although, as is discussed below, the BIT's substantive guarantees may require arbitrators to attempt to balance in some respects the rights of investors vis-à-vis the regulatory prerogatives of the host states in which they invest, this is a far cry from suggesting that the European margin of appreciation should be imported into this interpretation of Article XI. There is no evidence that with respect to investment treaties, or at least the *U.S.–Argentina BIT*, the parties agreed that investor-state arbitrators were entitled to engage in a margin of appreciation inquiry with respect to the application of the NPM clause.

There is yet another reason to be cautious about importing a margin of appreciation standard when applying Article XI: the European Court of Human Rights applies its

351 *Compare* Handyside v. United Kingdom, 24 Eur. Ct. H. R. (ser. A), at 22, Para. 48 (determining that it is for the national authorities to make the "initial assessment" of the reality of "pressing social needs").

352 *Compare* text and accompanying note 345.

353 They share that assumption with the WTO regime.

354 Indeed, Ratner argues that the European Convention "is not a treaty on the protection of property specifically—let along alien property—at all." Ratner, *supra* note 344, at 496 (citing Protocol I, Article. I's hedged language with respect to entitlement to "peaceful enjoyment of . . . possessions").

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margin of appreciation in the course of determining whether a state has engaged in a substantive breach of the European Convention. In the European Convention, as noted, rights are defined in ways that require weighing distinct individual rights vis-à-vis one another and balancing those rights against the rights of others and other state interests. Consider for example the text of its article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right *except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime*, *or for the protection of the rights and freedoms of others*. [Emphasis added.]

The substantive rights in the European Convention's text anticipate that applying these rights will necessarily involve judges striking a balance among its substantive rights. Accordingly, that court's judges have decided to focus their inquiries principally on how a discrete group of states, namely European democracies, have struck such balances not only because the text of the treaty suggests it but also to confine their judicial discretion within manageable bounds. The margin of appreciation is therefore necessarily part of the determination in that court about whether a substantive breach of the European Convention has occurred.

Burke-White's and von Staden's suggestion, by contrast, would have the margin of appreciation apply in the course of deciding the applicability of the NPM clause, presumably once a determination of substantive breach has been made. There is a serious question about whether importing a margin of appreciation doctrine at this late stage—by way of an excuse to an investment treaty breach—is consistent either with what the European Court of Human Rights does or more importantly, with what investment arbitrators are now doing.

Our arguments rejecting the European margin of appreciation doctrine for purposes of interpreting Article XI should not be understood as suggesting that other parts of the *U.S.–Argentina BIT* do not require, as does the European Convention more explicitly, some degree of balancing between the regulatory interests of states and the rights of alien investors. In the Argentine Gas Sector rulings discussed here, the *U.S.–Argentina BIT*'s substantive guarantees were interpreted to require consideration of proportionality or to otherwise require a balancing of the respective rights of sovereign and foreign investor—an analysis with some parallels to that involved in the European margin of appreciation analysis although that standard is never adopted. The *Enron* and *Sempra* tribunals' rejections of investors' claims that Argentina had taken "discriminatory" measures or actions "tantamount to expropriation" involved giving some weight to Argentina's regulatory discretion. Those tribunals found that the measures taken were not "arbitrary," for example, because "the Government believed and understood [them to be] the best response to the unfolding crisis."[355] And while the LG&E tribunal weighed Argentina's interests differently

355 Enron Award, *supra* note 1, at Para. 281 and Para. 283; Sempra Award, *supra* note 1, at Paras. 318–20.

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and concluded that it had indeed engaged in discriminatory action, it concluded, along with *Enron* and Sempra, that investors had not shown that Argentina had acted arbitrarily. The LG&E tribunal also found that, in determining whether there had been an indirect expropriation, it "must balance two competing interests: the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies,"[356] and as noted above, struck that balance in favor the state.[357]

The need for balancing the state's versus the investors' interests also appears to have informed these tribunals' respective findings of fair and equitable treatment breach. As discussed above (at Part II. C.3), the CMS, Enron, and Sempra tribunals all stated they were prepared to accept that measures needed to be taken by the Argentine government, and objected only to the fact that the measures taken were unilateral, rather than the negotiated measures contemplated under the licenses and their governing regime. Similarly, the LG&E tribunal, in its fair and equitable treatment analysis, after canvassing the actions of the Argentine government, stated that it "nevertheless recognizes the economic hardships that occurred . . . and certain political and social realities." It found, though, that "Argentina went too far."[358]

The emerging investor-state case law is replete with other instances in which the regulatory interests of governments are weighed in some fashion vis-à-vis investor rights, as with respect to national treatment,[359] fair and equitable treatment,[360] jurisdictional objections,[361] the scope attributed to MFN and umbrella clauses,[362] or the application of background principles, such as "reasonable" or "legitimate" expectations of the investor,[363] and determinations of whether there has been expropriation.[364]

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356 LG&E Decision on Liability, *supra* note 1, at Para. 189. *See also Id.* at Paras. 194–5.

357 *Supra* note 93 and accompanying text.

358 LG&E Decision on Liability, *supra* note 1, at Para. 139.

359 *See, e.g.*, Methanex v. United States, Final Award, Part III, Chapter B, 25–6, at Paras. 54, 57, Part II, Chapter D, 4 at Para. 10, Part III, Chapter A (*passim*).

360 *See* Peter Muchlinski, *"Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L. Q. 527 (2006). *See also* McLachlan, *supra* note 280, at 382–3 (arguing that the "inclusion of the reference to equitable treatment also provides a means by which an appropriate balance may be struck between the protection of the investor and the public interest which the host State may properly seek to protect in the light of the particular circumstances then prevailing.")

361 *See, e.g.*, The Loewen Group, Inc. and Raymond Loewen v. USA, ICSID Award Case No. ARB(AF)/98/3, June 26, 2003 (dismissing case by shareholder and company on jurisdictional grounds).

362 *See, e.g.*, SGS Société Général de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction of August 6, 2003 (refusing to interpret an umbrella clause as extending to a government contract because of, among other things, the "burdensome" consequences on the government).

363 *See, e.g.*, McLachlan, *supra* note 279, at 378.

364 Indeed, Yuval Shany argues that the following language relating to expropriation from the Award in *S.D. Myers, Inc*. v. *Canada* is example of margin of appreciation-type reasoning:

> [A] breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination 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 own borders.

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In these cases, such deference is arguably textually legitimate—because such weighing of the respective interests of sovereign and investor are an inescapable part of the substantive guarantees themselves and indeed is anticipated by the underlying customary rules on state responsibility to aliens.[365]

As the *Argentine Gas Sector Cases* suggest, a balancing of the respective interests of investors and their host governments may also occur at the damages phase.[366] Indeed, one author argues that the ICJ used a "decision-making methodology compatible with the margin of appreciation doctrine" in its discussion of remedies in the *LaGrand* and *Avena Cases*.[367]

Either of these options would be more appropriate, given the existing principles of customary international law relating to necessity as well as the laconic text of Article XI, than undertaking this balancing (or affording a margin of appreciation) when assessing whether a state is entitled to take measures not precluded under a provision like Article XI. Further, it is not clear why balancing of such interests, if it occurs at the time of determination of substantive breach or when calculating damages, should in addition occur when determining the applicability of Article XI.[368]

D. Necessary for what?

One of the most contentious issues in the Argentina cases was whether the conditions that this country faced, particularly in 2001 when it proclaimed its Emergency Law, satisfy the preconditions in Article XI, that is, were necessary either to "maintain public order" or to protect Argentina's "essential security interests."[369]

NAFTA Arb. Trib., Partial Award, November 13, 2000, 40 I.L.M. 1408 (2001), quoted in Shany, *supra* note 340, at 930.

365 *See, e.g.*, Louis B. Sohn and R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AJIL 561 (1961); Restatement (Third) Foreign Relations Law of the United States, § 712 (g) (1986).

366 *See* Part II(C)(4). *See also* Ioana Tudor, *Balancing the breach of the FET standard*, 4:6 Transnat'l Disp. Mgmt. (2007).

367 Shany, *supra* note 340, at 935–6, citing *Avena (Mexico v. US)*, [2004] ICJ Rep and *LaGrand (Germany v. U.S.)*, [2001] ICJ Rep 466. Shany contrasts this approach with the "strict application of the *Chorzow Factory* remedial formula" in the *Wall* Advisory Opinion. *Id.* at 938, citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Opinion of July 9, 2004 [2004] ICJ Rep, 43 ILM (2004) 1009.

368 Notably, in *Siemens* v. *Argentina*, the tribunal rejected Argentina's argument, based (among other things) on *James v. UK*, that its financial crisis had rendered it effectively bankrupt, and that something less than the fair market value measure should therefore be applied to determine compensation for the expropriation. It reasoned that a balancing of social and economic objectives against investment guarantees had already been undertaken in determining whether an expropriation had occurred, and that it should not be repeated in the damages calculation. *Siemens, supra* note 340, at Para. 346 and Para. 354.

369 No one contested that the other trigger in Article XI, to maintain or restore "international peace and security" was intended to refer to measures authorized (presumably by the Security Council) under the UN Charter.

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Argentina argued that "public order," as used in the Spanish version of the treaty (which by the terms of the treaty is equally authentic as is the English) is the equivalent of the broad civil law concept of "*orden público*," namely "a broad set of fundamental conditions of social life instituted in a juristic community."[370] As this suggests, the civil law concept of "*orden público*" is roughly equivalent to the common law concept of public policy. If interpreted this way, Article XI could conceivably permit derogations from the BIT whenever a state finds it necessary to address any matter relating to public morals, health, safety, welfare or the like.[371] As this suggests, Argentina's interpretation of "public order" would essentially turn Article XI into a far more general measures not precluded clause as contained in the GATT's Article XX.

The U.S. investors argued, by contrast, that public order in Article XI referred to its ordinary English meaning—that is, the absence of public disorder—and not to the civil law legal term.[372] As the United States indicated to the Senate on a number of occasions, the phrase covered "measures taken pursuant to a Party's police powers to ensure public health and safety."[373]

It would appear that even the arbitrators in LG&E accepted this second, more narrow interpretation. Thus, even those arbitrators, who upheld Argentina's invocation of Article XI, did so on the premise that it was necessary to prove the "existence of serious public disorders."[374] They found that Argentina had shown a need to "maintain order and control the civil unrest."[375]

The arbitrators in these cases were correct to find that public order referred to states' police power since the term, used in all prior U.S. BITs, was drafted by U.S. lawyers for use in a variety of contexts and was not intended to refer to the particular civil law concept of *orden público*. In this instance, it was inappropriate to take at face value the Spanish language reference to *orden público*, but to see it in the context of the rest of Article XI. Article XI refers to the "maintenance" of public order. If *orden público* (or the French equivalent *ordre public)* had been the intended meaning, one would have

370 *See, e.g.*, LG&E Decision on Liability, *supra* note 1, at Para. 216 (noting Argentine government contentions that its actions would be fully justifiable under the public order provisions of article XI).

371 *Compare* Black's Law Dictionary definition of "public policy" which not surprisingly, does not define "public order" or "ordre public."

372 LG&E Decision on Liability, *supra* note 1, at Para. 221.

> Claimants define public order measures as "actions taken pursuant to a state's police powers, particularly in respect of public health and safety." Based on this definition, Claimants state that the measures in dispute in this case were not aimed at bringing calmness to the collapse that was threatening the country. Consequently, such measures cannot be deemed necessary to maintain public order.

373 *See, e.g.*, *Message from the President of the United States Transmitting the Treaty Between the United States of America and Mongolia Concerning the Encouragement and Reciprocal Protection of Investment, with Annex and Protocol, Signed at Washington on October 6, 1994*, 104th Congress, 1st Session, Senate, Treaty Doc. 104–10, *at* http://www.sice.oas.org/investment/BITSbycountry/BITs/US_Mongolia.pdf, at XII.

374 LG &E Decision on Liability, *supra* note 1, at Para. 228.

375 *Id.* at Para. 237.

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expected the English version of the treaty to have referred to "public policy" instead, or at least to have referred to the "protection of" public order. Of course, the drafters of the U.S. BIT were familiar with far more extensive lists of measures not precluded, as in the GATT, or indeed, the United States' own FCNs, and they specifically did not include such a lengthy list, presumably out of concern with carving out too many exceptions in the BIT. We therefore believe that the arbitrators were correct to understand public order as meaning measures to ward off disruption or to re-establish order that has been disrupted.

What this means is that Argentina had to make a very difficult argument under the "public order" provision of Article XI: namely that it had no alternative but to refuse to adjust the tariffs or to refuse to comply with its other assurances to the investors because otherwise public utility prices would have risen, prompting or exacerbating consumer riots in the streets. It is not altogether clear whether Argentina even attempted to make such a claim in these cases but if it had, it would have faced a high hurdle with respect to proving the causal links such an argument entails. Assuming "necessary" requires demonstration that the action taken was the "only means," Argentina would also have needed to show that alternatives—such as providing subsidies to consumers—would not have addressed the threat to public order.

There was more disagreement among the arbitral tribunals with respect to the meaning of "essential security interests," or at least with respect to how to apply that phrase to the facts in Argentina. All of the arbitrators agreed that, at least in principle, that phrase did not exclude "major economic crises." However, they disagreed about whether, in the context of the *U.S.–Argentina BIT* and given that treaty's object and purpose, economic crises pose an exceptional burden of proof on the state invoking them to prove that these threaten its "essential security interests." The LG&E tribunal did not hesitate in determining the existence of "extremely severe crises in the economic, political, and social sectors" which threatened the "total collapse of the Government and the Argentine State."[376] The CMS, Enron, and Sempra tribunals, on the other hand, examining the same set of underlying facts, did not find that Argentina's "essential security interests" were sufficiently threatened. All three suggested that the Argentina crisis, though severe, did not result, in the words of the CMS tribunal, "in total economic and social collapse."[377]

There are various ways to interpret the differing results. One possibility is that all four tribunals interpreted "essential security interests" the same way—as requiring an exceptional state of affairs tantamount to the collapse of a state even if originally stemming from economic circumstances—but only differed in their respective factual assessments. This is possible because, although the legal contentions made in these cases were similar, each of these tribunals faced a battery of different experts, armed with differing data, and, of course, subject to different credibility determinations. On the other hand, at least two of the tribunals, *Enron* and Sempra, may have applied a

376 LG&E, *supra* note 1, at Para. 231.

377 CMS Award, *supra* note 1, at Para. 355.

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different presumption or burden of proof. This is certainly suggested by those tribunals' pointed reminders that the:

> . . . object and purpose the Treaty is, as a general proposition, to apply in situations of economic difficulty and hardship that require the protection of the international guaranteed rights of its beneficiaries. To this extent, any interpretation resulting in an escape route from the obligations defined cannot be easily reconciled with that object and purpose. Accordingly, a restrictive interpretation of any such alternative is mandatory.[378]

As is suggested in Part III(A), above, the history of the U.S. BIT program and of the *U.S.–Argentina BIT* in particular is consistent with the *Enron* and *Sempra* views expressed above. U.S. BITs, like prior U.S. efforts to promote investment protections dating at least to the Mexican revolution, were intended to address situations of economic crises, and sought to protect investors particularly in such acute cases. Moreover, as even the LG&E tribunal pointed out:

> It should be borne in mind that Argentina declared its state of necessity and has extended such state until the present. Indeed, the country has issued a record number of decrees since 1901, accounting for the fact that the emergency periods in Argentina have been longer than the non-emergency periods.[379]

As the legislative history of the *U.S.–Argentina BIT* suggests, both countries entered into that agreement to provide foreign investors, including those then being recruited by Argentina to bid on its newly privatized public utilities, with assurances that henceforth they would enjoy an international legal guarantee the next time Argentina was tempted to proclaim one of its perennial "emergencies." As noted, that treaty also provided specific assurances that investors would be able to enforce existing Argentine laws that protected guarantees made to investors "with regard to" their investments.[380]

Taking Article XI on its own terms, it is important to keep in mind that "essential *security* interests" is not a particularly open-ended term. Article XI does not refer to "emergencies" as such. "Security" normally refers to military or defense matters and "essential" means only the most important or serious. It seems doubtful that one could take that term to embrace "any policy interest of a certain intensity"[381] or a "function of contemporary sovereignty" demanding "deference to the government concerned in this regard."[382] In any case, this is not how the drafters of U.S. BITs defined the term. U.S. State Department officials both in connection with BITs and prior FCNs, repeatedly used "essential security interests" to refer to fundamental interests relating to defense or military concerns, usually involving exceptionally serious external threats to the

378 Enron Award, *supra* note 1, at Para. 331, Sempra Award, *supra* note 1, at Para. 373.

379 LG&E Decision on Liability, *supra* note 1, at Para. 228.

380 *U.S.–Argentina BIT*, articles II(2)(c), II(6), and X.

381 *Compare* Burke-White and von Staden, *supra* note 36, at 351, n. 195 (citing WTO commentators).

382 *Compare* Burke-White and von Staden, *supra* note 36, at 352 and n. 199 (citing WTO commentators but recognizing that "part" of this deference might stem from the "which it considers necessary" phrasing in GATT Article XXI).

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security of the United States.[383] It is also the meaning suggested by the ICJ's treatment of the same phrase ("essential security") in connection with the FCNs relied upon in the *Nicaragua* and *Oil Platforms Cases*.[384]

Indeed, just four years prior to the signing of the *U.S.–Argentina BIT*, State Department lawyers fended off attempts by the U.S. Congress to pass a statute that would have permitted the President to take divestment actions against foreign investors should these involve "essential commerce which affects national security."[385] As the legislative history of that effort demonstrates, this phrase was changed in the proposed legislation to "national security" in part because the broader original phrasing might prompt breaches of existing U.S. FCNs and BITs and provoke reciprocal actions against U.S. investors abroad.[386]

Accordingly, although we do not take issue with the findings in the *Argentine Gas Sector Cases* that *in principle* economic crises of a certain catastrophic dimension could pose the kind of internal ("public order") or external threats to the state contemplated by Article XI, we agree with the tribunals in *Enron* and *Sempra* that such an extreme economic crisis would be a rare event and that, given the purposes of the *U.S.–Argentina BIT*, we should not presume that economic crises as such would be embraced by Article XI. We also agree with the CMS, Enron, and Sempra tribunals when they suggest that successfully invoking necessity with respect to decisions taken in the economic realm and in respect to what appears to be an economic crisis is exceptionally difficult, if not impossible. Given the history of U.S. BITs and of the *U.S.–Argentina BIT* in particular this is entirely consistent with what such treaties demand and this is not merely because of the need to satisfy the "only means" test. It is because Article XI demands a causal nexus between the actions that a state claims that it needs to take that would otherwise be embraced by the BIT and threats encompassed by that Article.

On this interpretative issue, the customary exceptions to state responsibility are again instructive. As noted in Part III(C)(1), the triggers in Article XI and the traditional defenses of distress and necessity interrelate. As with respect to necessary measures to maintain pubic order, the defense of distress precludes state responsibility in cases where measures are taken to safeguard lives, as in situations of hostilities or open riot. As the ILC recognized, state responsibility is precluded "if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care."[387] As would be the case under Article XI of the BIT, distress requires cases of "extreme urgency involving elementary humanitarian considerations" and does not apply if the situation of distress "is due, either, alone in combination with other factors, to the conduct of the State invoking it."[388] None of the cases involving "distress" cited in the ILC's Commentaries involve voluntary actions taken by a state in order to stabilize its economy. It is no

383 *See generally*, Alvarez, *Exon-Florio*, *supra* note 245, *passim*.
384 *Nicaragua Case*, *supra* note 244, Para. 282; *Oil Platforms Case*, *supra* note 245, Paras. 43, 78.
385 *See* Alvarez, *Exon-FLorio*, *supra* note 246, at 76–7.
386 *Id*.
387 ILC Commentaries, *supra* note 299, Article 24, at 174.
388 ILC Commentaries, *supra* note 299, at 175.

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surprise why this is the case. It is difficult to see how distress, or the public order exception in Article XI, can be applicable in cases of voluntary or discretionary state action directed at solving perceived economic crises, typically emerging in circumstances implicating at least partly the conduct of the state suffering the crisis. With respect to necessity, the Commentary to Article 25 of the ILC's *Articles* states that this defense normally "involves a threat to the very existence of the state."[389]

The *Enron* and Sempra's dicta on this issue are justified because it is difficult to even conceive of an economic situation of such magnitude that would genuinely pose that kind of threat to a state *and* that would also require preventing payment of compensation to a foreign investor. Indeed, one of the prominent cases involving an attempt by a state to use necessity to avoid paying an economic debt cited in the ILC's Commentaries, the *Russian Indemnity* case, rejected the plea because the arbitrators found it implausible to conclude that the sums due "would have imperiled the existence of the Ottoman Empire or seriously endangered its internal or external situation."[390]

The quotation from the *Russian Indemnity* case raises doubts about the contrary rationale offered by the LG&E tribunal. In that case, as in the other Argentina cases, Argentina was not arguing that it could not afford to pay the alien investors due to its crisis, or that making such payments would endanger the Argentine state. Indeed, the LG&E tribunal had found that the Argentine crisis was over, at least by the time these decisions were rendered, and that the Argentina economy was growing at a steady clip. It does not appear that Argentina was suggesting that it could not afford to pay at the time any of these liability judgments were rendered. Its actual plea, partly accepted by the LG&E tribunal but rejected by the others, was that its crisis starting in 2001 precluded payment years later. The LG&E tribunal accepted this contention because it appeared to decide that Argentina's general Emergency Law (which included provisions that derogated from the assurances from the state benefiting the company in which LG&E had invested) was necessary to address, among other things, Argentina's essential interests. With all due respect, this was an inaccurate interpretation of the nexus demanded by Article XI.

Even assuming that the Argentine crisis of 2001 threatened Argentina's "essential security interests," what Article XI demands is a showing by the state that the specific measures it takes that would otherwise violate the BIT are, at the time they are taken, necessary to address those interests. This demands a nexus between the *threat posed to the state* and the *actual measures that violate investors' rights under the treaty*, and proof that those measures are directed at (that is, were "for") the threat.

The LG&E tribunal did not explain why the measures Argentina took were found to violate the BIT, that is, why those *specific measures*—including its elimination under the Emergency Law of the right to calculate tariffs in U.S. dollars or its adjustment of gas tariffs (which first occurred in early 2000)—were steps that were necessary to address a crisis that that tribunal itself determines began in December 2001. Its analysis in this regard is limited to a broad statement to the effect that the

389 ILC Commentaries, *supra* note 299, at 178.
390 ILC Commentaries, *supra* note 299, at 180.

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"Emergency law—was a necessary and legitimate measure."[391] This finding not only does not satisfy the degree of specificity—the nexus between means adopted and crisis asserted—required by Article XI, but also does not address all of the measures taken by Argentina that were being challenged in these cases. Indeed, that tribunal never explained the precise causal connection between Argentina's refusal to adjust tariffs, for example, and the underlying threats faced by that country.

Finding an "irreconcilable conflict"[392] between a state's essential security interests (or its needs for public order) and its obligations to alien investors is also difficult when the state's own pre-existing law would not recognize that such a conflict exists or would not excuse performance under the same facts. As discussed above (in Part II.C.3), this is precisely what was found by the CMS, Enron, and Sempra tribunals, all of which carefully considered and rejected Argentina's defense of necessity under Argentine law. (It is interesting to note that the one tribunal that did not consider whether Argentina's necessity defense would be accepted under its own law was LG&E.) Further, and also as discussed above (at Part II.C.3), the CMS, Enron, and Sempra tribunals found that the licenses themselves provided a means for addressing the crisis. The fact that Argentina opted for unilateral measures rather than the negotiated solution contained in those licenses clearly influenced their decisions as to the legality of Argentina's measures under its own law.

It is striking then that under the substantive legal rulings of the CMS, Enron, and Sempra tribunals regarding Argentine law (which were left undisturbed by the CMS Annulment Committee) the respective investors would have won their cases even if all that they had cited was Article X of the BIT, as that provision simply gives them the better of any rights accorded under the treaty *or* national law. It would appear strange indeed to suggest that an arbitral body should ignore this fact and apply a broader defense of necessity than is recognized in Argentina's own law because of Article XI. Quite apart from everything else, such a ruling would appear to reward a party that was violating not only its specific assurances to investors, the investors' settled expectations, but its own law.

E. And if necessary, what follows?

The LG&E tribunal found that because Article XI, and possibly the customary defense of necessity, had been properly invoked, Argentina was excused from paying compensation to the investor for the period during which the crisis endured. It is clear from the subsequent Damages Award that what the LG&E tribunal meant was that Argentina was permanently excused from compensating any injuries incurred during the crisis period, and not only that any obligation to compensate would be suspended but would re-emerge, intact, at the end of the crisis. The CMS Annulment Committee suggested that this was the proper interpretation of at least Article XI. As it put it, the question of compensation under the BIT if the measures taken by Argentina had been covered by Article XI was "clear enough: Article XI, if and for so long as it applied, excluded the

391 LG&E Decision on Liability, *supra* note 1, at Para. 240.

392 *See, e.g.*, ILC Commentaries, *supra* note 299, at 178.

operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period."[393]

With all due respect, this conclusion is not "clear enough." Even assuming that Article XI is, as the arbitrators in LG&E assumed, a clause that when properly invoked during a period of crisis excuses a state's financial liability during that crisis, it is not at all clear why this result follows when the clause is invoked by a state long after the crisis is over and there is *no* evidence that the failure to pay compensation remains "necessary." Neither LG&E nor the CMS Annulment Committee clearly explains why the plain meaning of Article XI, not to mention the rules of equity or fundamental fairness, leads to a conclusion that it remains "necessary" for a state not to pay compensation long after the end of the threat to its essential security.

But our argument here goes beyond the question of timing, that is, of when Article XI can be properly invoked. We contend that the most plausible interpretation of Article XI is the opposite of what the CMS Annulment Committee suggests: namely that neither that Article nor the customary defenses which underlie it permanently excuse a state invoking this exception from the duty to pay compensation that would otherwise be due under international law.[394] This is, of course, what the CMS, Enron, and Sempra tribunals found. This interpretation is supported by the text, object, and purpose and context of the *U.S.–Argentina BIT* and is consistent with customary international law.

Article XI is a "measures not precluded" clause. It is not—either in terms of its text or by design—comparable in its application to the *U.S.–Argentina BIT*'s "denial of benefits" clause at Article 1(2). The latter reserves the rights of treaty parties to deny the company of the other Party advantages of the treaty because a non-national of a state party owns the company in question. Neither is Article XI a termination clause, as is Article XIV. And neither is Article XI a clause setting out exceptions, as is contemplated by Article II, and effected in the Protocol to the BIT. As all those other provisions indicate, the BIT uses explicit language to render its benefits entirely inapplicable. The drafters of this treaty did not do the same when they came to Article XI. Article XI states merely that the BIT does not "preclude the *application* by either Party of certain measures (emphasis added) or, in Spanish, "no impedirá *la aplicación*" (would not impede the application). What this literally means is that when successfully invoked, the state can take action, or would not be stopped from taking action, that would otherwise be precluded by the BIT. It does not, unlike Article I(2), permit either party

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393 CMS Annulment, *supra* note 3, at Para. 146.

394 This view is supported by dicta of the Annulment Committee in *Mitchell* v. *DRC*, *supra* note 298, at Para. 57 (". . . even if the Arbitral Tribunal has examined Article X(1) of the Treaty. . . and if it had concluded that they were not wrongful, this would not necessarily have had any impact. . . on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation," citing Article 27, among other things) and Para. 59 ("even if it were assumed that the Arbitral Tribunal had examined Article X(1) and had agreed that the measures undertaken were not wrongful, this would not have ruled out the need for compensation"), as well as by dicta in *BG Group v. Argentina*, *supra* note 306, at Para. 409 (stating that "assuming that necessity were to justify some fair and non-discriminatory measures by Argentina, an obligation to compensate would still obtain by virtue of the BIT").

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to "deny" benefits; nor does it, unlike Article II, create an "exception" from application of the treaty; nor does it, unlike Article XIV, allow a party to "terminate" the treaty's benefits.[395] Seen in the context of the rest of the BIT, successful invocation of Article XI provides a state with an excuse, without proscribing the legal consequences of that excuse. Interpreting the clause as do the LG&E tribunal and the CMS Annulment Committee eliminates the significance of the difference in wording between these clauses. Accordingly, the plain meaning of the *U.S.–Argentina BIT* does not support the contention that Article XI is, as the CMS Annulment Committee, suggested *in dicta*, a "primary" rule, or an excuse that precludes compensation.

The CMS Annulment Committee's view of applicable compensation is also at odds with the object of this agreement, namely to protect the legitimate interests of alien investors. There is nothing in the *U.S.–Argentina BIT* that suggests that contrary to its object and purpose, foreign investors who cannot be blamed for the underlying economic crisis faced by the state should bear the costs of measures that states need to take to handle a crisis that, on the interpretation of the Article XI clause that the CMS Annulment Committee appears to favor, states themselves may have helped to cause. The LG&E and CMS Annulment Committee interpretation as to compensation is also at odds, more specifically, with the BIT's intent, made manifest in Article XIV(2) and (3), to protect the settled expectations of those who invest in reliance upon it. Finally, such an interpretation undercuts the value of other provisions in the BIT, such as Articles II(2)(a) and X, which specifically protect investors from violations of other rights, including under their investment agreements, customary international law, or national law.[396]

Of course, the CMS Annulment Committee's interpretation of Article XI as a primary rule that exempts a state from paying compensation since the investment rights of the BIT no longer apply stems from that Committee's erroneous view that Article XI is intended to derogate from the ordinarily relevant customary international rules—and presumably from the ordinary application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties which sanctions reliance on such rules.[397] As a number of international tribunals have affirmed, the ordinary application of the customary defense of necessity would not preclude payment of compensation.[398] This has been true from the first

395 *Compare BG Group v. Argentina*, *supra* note 306, at Para. 315, n. 326 (noting that compensation is not payable to the extent an exculpatory BIT provision "exonerates a party from liability").

396 As Kenneth Vandelvelde puts it, these clauses generally serve as an explicit choice of law clause in U.S. BITs making clear that "international law provides the governing rules of decision, except where national law is more favorable." Vandelvelde, *supra* note 214, at 78.

397 For an argument that LG&E's interpretation with respect to compensation itself ignores the traditional rule that important principles of customary international law should not be ignored in the absence of express words doing so, *see* Stephan W. Schill, *International Investment Law and the Host State's Power to Handle Economic Crises*, 24 J. Int'l Arb. 265, at 281–4 (2007).

398 *See, e.g.*, The *Gabcikovo-Nagymaros Dam Case*, *supra* note 245, at Para. 48 ("in any event, such state of necessity would not exempt it from its duty to compensate its partner") and Para. 57 (interpreting Article 27 of the ILC Articles to make it "clear that circumstances precluding wrongfulness do not as such affect the underlying obligation, so that if the circumstance no longer exists the obligation regains full force and effect").

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articulation of the notions of necessity and the need for self-preservation by Grotius.[399] As is suggested by the arbitral award rendered in the Russian Indemnity Case, one rationale for this rule may be that it is difficult to accept the proposition that payment of a debt would itself imperil the existence of a state.[400] This was not, however, a question addressed by the LG&E arbitrators. They inexplicably treated the defense of necessity as an exculpatory defense, even when applying it to an intrinsically transient or temporary phenomenon that was, by that tribunal's own admission, over at the time that tribunal rendered its decision.

Nor is the case that the interpretation given by the LG&E tribunal or by the CMS Annulment Committee is necessary to give Article XI meaning. There are many reaons—apart from depriving injured investors compensation to which they would otherwise be entitled—for the United States to insert a measures-not-precluded clause that takes the form of Article XI.

First, such a clause permits state parties to distinguish legal from illegal actions. A state that is able to invoke such a clause successfully—that can show for example, that it took the only means necessary to respond to its essential security interest—would not have acted wrongfully. Such a determination may prove important when it comes to determining liability, as is clear from numerous cases addressing the measure of damages for legal versus illegal expropriations, for example.[401] Of course, comparable provisions that enable otherwise unlawful action to be taken, but that do not preclude the responsibility to pay compensation when such action is taken, are not uncommon in either national or international law.[402] That possibility is foreseen by the customary defenses of *force majeure*, distress and necessity. Quite apart from the potential impact on the measure of damages, making such distinctions may be otherwise important to states since such determinations have expressive value and impact on their reputations for adhering to their promises.[403]

399 Thus, Grotius wrote that "nothing short of extreme exigency can give one power a right over what belongs to another no way involved in the war," that "even where the emergency can be plainly proved, nothing can justify . . . taking or applying the property of [the neutral power], beyond the immediate demands of that emergency;" and that when the emergency ceases, the property had to be returned to the neutral state and "full value should be paid." Luzi, *supra* note 284, at 166 (quoting Grotius' The Rights of War and Peace at 377).

400 *See* Russian Indemnity Case (Russ. v. Turk.*)*, 11 R. Int'l Arb. Awards 421 (Perm. Ct. Arb. 1910).

401 *See generally*, R. Doah Bishop et al., Foreign Investment Disputes, at 1305–25 (2005) (summarizing cases that distinguish legal from illegal takings for purposes of calculation of damages). *See also* Bjorklund, *supra* note 281, at 53. As noted above, *supra* at text accompanying notes 184 to 185, the LG&E tribunal rejected the fair market value as the appropriate measure of compensation for breach of the fair and equitable treatment standard and the umbrella clause, including because the measure of damages for wrongful acts should be different from that for compensation for lawful expropriation.

402 *See, e.g.*, Trevor Morrison, *Suspension and the Extrajudicial Constitution*, 107 Colum. L. Rev 1533 (2007) (discussing the historical evidence supporting such a distinction in the context of action taken by Congress to strip habeas protections).

403 *See, e.g.*, Bjorklund, *supra* note 281, at 53 (pointing that determinations of wrongful behavior could also have an impact on a state's access to credit).

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Second, in particular in the context of a rare economic crisis that satisfies the requirements of Article 25 of the *ILC Articles*, a measures-not-precluded clause could permit a state facing a problem of liquidity to *defer* its financial obligations under the BIT, thereby averting a worsening of the state's financial situation without permanently depriving an investor of eventual compensation.

Third, as is suggested by the negotiating history of the *U.S.–Argentina BIT* itself as well as relevant scholarship on the history of that the BIT's NPM clause, Article XI was intended to, among other things, recognize the power of the U.S. executive to take action pursuant to such statutes as the *International Emergency Economic Powers Act* (the IEEPA), under which the President can take certain economic actions for purposes of national security.[404]

Fourth, on our interpretation a successful invocation of Article XI prevents treaty parties from demanding that one of them take certain specific actions (such as the issuance of an export license to an enemy state during wartime). On its terms, that Article precludes claims for specific performance or the issuance of the equivalent of interim protective measures or provisional measures requiring the taking of certain forms of state action, but does not preclude monetary liability that may otherwise arise under the BIT. Although it is true that arbitral decisions in investor-state disputes usually only concern claims for damages, the ISCID Convention itself permits arbitrators to "recommend" provisional measures unless the parties indicate otherwise.[405] Absent a clause like Article XI or other equivalent, there is no reason why an investor under a BIT could not claim, in an appropriate context and depending on the arbitral rules that govern the proceeding, the equivalent of interim measures of protection.

It is also important to recall that Article XI is a general BIT provision. It applies to the entire treaty and not merely investor-state arbitration. Its preclusion of some kinds of relief within its delimited scope may prove necessary should the BIT be invoked in national court or other national venues that may be otherwise empowered to issue injunctive relief against a state. That clause may be invoked as well in the course of state-to-state dispute settlement anticipated in Article VIII of the *U.S.–Argentina BIT* or in the less public, less formal diplomatic representations that treaty parties may

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404 Article XI permits IEEPA actions to be taken despite the BIT. But IEEPA does not, by its terms, enable the President to violate with impunity the acquired rights of those injured by Presidential emergency action. As suggested in a footnote in the Supreme Court's *Dames & Moore* decision interpreting the President's foreign affairs and national security powers, it remains an open question, for example, whether Presidential action directed at resolving something as grave as the Iran Hostage crisis could nonetheless trigger compensation under the U.S. Constitution's takings clause. Dames & Moore v. Regan, 453 U.S. 654, at 688–9, n. 14 (1981) (expressing no opinion about whether compelling the petitioners to go to the Iran–U.S. Claims Tribunal would constitute a "taking" of property).

405 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), 17 U.S.T. 1270, 575 U.N.T.S. 159, entered into force October 16, 1966, at Article 47. Precluding such measures against state action appears consistent with few arbitral decisions that have addressed the point. *See, e.g.*, Bishop, et al., *supra* note 401, at 389 (excerpt from the *Holiday Inn Case* which relied on the ISCID Convention's negotiating history for the conclusion that provisional measures against a state require "compelling reasons" or an "exceptional case").

engage in as between themselves whenever a sufficiently important treaty interpretation question arises. In all these contexts, it is important for BIT parties to be able to rely on a clause that, though it does not permanently absolve a state of financial liability to an injured investor that is otherwise due under the treaty, nonetheless permits them to take emergency actions without protest or other attempts to stop state actions.

As all this suggests, a NPM clause such as Article XI whose application nonetheless protects the vested financial rights of investors and does not provide a host state with a windfall or unduly penalize foreign investors is not superfluous. On the contrary such a clause—that affects whether an action is wrongful, may permit reasonable delay in the payment of compensation, gives effect to national law, and precludes claims for specific performance but does not otherwise permanently deprive investors of their right to eventual compensation especially after the state's economic crisis is over—is most consistent with customary international law, including but not only the traditional rules of state responsibility to aliens that the *U.S.–Argentina BIT* intended to affirm and enforce. Just as Article XI ought not to be seen as *lex specialis* when it comes to the applicable customary law with respect to excuses from treaty breach (see Part III(C)(1) above), it ought not be seen as *lex specialis* when it comes to the customary law dealing with the consequences of treaty breach.

For these reasons, the CMS, Enron, and Sempra tribunals properly suggested, *in dicta*, that the traditional rule, codified at Article 27(b) of the ILC's Articles on State Responsibility, continues to apply. They were quite correct to suggest that any invocation of necessity (as well as of *force majeure* and distress) whether under Article XI or customary law should be "without prejudice to . . . the question of compensation for any material loss caused by the act in question."[406]

IV. CONCLUSION: DO THE *ARGENTINE GAS SECTOR CASES* SUGGEST THAT THE INVESTMENT REGIME HAS NO HEART?

We could not agree more with Burke-White and von Staden when they assert that the interpretation of the *U.S.–Argentina BIT* and its Article XI must be faithful to the rules of treaty interpretation contained in the *Vienna Convention on the Law of Treaties*, including the requirement that treaties be interpreted "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."[407] As we argue in Part III, we believe that the most faithful interpretation of the traditional rules of treaty interpretation lead to the conclusions reached by the original CMS arbitral panel and the *Enron* and *Sempra* tribunals.

In Part III we argue that the text, object and purpose, context, and negotiating history of that treaty shows that the *U.S.–Argentina BIT* was intended by both parties to address investment disputes that emerge most acutely in times of economic crises,

406 CMS Award, *supra* note 1, at Para. 383; Enron Award, *supra* note 1, at Para. 344; Sempra Award, *supra* note 1, at Para. 393.

407 *See* Vienna Convention, *supra* note 35, Article 31(1).

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when host governments are tempted, for financial or political reasons, to disfavor the interests of foreign investors, including by expropriating their assets or breaching contractual guarantees. The *U.S.–Argentina BIT* should be interpreted in light of the well-known correlations between economic woes and the accompanying potential threats to foreign investments that inspired the content of that agreement (and the 1987 Model BIT which it tracks). That treaty, like the Model BIT on which it was based, is designed in part to remove the temptation to declare an economic emergency and take advantage of investors' proprietary interests at a dire time. Consistent with that treaty's plain meaning and object and purpose and the contemporaneous statements of high Argentine and U.S. government officials, it was this type of "political risk" that the treaty was intended to address, the better to promote mutual flows of foreign investment. The *U.S.–Argentina BIT* contains a relinquishment by both sides of the ability to rectify their economic situation in times of trouble by revoking the legal protections granted to foreign investors. By adhering to the BIT, Argentina traded the right to use this tool in exchange for stability of investment expectations. This bargain benefited Argentina by according to its government a potent legal excuse with which to deflect political pressures—whether by domestic firms seeking protectionist measures or by the U.S. government in espousing the claims of its investors. The stability that the treaty promised was, in part, what brought investors such as LG&E, CMS, Enron, and Sempra to its shores.

As our overview of the relevant decisions in Part II indicates, most of the arbitrators in the *Argentine Gas Sector Cases* rightly found that it would be a gross re-working of the bargain struck in that treaty if Argentina were permitted to claim that it was "necessary" for it to derogate from the rights it guaranteed foreign investors under its own law, customary international law, and the BIT. Most of the arbitrators rightly found that Article XI, like every other provision of the BIT, did not remove their competence to apply its terms but, on the contrary, anticipated careful scrutiny, by an impartial third party, to determine whether particular measures taken by Argentina violated the treaty or were excused by necessity. All the arbitrators accordingly rejected the claim that Article XI was "self-judging." All of them, with the possible exception of those hearing LG&E's complaint, also properly rejected the contention that this provision was otherwise subject to a special deferential standard and burden of proof never suggested by the treaty itself. Most correctly found that the requisites of necessity, applicable under Article XI as informed by customary law, were not satisfied and most therefore determined that Argentina owed the investors damages, including for injuries suffered over the course of Argentina's crisis.

The conclusions that we reach in Parts III(A), (B), (C)(1) and (2), and (D), each stand on their own. Although we believe that all derive from a proper application of the traditional rules of treaty interpretation, those who disagree with some of our conclusions may still agree with the decisions rendered in the CMS Award and in *Enron* and Sempra. Assuming Article XI is not self-judging and someone other than an interested party is capable of interpreting its terms, Argentina would not have been able to invoke the provisions of that Article to preclude its liability under the *U.S.–Argentina BIT* (1) if Article XI is read as consistent with the customary defense of necessity; (2) even assuming Article XI is a distinct *lex specialis* defense, if Argentina nevertheless failed to prove that the measures that it took were "necessary" for dealing with

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its "essential security interests" or to maintain "public order" in accordance with Article XI; *or* (3) even if Argentina had successfully invoked either the customary defense of necessity or Article XI, this does not absolve Argentina from compensating investors who prove a violation of the BIT under the normal operation of customary international law.[408] Further, even those who agree with the proposition that a successful invocation of Article XI would have made the obligations of the BIT ineffective, may nonetheless disagree with the conclusion in LG&E that Article XI can still be successfully invoked once a state is no longer faced with the threats contemplated by that clause.

But our goals here are not limited to defending the particular outcome in these cases or critiquing some of the contrary views expressed by the LG&E arbitrators and the CMS Annulment Committee. As we indicate in our Overview in Part I, the *Argentine Gas Sector Cases* feature prominently in broader ongoing critiques of the investment regime. In the remaining part of this conclusion we question the merits of some of the suggestions now being made for addressing these concerns as well as the underlying focus on establishing consistent investment law. Thereafter, we draw some tentative lessons about the investment regime's more genuine legitimacy deficits.

The criticisms of the investment regime canvassed in our Overview are often provocatively made. It has been suggested: that recourse to investor-state arbitration, whether in BITs or Chapter Eleven of the NAFTA, constitutes an "undemocratic delegation" of authority to "unaccountable" bodies, thereby trumping the freedom of action of national law-making authorities;[409] that investor-state arbitration is displacing the gunboat diplomacy of old with "gunboat-arbitration"[410] or that such arbitral tribunals are "businessmens' courts;"[411] that international investment law threatens to become "privilege law for foreigners;"[412] that the arbitral outcomes (such as those we defend in Part III) are "affronts to sovereignty" and threaten the right of states to self-preservation;[413] that what investment treaties compel governments like Argentina to do threatens their ability to protect their citizens' rights to equality, life, liberty, and security of the person;[414] or that investment treaties, far from promoting the rule of law and

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408 *See, e.g.*, Schill, *supra* note 396, at 282 (arguing that even if Article XI and the customary defense of necessity are distinct defenses as is suggested by the CMS Annulment Committee, the subsidiary application of customary international law requiring payment of damages nonetheless applies).

409 *See, e.g.*, Public Citizen, *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994–2005*, (February 2005), *at* http://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf. *See also* Jeffrey Atik, *Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques*, 3 Asper Rev. Int' L Bus. & trade L. 215, at 218–220 (2003).

410 *See, e.g.*, Montt, *supra* note 22, at 80.

411 Van Harten, *supra* note 12, at 153 (title for his Chapter 7).

412 Montt, *supra* note 22, at 80.

413 Bottini, *supra* note 298, at 145.

414 *See, e.g.*, Craig Forcese, *Does the Sky Fall?: NAFTA Chapter 11 dispute Settlement and Democratic Accountability*, 14 Mich. St. J. Int'l L. 315, at 321–22 (citing applicants in Council of Canadians v. Canada (Attorney General), [2005] O.J. No. 3422 (O.S.C.J. July 8, 2005)).

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democratic governance, create legal enclaves that *discourage* generalized rule of law reforms in developing countries and in fact “retard the development of certain regulatory initiatives that are the hallmarks of the mature social welfare state.”[415]

We find it striking that given these provocations, most academic commentaries on the investment regime have chosen to focus on only the most lawyerly of concerns—namely whether the regime (or the *Argentine Gas Sector Cases*) threatens the uniformity of international law or international investment law through the production of inconsistent arbitral decisions.

We draw very different lessons from the *Argentine Gas Sector Cases*. Although we agree that these cases trigger significant questions about the legitimacy of the investment regime, we question the prevailing remedies being urged to address this problem; indeed, we are not so sure that the risk of inconsistent arbitral awards is worth the attention now devoted to it.

Like many others, Burke-White and von Staden emphasize the inconsistency of the rulings rendered in the course of the *Argentine Gas Sector Cases*. Their remedy is to suggest common interpretative principles that would render the future interpretations of NPM clauses more predictable and uniform. To this end, they draw connections among those investment agreements that contain NPM clauses that they claim are similar to Article XI of the *U.S.–Argentina BIT*.

Closer examination of the examples they cite reveals that relevant comparisons among such clauses are dubious, however. Even those “measures not precluded” clauses that they compare to Article XI, such as Article 3 of the Belgium-Luxembourg Economic Union, are actually starkly different.[416] Indeed, that provision lacks any language approximating the “measures not precluded” wording of Article XI. Some of the provisions that they cite are more comparable to U.S. BIT provisions protecting parties from regulatory formalities that do not otherwise impair the investors’ protections.[417] Many of these clauses are subject to some other substantive provision of the

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See also suggestions to the same effect made by the Office of the High Commissioner of Human Rights in Human Rights, Trade and Investment, E/CN.4/Sub.2/2003/9 at 17 (2003).

415 Andrew Newcombe, *Sustainable Development and Investment Treaty Law*, J. World Investment & Trade, 357, at 394 (citing work by R. J. Daniels). *See also* Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 Int’l Rev. L. & Econ. 107 (2005) (arguing that the spread of investment agreements permitting powerful players to bypass national courts may help to explain the intractability of LDC’s efforts to improve such courts).

416 Burke-White and von Staden, *supra* note 36, at 328. Article 3 provides: “Except for measures required to maintain public order, such investment shall enjoy continuous protection and security, i.e., excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof.”

417 *Compare* Articles III and V(3) of the *U.S.–Argentina BIT* to the NPM clause in the Belgium-Uganda BIT (cited by Burke-White and von Staden, *supra* note 36, at 328): “Except for measures required to maintain public order, such investments shall enjoy continuous protection and security, i.e., excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof.” *See also* Rose-Ackerman and Billa, *supra* note 252, at 451–6 (surveying diverse treaty exceptions and concluding that “there is simply no such thing as “the” national security exception”).

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relevant investment treaty before they can be invoked by a state party (and are therefore narrower than Article XI at least to this extent); some are cast only as limitations on the meaning of MFN guarantees, whereas others indicate that even those measures ostensibly not precluded nonetheless need to be applied on a "non-discriminatory" basis.[418] Others include triggering mechanisms absent from Article XI, permitting states to take measures because of a "national emergency" or to protect "public health" or "public morals."[419] Some replace the phrase "necessary for" with other looser formulations such as "directed to" or "in the interests of."[420] Of course, as even these authors acknowledge, common interpretative principles of interpreting NPM clauses (even assuming these were possible) will not produce harmonious results with respect to the nine out of ten investment agreements that contain no NPM clause at all.[421]

Differences among the NPM clauses of even those investment agreements that have such clauses, as well as differences in the agreements in which such clauses appear, render Burke-White's and von Staden's otherwise impressive prescriptive effort, which includes a flow chart of how NPM clauses ought to be interpreted,[422] a highly academic and impracticable exercise. How should their common interpretative principles apply with respect to NPM clauses that appear in investment agreements that, unlike the *U.S.–Argentina BIT*, do not include distinct "denial of benefits" or termination clauses that differ from the wording of their "measures not precluded" clauses? How does one square their common principles with the undeniable fact that investment treaties differ with respect to their respective negotiating histories or the respective FDI-related histories of their respective parties? As the evidence presented in the *Argentine Gas Sector Cases* concerning the changes to the "measures not precluded" clauses made by the United States since conclusion of the *U.S.–Argentina BIT* indicate, even a single state's view of what an investment protection treaty means may evolve over time. (Of course such evolving views with respect to other treaties with other treaty partners have no necessary bearing on the meaning of a particular treaty when that agreement was concluded.) The differences among investment agreements and with respect to the texts of their NPM clauses matter a great deal when it comes to interpreting treaties that are typically only between two parties, express a particular bargain struck at a particular moment in time, are intended to benefit third-party beneficiaries who are induced to incur considerable sunk costs in reliance upon that bargain, and may, as the *U.S.–Argentina BIT* does, preclude their respective signatories from undermining the rights of those who relied on their agreement for as much as twenty years.[423]

For all these reasons, Burke-White's and von Staden's well-intentioned attempt to find common rules for disparate "NPM" clauses seeking different things within agreements that, at least to some extent, may be motivated by differing concerns, is likely to prove futile at best, and inappropriate and inconsistent with the *Vienna Convention*

418 *See* clause in India–United Kingdom BIT, cited by Burke-White and von Staden, *id.* at 328.
419 *See* clause in the 2004 Canadian Model BIT, cited at *id.* at 329.
420 *See id.* at 330.
421 *Id.* at 313 (estimating that of 2,000 BITs in force, NPM clauses appear in some 200).
422 Burke-White and von Staden, *supra* note 36, at 320–4.
423 *See U.S.–Argentina BIT*, Article. XIV (1) and (3).

at worst. Consider, as an example, Burke-White and von Staden's efforts to promote their "good faith" interpretative standard for NPM clauses generally. One would think that this effort would prove most valuable with respect to those treaties, such as some of those concluded by the United States after the conclusion of the *U.S.–Argentina BIT* which contain the "which it considers" self-judging language. But the problem is that, as the evidence presented in the *Argentine Gas Sector Cases* reveals, even the United States appears not to have been consistent in how it has sought to make its NPM clauses "self-judging."[424] Specific language in the United States–Peru Free Trade Agreement of 2006, to cite but one example, strongly suggests that the NPM clause in that treaty (but perhaps not other U.S. investment agreements?) renders its invocation an entirely unreviewable matter *not subject* to any "good faith" gloss.[425] Under the circumstances it is difficult to see how meaningful generalizations can be made about all the NPM clauses that appear even in a subset of the most recent U.S. investment agreements.[426]

The *Argentine Gas Sector Cases* provide a lesson in the difficulties of attempting to lessen the internal fragmentation of investment law (or for that matter for lessening the divide between that law and the rest of international law) in the absence of a single overarching agreement governing all parties and a single unified dispute settlement system. The existence of both in the WTO regime, by contrast, makes such efforts more plausible for that regime. With respect to the increasingly nuanced interpretative issues being presented in the over 200 ongoing investment disputes now being heard around the world—such as those in the *Argentine Gas Sector Cases*—there is no substitute for engaging in close textual analysis of the particular investment treaty at issue.

As indicated in Part III, general customary international law may often prove invaluable to interpreting a particular BIT. It may also be appropriate to interpret a particular treaty, such as the *U.S.–Argentina BIT*, by considering what we know of the Model BIT program that gave rise to it. In some cases, these references may serve to promote more consistent interpretations of *some* investment agreements.We have argued here that it is entirely appropriate to interpret the *U.S.–Argentina BIT* in light of the extensive public record about prior U.S. FCNs and the evolution of the U.S. BIT and the Model text replicated in the *U.S.–Argentina BIT* because these materials appear to reflect the mutual intentions of the United States and Argentina, as well as the object and purpose of their treaty. We have also argued that it is fully consistent with what we know of this treaty to read its terms in light of the customary international law that the parties explicitly or implicitly intended to incorporate. But we have also argued that, in

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424 *See* text and accompanying notes to 256–62 (discussing different NPM clauses in U.S. investment agreements).

425 The 2006 Peru–U.S. Free Trade Agreement includes a measures non precluded clause, Article 22.2, which is like the one in the United States 2004 Model BIT (which makes a state's invocation of "essential security interests" self-judging). A footnote to that provision states: "[f]or greater certainty, if a Party invokes [the measures non precluded clause] in an arbitral proceeding . . . the tribunal or panel hearing the matter shall find that the exception applies." For text *see* http://www.ustr.gov/trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html.

426 *Compare* Burke-White and Von Staden, *supra* note 36, at 320–4. This renders these authors' impressive prescriptive efforts, such as a flow chart of how "NPM" clauses ought to be interpreted, highly academic and (sadly) impracticable. *Id.* at 65.

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the end, references to such external sources must be earned—in accordance with the traditional rules of treaty interpretation and accepted canons of interpretation. They must be based on the plain meaning of the particular investment agreement being relied upon: *its* text, *its* object and purpose, *its* context, and *its* negotiating history.

Accordingly, we are not sanguine about the prospects that a second proposal for lessening the investment regime's fragmentation—greater recourse to the background rules of public international law—can actually accomplish its stated goal. Campbell McLachlan, among others, is surely correct to suggest that one way of addressing the risk of inconsistent arbitral awards in the investment regime is to turn to Article 31(3)(c) of the Vienna Convention on the Law of Treaties. He argues that this provision, authorizing recourse to "relevant rules of international law," is a valuable tool of "systematic integration" for investment law.[427] We agree with him that where there is universal agreement about the content of these "relevant rules," as there appears to be today with respect to the customary international law defense of necessity, reliance on such backdrop rules could lessen the inconsistencies among investment treaties and between such treaties and other international law regimes. At the same time, as is suggested by the different conclusions reached among the arbitrators considering the *Argentine Gas Sector Cases*, international lawyers appear to disagree about when such rules are "relevant," or when such rules yield to *lex specialis*.[428] They may also disagree more often than they agree about whether such "rules" truly exist or, if they do, about the content of such rules. Most rules of custom or general principles of law have not, after all, been codified in convenient black letter form—as have the Articles of State Responsibility. And MacLachlin's tool of systematic integration will not be of much use when confronted with obvious discrepancies among the texts of investment treaties, including stark differences among their NPM clauses.

Other would-be reformers of the investment regime also appear to assume that the legitimacy problems of the regime would dissipate if its arbitrators just managed to get the law right; they just emphasize the need to get better arbitrators. Accordingly, some have argued that what the regime needs most is a single Appellate Body along the model of the WTO's Appellate Body, consisting of a group of eminent permanent judges duly representative of the international community that would make sense of the disparate rulings in the *Argentine Gas Sector Cases* and produce consistent jurisprudence over time.[429] The assumption appears to be that the common guarantees these agreements contain lack only a permanent body of diligent, objective judges to yield harmonious law and that such consistency will itself lend the regime the legitimacy and coherence that it so far lacks.[430] It is argued that once such an appellate mechanism

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427 *See* Campbell McLachlan, *The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention*, 54 ICLQ 279 (2005).

428 *Compare* our views here to those of Campbell McLachlan, *supra* note 279, at 385–91(arguing that Article XI of the *U.S.–Argentina BIT* was clearly *lex specialis*).

429 *See, e.g.*, Van Harten, *supra* note 12, at 180–4. For a discussion of this issue, *see* Appeals Mechanisms in International Investment Disputes (Karl P. Sauvant ed. 2008).

430 *See, e.g.*, Susan D. Francks, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev 1521 (2005).

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is in place, it would be but a short step to the formulation of a "Statement of International Investment Law Principles" to rival those now being drafted by the American Law Institute (ALI) for the WTO regime.[431]

As our discussion of the differences among investment treaties implies, we are skeptical that consistent rulings will emerge even with a single body of judges if these judges are applying an array of treaties. Those who argue for an appellate mechanism for BITs, as under the auspices of ICSID, need to temper their expectations of what that body can achieve. If the differences with respect to "measures not precluded" clauses are indicative of the subtle but crucial differences in wording and intent among international investment agreements, even a single Appellate Body will not achieve the harmonious body of law that some of its advocates expect.

In fact, it is unclear that there really is as great an inconsistency problem as some contend, whether raised by the *Argentine Gas Sector Cases* or otherwise. Further, those who seek consistency for its own sake need to be more precise about what it is that they are worried about.

Despite the fact that investor-state arbitrators are reviewing different agreements and are doing so under differing procedural rules or institutions (including ISCID, its Additional Facility and UNCITRAL) and with differing mechanisms for annulment or review of initial awards, there is a surprising degree of uniformity among the published decisions issued to date, including with respect to the interpretation of such vague injunctions as those requiring "fair and equitable treatment" or payment of compensation after an "indirect" expropriation.[432]

Closer scrutiny of the *Argentine Gas Sector Cases* does not demonstrate that the investment regime really faces a grave legitimacy crisis because of inconsistent interpretations of the same investment agreement. As our Part II makes clear, the *Argentine Gas Sector Cases*, for all their differences, reach many strikingly similar legal conclusions. All the decisions affirm liability under the treaty's assurance of "fair and equitable treatment." All reject, on the basis of similar rationales, most of the other claims that these investors asserted based on other provisions in the BIT. And, for all the criticism of the CMS award by the CMS Annulment Committee, those arbitrators left the bulk of the CMS rulings undisturbed. Although there are differences among these tribunals on the meaning of the treaty's umbrella clause and Article XI, there is considerable common ground with respect to how even these contentions are addressed and the underlying factors that need to be considered. And at least some of the differences in the remedies accorded in these cases, including with respect to the applicability of Argentina's defense of necessity and ultimate determination of damages, may turn on understandable differences among these cases in terms of how the relevant facts were presented in each and by whom. Although the damages awarded to LG&E are substantially lower than those awarded to the other claimants, as noted above, that tribunal left open the possibility of future ICSID proceedings for further damages for continuing breach by Argentina, which at least notionally could

431 *See, e.g.*, Thomas Wälde's chapter 12 in this volume.

432 *See generally*, Ratner, *supra* note 344.

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make up the difference.[433] Further, and as also noted above, the difference of views on Article XI accounted for a relatively small portion of the difference in compensation in the LG&E award.[434] Of course, we should also acknowledge that there remain many pending cases against Argentina yet to be decided, as well as pending claims for annulment in the *Enron* and *Sempra* Cases. Under the circumstances, it seems premature to proclaim a legitimacy crisis on the basis of inconsistent legal outcomes in the *Argentine Gas Sector Cases*.

The relatively small, relevant epistemic community that hears these disputes appears, in the normal course, ready to consider the views of prior tribunals who have heard similar claims. As in the WTO, there seems to be a remarkable degree of respect for prior arbritial decisions among investor-state arbitrators,[435] even though they operate, unlike WTO adjudicators, largely without a permanent legal secretariat to call attention to relevant prior case law or to assist them in drafting their opinions.[436]

Further, to the extent different results arising under comparable facts under comparable treaties emerge within the investment regime, plausible explanations for these differences exist precisely because the underlying dispute settlement mechanisms, rules, and processes involved differ depending on whether the dispute was heard before ICSID, its Additional Facility, or under the UNCITRAL rules.[437] As seems clear from the experience of international human rights lawyers, the legitimacy of human rights law is not necessarily undermined merely because differing regional courts or UN committees reach distinct rulings with respect to comparable rights. International lawyers and states have long lived with differing results produced by bilateral treaties. That such results may also emerge, despite the operation and effects of most-favored nation clauses, even within a network of similar, but far from identical, investment agreements, should not be *in itself* a source of great concern.

More worrying is the prospect suggested by the *Argentine Gas Sector Cases*, namely that the *same treaty* (or the same underlying relevant rule of international law) might be the subject of differing legal interpretations by different ad hoc tribunals, particularly when these decisions are directed at the same state. It would be understandably politically difficult for Argentine government officials to explain to the Argentine public why millions are owed to one public utility owned by U.S. investors under international law but another utility, also owned by U.S. investors and operating under the same law, is owed substantially less. Inconsistency becomes more of a legitimacy concern when the same underlying obligations are being interpreted with different results.

433 LG&E Damages Award, *supra* note 2, at Para. 96 (anticipating the posibility of "periodic additional relief").

434 *See supra* at Part II(C)(4).

435 The LG &E tribunal departed from this tradition by failing to cite, never mind distinguish, the prior CMS award.

436 This may yet change should, for example, ICSID alter its mode of operation and attempt to use its legal staff to assist investor-state arbitrators in more substantive ways than has occurred to date.

437 Ratner accounts for many of the apparent differences in the results reached by U.S. agencies under OPIC insurance from those reached under ICSID dispute settlement on the basis of differences among those institutions and their goals. Ratner, *supra* note 344, at 489–93.

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To the extent that such inconsistent results are really a persistent problem under the investment regime and not a rare event, it may indeed be proper to consider remedies, such as those suggested by those urging generalizable principles of investment law (at least to the extent consistent provisions in investment agreements exist), greater recourse to relevant background principles of international law, or even establishment of an Appellate Body. (But we might also consider other ways to ameliorate such problems, such as greater recourse to provisions like those under the NAFTA's Chapter Eleven enabling the state parties to issue binding joint interpretations of their agreement or, as under the NAFTA, permitting arbitrators to consolidate a number of claims directed at the same state party.)[438]

Critics are nonetheless correct to express some concern about differences of legal interpretation—as with respect to whether Article XI of the *U.S.–Argentina BIT* is or is not *lex specialis*. The investment regime is not, after all, like the United States' federal system in which the experimentalism of lower federal and state courts is tempered by the prospect of resort to a hierarchically superior ultimate decider. Inconsistent or erroneous interpretations of the *U.S.–Argentina BIT* are not self-correcting. The ICSID annulment system is not intended to be an appellate mechanism designed to correct mistakes of law.[439] (On the other hand, even the ICSID annulment system can, as is suggested by the *dicta* by the CMS Annulment Committee, generate attempts (even if erroneous) to provide guidance to other arbitrators considering comparable claims.) Yet the more general lesson of the *Argentine Gas Sector Cases* is that those who seek legitimacy through consistency should focus, more particularly, not on consistency of result but on consistency of reasoning.[440] We should be seeking consistent reasoning for different results. Our article, although limited to seeking the best interpretation of one clause in a particular investment agreement, is one such attempt.

At the same time, we are not convinced by those who suggest that neither structural nor interpretative reforms may be needed. The eminent international lawyer Brigitte Stern

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438 *See* NAFTA, Article 1131(2)(providing that interpretations issued by the NAFTA parties acting as the Free Trade Commission shall be binding for purposes of investor-state arbitrations); article 1126 (providing for the consolidation of claims). Of course, other structural changes could lessen the chances of inconsistent awards by reducing the numbers of published awards, as is likely under ICSID's new rule permitting expedited dismissal of claims that are "manifestly without merit." ICSID, ICSID Convention, Regulations and Rules: rules of Procedure for Conciliation Proceedings, R. 41(5) (2006), *at* http://www.worldbank.org/icsid/basicdoc/basicdoc.htm. *See also* Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 Fordham Int'l L.J 138 (2007) (suggesting mediation in lieu of litigation or arbitration).

439 Under the ICSID Convention, annulment committees can only consider whether the tribunal below was improperly constituted, manifestly exceeded its powers, was corrupt, engaged in a serious departure from fundamental rules of procedure, or failed to state the reasons for its award. ICSID Convention, Article 52(1).

440 For this reason, we are far more alarmed by the *dicta* in Continental Casualty and Argentina, *see supra* note 332 (suggesting the Article XI of the U.S.–Argentina BIT needs to be read in light of GATT or WTO case law relating to the meaning of Article XX of the GATT and not the customary international law defense of necessity).

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suggests that the investment regime is merely suffering a "*crise de croissance*" ("growing pains") and that over time, even in the absence of an appellate body or agreement on common interpretative principles, its arbitrators will produce in the course of deciding ad hoc disputes an informal body of precedent grounded in viable "compromises between the divergent interests of the stakeholders in the system."[441] The implication is that arbitrators in investor-state cases will be able to interpret agreements such as the *U.S.–Argentina BIT* to strike a better balance between the needs of the market and the needs of sovereigns to protect the rights of their peoples and promote "sustainable economic development"[442]—as did the WTO Appellate Body in its Shrimp-Turtle decision.[443]

The *Argentine Gas Sector Cases* suggest, on the one hand, that Stern's optimism is unwarranted. Consider Stern's reliance on the preamble to the *U.S.–Argentina BIT*. Stern cites that treaty's preamble in support of her argument that, over time, interpretations of this treaty will yield interpretations that are more respectful of sovereign concerns than those issued to date. She relies on the preamble's references to "greater economic cooperation," "economic development," "effective use of economic resources," the "well-being of workers," and "respect for internationally respected recognized worker rights."[444] She suggests that such language could lead to interpretative presumptions reminiscent of those urged by Burke-White and von Staden and their analogies to the WTO's case law, namely interpretations that resolve ambiguity "in favor of state sovereignty."[445]

Stern's arguments are hard to sustain with respect to the preamble of the *U.S.–Argentina BIT*. All the phrases that Stern cites are not self-standing goals in its preamble. On the contrary, all are stated as possible outcomes if the object and purpose of the treaty—to protect foreign investments—is given effect. The preamble expresses the hope that the protection of foreign investors will promote greater economic cooperation and economic development, give rise to effective use of economic resources, and contribute to the well-being of workers and respect for worker rights. This cautious preamblar phrasing reflects our description (in Part III (A)) of how this particular treaty was promoted and negotiated by the United States, i.e., not as a guarantee that foreign investment will flow or that these outcomes will be achieved, but rather as seeking only

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441 Brigitte Stern, *The Future of International Investment Law: a balance between the protection of investors and the States' capacity to regulate*, *in* THE FUTURE OF INTERNATIONAL LAW AND POLICY (José E. Alvarez et al. eds. forthcoming).

442 Stern, *supra* note 441.

443 Burke-White and von Staden also rely on WTO case law to similar effect. *See* Burke-White and von Staden, *supra* note 36, at 346–7, 361–3; 365–6.

444 Stern, *supra* note 441. Many other scholars have suggested that investment agreements need to strike a better balance between the needs of their competing stakeholders. *See, e.g.*, Ursula Kriebaum, *Privatizing Human Rights: The Interface between International Investment Protection and Human Rights*, TRANSNATIONAL DISPUTE MANAGEMENT (December 2006); Peter Muchlinski, *'Caveat Investor': The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard*, 55 INT'L AND COMP. L. QUARTERLY 527 (2006); Charles H. Brower II, *Obstacles and Pathways to Consideration of the Public Interest in Investment Treaty Disputes*, 1 INT'L INVESTMENT LAW & POLICY YEARBOOK (2008).

445 Stern, *supra* note 441.

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to establish and enforce minimum standards for protecting investors. There is nothing in this preamble (or in Article XI) that implies that the treaty's investor guarantees are conditioned on achieving these desirable outcomes. What this means is that it may not be so easy to outgrow the *U.S.–Argentina BIT*'s "adolescent" preoccupation with protecting investors' rights. Protecting such rights is the *sine qua non* of that treaty.

On the other hand, the *Argentine Gas Sector Cases* provide some support for Stern's general conclusion—namely that over time, interpretations of investment agreements, including of the *U.S.–Argentina BIT*, will attempt to balance the needs of sovereigns and foreign investors. The arbitral decisions issued in these cases suggest the need for caution with respect to conclusions that BITs are illegitimate because they utterly fail to balance the needs of sovereigns with those of investors. As shown in Part III (C), we believe that even with respect to a BIT as investor-protective as is the *U.S.–Argentina BIT*, such balancing has tended to occur where the text of such agreements are open to this possibility—as in the course of applying these agreements' substantive guarantees and perhaps in the calculation of damages (which, except with respect to expropriation, are not spelled out in the text of that treaty at all).[446] The *Argentina Gas Sector Cases*' careful and circumscribed determinations of substantive liability, including their rejections of the claimants' contentions based on national treatment and expropriation, were well within the established meaning of these BIT guarantees. These cases' determinations that Argentina's actions were not "fair and equitable" would not have surprised advocates of even the *Neer* standard under customary international law.[447] Putting these tribunals' interpretations of Article XI to one side, their applications of the substantive rights contained in the *U.S.–Argentina BIT* are not innovative interpretations that unfairly trump legitimate sovereign attempts to regulate in the public interest. These arbitrators' applications of the fair and equitable treatment and umbrella clauses of the *U.S.–Argentina BIT* reflected the undeniable fact that, as the tribunals in CMS, Enron, and Sempra found, Argentina's actions were problematic under existing Argentine law, highly unusual, and profoundly at odds with the assurances previously given by that government. In so finding, the arbitrators in these cases did in fact "balance" the rights of Argentina vis-à-vis the investors but did so in the

446 As indicated in Part II(C)(3), the CMS, Enron, and Sempra tribunals all agreed, for example, that Argentina may well have needed to take some measures to respond to the underlying crisis but they found the *unilateral* nature of the measures taken by that government were not inconsistent with assurances previously given and were therefore unnecessary, including under Argentine law. This appeared to be a crucial reason for these tribunals' respective determinations that Argentina's actions violated the BIT's fair and equitable treatment provision as well as its umbrella clause. *See supra* text accompanying notes 169–74. This finding suggests that these tribunals did in fact balance the respective rights of the investor, including the investors' reasonable expectations under existing Argentine law, vis-à-vis the rights of the sovereign to respond to a crisis.

447 In *Neer*, the U.S.–Mexico Claims Commission found that the international minimum standard under customary international law was violated when a government's acts amounted to "an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." U.S.A. (L.F. Neer) v. United Mexican States, (1928), RIAA iv. 80, at 62–2.

course of applying the substantive guarantees in the *U.S.–Argentina BIT*. But we do not believe that the traditional rules of treaty interpretation authorize or anticipate a free-floating interpretative gloss in favor of sovereignty (or the alleged principle of *in dubio mitus*) that can be applied to any clause of such treaties, including its NPM clause, irrespective of what the actual object and purpose of such treaties is, what the particular NPM clause states, or whether such balancing has already been taken into account in determining whether breach has occurred or in awarding damages.[448]

Nonetheless, we agree that the *Argentine Gas Sector Cases* raise highly charged political questions about the legitimacy of the underlying investment regime. But most of those concerns—or the most serious of them—are directed at the substantive law contained in investment agreements themselves and not merely the competency or unbiased nature of those who interpret such agreements. Those worried about "democratic deficits" appear to be most worried about whether it is right to accord foreign investors non-relative guarantees that go beyond nondiscrimination and to some extent, may differ or exceed the treatment accorded to national investors. Those worried about the "horizontal" equities of the regime direct attention to whether the requirements of some investment agreements (such as those that impose national treatment on the entry of foreign investment and not merely post-entry treatment or that prohibit certain performance requirements) hinder developing countries from adopting policies that other states enjoyed at comparable stages of their development. Those who contend that arbitral mechanisms are ideologically unbalanced are not necessarily questioning the bonafides of investment arbitrators; they may be targeting, more fundamentally, the fact that most of the investment agreements that those arbitrators are charged with interpreting do not contain provisions explicitly recognizing either the host state's or the investors' duties to protect the environment, labor rights, or human rights.[449]

All of these critiques suggest that the *substance* of international investment law—and not merely its procedures for resolving disputes or its interpretative methods—create tensions among a state's social contract with its citizens, its commercial contracts with investors, and its sovereign arrangements with its ostensible sovereign equals. And all of these concerns cast doubt, more fundamentally, on the very premises of the investment regime—namely, that treaties designed principally to protect foreign entrepreneurs, even at the risk of according such investors greater rights than nationals and even if this removes certain policy options for governments, is a good idea because it encourages greater flows of incoming capital and contributes to economic development.

448 *See* Rose-Ackerman and Billa, *supra* note 252, at 443–51 (arguing that there is no such thing as an "implicit" national security exception). But *see* Sir Robert Jennings and Sir Arthur Watts, ed. Oppenheim's International Law, at 1278 (9th ed. 1992)(suggesting that the *in dubio mitius* principle applies in interpreting treaties but that it must be applied with regard to the principle of effectiveness); C.H. Schreuer, *The Interpretation of Treaties by Domestic Courts*, 45 Brit. Y.B. Int'l L. 255, at 283–301 (1971)(discussing contrasting principles of treaty interpretation deployed by national courts, including the principle of "restrictive interpretation" in deference to sovereignty).

449 *Compare* International Institute for Sustainable Development, Model International Agreement on Investment for Sustainable Development, *at* http://www.iisd.org/investment/model/.

Some of the most serious legitimacy challenges facing the investment regime are driven by doubts about the benefits that investment agreements promise but some believe have not yet delivered, such as the promise of the enhanced competitiveness of domestic firms, of incentives given to promote the national rule of law, and of reforms and modernization of national institutions (including courts and administrative agencies).

At heart, doubts about the results in CMS, Enron, and Sempra suggest second thoughts about the merits of the bargain struck in the *U.S.–Argentina BIT:* a more secure investment environment for more foreign capital. If so, supporters of the investment regime ignore skepticism about the relative costs and benefits of BITs at their peril. Renewed attention to proving, ideally with empirical evidence, that investment treaties deliver, at least over the long term, on their promises[450] and that those real benefits exceed their costs,[451] will be crucial to the long-term viability of the regime.

International lawyers also need to devote considerable more time to explaining why the substantive law applied in investment agreements—both the rights they provide as well as their failure to include provisions anticipating overlap with other international law regimes—continue to make sense. This includes explaining to skeptical audiences (such as the citizens of Argentina) why the backdrop rules of international law—so crucial to all sides in debates over the *Argentine Gas Sector Cases*—should continue to apply.

Some might challenge the common starting point for all of us who have considered these cases, including Burke-White and von Staden: the traditional rules of treaty interpretation. Given what we indicate in Part III(A) about the evolution of the U.S. BIT program and the U.S. negotiating stance at least through its conclusion of its early BITs, it is not unreasonable to describe the *U.S.–Argentina BIT* as an internationalized "standard form" contract. Indeed, given that the U.S. Model BIT was presented to Argentina by a party in a superior bargaining posture on an essentially "take it or leave it" basis, some might describe the *U.S.–Argentina BIT* not as the prototypical treaty between sovereign equals presumed by the Vienna Convention on the Law of Treaties but as a contract of adhesion. Those sensitive to horizontal critiques of the regime would add that if this is the case, that treaty should be subject to rescission or even be rendered null and void on the basis of unconscionability or, at a minimum, should be interpreted *contra proferentem*.

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450 To date, most of the scholarly attention has focused on whether investment agreements really have an impact on incoming capital flows. The most important studies in this respect are contained in THE EFFECT OF BILATERAL INVESTMENT TREATIES AND DOUBLE TAXATION TREATIES ON FOREIGN DIRECT INVESTMENT FLOWS (Karl P. Sauvant & Lisa Sachs eds. 2009). Only some scholars have considered the impact such treaties might have on host states' economic development more generally, income or regional disparities, environmental or labor standards, or political stability. *See, e.g.*, Ginsburg, *supra* note 415; FOREIGN INVESTMENT ITS SIGNIFICANCE IN RELATION TO THE FIGHT AGAINST POVERTY, ECONOMIC GROWTH AND LEGAL CULTURE (Rudolf Dolzer et al., eds. 2006) (*see* in particular chapters on China, Mexico, and India).

451 *Cf.* Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 NORTH CAROLINA L. REV 1 (2007) (discussing what we know of one of these costs, namely the scope of damage awards issued to date against host states).

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Such an argument has been advanced in relation to other treaties. Donald P. Harris argues that the WTO's TRIPs Agreement was in essence a contract of adhesion imposed by stronger states in a superior bargaining position on others who were effectively denied meaningful choice on its terms.[452] After surveying relevant contract law in the United States, the United Kingdom, the European Union, the Republic of Korea, Canada, China, and Japan,[453] Harris concludes that there is "sufficient consensus" to show that "the contracts of adhesion doctrine" is an established general principle of law recognized by civilized nations that can and should be applied at the international level to treaties such as the TRIPs.[454] Accordingly, Harris suggests a number of ways that the TRIPS Agreement be interpreted *contra proferentem*, that is, "so as to benefit developing countries."[455]

Although full consideration of Harris's contentions is outside the scope of this article, our tentative answer is that characterizing the *U.S.–Argentina BIT*, even by way of analogy, as a contract of adhesion would do considerable violence to the circumstances of its conclusion and to U.S. BITs generally. Unlike the typical contract of adhesion, investment agreements, including the U.S. BITs, are fully reciprocal in nature. Except for sectoral exceptions or other special conditions undertaken to benefit only one party (typically included in a Protocol, as in the *U.S.–Argentina BIT*), these treaties apply the same rules to both state parties.[456] As noted in Part III(A), this accords with the underlying economic premise that both parties, no matter the comparative flows of capital as between them, benefit from free flowing investment flows. Further, as the Protocol of the *U.S.–Argentina BIT* demonstrates, unlike the typical contract of adhesion, this treaty was the product of a genuine negotiation between the parties, albeit one which, like all treaty negotiations, reflected differences in bargaining leverage between the parties. Unlike a contract of adhesion between a consumer and a business, both of the parties to the *U.S.–Argentina BIT* were repeat players in the investment regime and both states had adhered previously to comparable investment agreements with others. It is doubtful that Argentina can be described as a party lacking the negotiating power to reformulate the BIT's terms or to decide not to ratify a BIT that it decided was not in its long term interests.[457]

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452 Donald P. Harris, *Carrying a Good Joke Too Far: TRIPs and Treaties of Adhesion*, 27 U. Pa. J. Int'l Econ. L. 681, at 724–38 (2006). Harris contends that the basic elements of TRIPs that make it a contract of adhesion are (1) it was presented by parties in superior bargaining positions; (2) it consisted of a pre-formulated or form contract; (3) it was presented on a take-it-or-leave-it terms, (4) the weaker party lacks the negotiating power to reformulate contract terms, and (5) the terms of the contract are onerous or unfavorable or inconsistent with the reasonable expectations of the weaker party and results in unfair surprise. *Id.* at 724.

453 *Id.* at 694–712.

454 *Id.* at 708, 724–38.

455 *Id.* at 739–45.

456 As noted in Part III(A), this is because such agreements are premised on the theory of comparative advantage, including the premise that the free investment flows encouraged by such agreements benefit all states, irrespective of stage of development.

457 *Cf.* Harris, *supra* note 452, at 724. This is also suggested by Harris's own distinctions among the developing states that negotiated the TRIPs Agreement. Thus, Harris argues that India,

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Even in the case of relations between Argentina and the United States, there is need for some caution about presuming that the investment regime consists of one-sided bilateral treaties imposed on needy capital importers by greedy capital exporters. Both Argentina and the United States have been and continue to be capital importers as well as capital exporters. Both states have reciprocal interests in protecting their investors abroad as well as making their own respective internal legal regimes stable and attractive for foreign investors.[458] The fact that, as between them, at the time the *U.S.–Argentina BIT* was concluded *most* of the flows of foreign investment were going to Argentina from the United States and not the reverse, is subject to change. Nor does that fact mean that Argentina was not receiving a benefit from the treaty or that Argentina had no reciprocal interests in protecting its own foreign investors abroad—whether in the United States or elsewhere. By concluding a BIT with the United States with a most favored nation clause, Argentina was sending a message to many other nations about its intentions to maintain a stable foreign investment environment, not only to protect the interests of other foreign investors in Argentina, but also to ensure the mutual protection of Argentine investors elsewhere.

Moreover, unlike the typical contract of adhesion where the party who proffers the allegedly onerous terms is also the ultimate beneficiary of those terms, the direct beneficiaries of the *U.S.–Argentina BIT* (and of investment agreements generally) are third parties, namely foreign investors. In the context of the *Argentine Gas Sector Cases*, the *contra proferentem* rule would be applied against a non-party to those arbitrations, whereas claimant investors would necessarily bear the brunt of that rule.[459]

Finally, unlike the typical contract of adhesion in which an element of surprise attends the onerousness of the obligations, there is a great deal of transparency about the *U.S.–Argentina BIT* and about the object and purpose of the U.S. BIT program generally. Indeed, our description of the object and purpose of that treaty in Part III(A) relies on a substantial *public* record readily accessible to both states. Contemporaneous statements by Argentine government officials demonstrate that both parties to this treaty—as well as the foreign investors who testified on behalf of the treaty before the U.S. Senate—were clear on what the U.S. Model BIT meant and that it sought to protect U.S. investors from well understood "political risks." The evidence suggests that both states turned to this treaty in order to provide an international guarantee to back the national legal reforms undertaken by Argentina—and that such reforms (including privatizations) were needed by Argentina to turn a new page with respect to its treatment of foreign investors.

Brazil, and other "larger developing countries not only participated in the negotiations but also are not in the "unequal bargaining position" that many African nations are in" and accordingly should not have the contract of adhesion doctrine apply in their favor. *Id.* at 754.

458 Indeed, the evolving views of the United States with respect to NPM clauses revealed in the course of these cases is itself a testament to the fact that the United States now is the world's largest foreign investor as well as the world's largest importer of foreign capital.

459 Moreover, many foreign investors face, once they have invested sunk costs in a foreign enterprise, an "obsolescing bargain" insofar as leverage over the conditions affecting that investment normally shifts to host states.

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For all of these reasons, it is not at all clear that the CMS, Enron, and Sempra interpretations of Article XI were, in Harris's terms, "onerous or unfavorable," inconsistent with the "reasonable expectations" of the parties, or "unfairly surprising."[460]

Of course, some might also find the suggestion that Argentina, home to one of the most sophisticated legal systems in Latin America, ought to be treated as akin to an unsophisticated consumer who purchases a car from an automobile dealer who relies on a boiler plate standard form contract and is unfairly surprised by its true contents, a condescending, inappropriate, and offensive suggestion.[461]

Caution is also warranted with respect to treating other investment agreements as "contracts of adhesion." The extensive network of investment agreements today is, particularly but not only through the operation of these treaties' most favored nation guarantees, global in nature. The investment regime is not only about unidirectional investment flows flowing from the North to the South. It is inaccurate to suggest that all or most investment agreements consist of treaties by rich capital exporting states seeking to protect their investors in poor capital importing states. Approximately 27% of the wide network of investment agreements now in place consists of agreements between emerging markets, and many of the most prominent players in the investment regime, such as China and the United States, are both leading capital importers as well as leading exporters of capital.[462] Further, as demonstrated by the Energy Charter, the NAFTA, and free trade agreements between the U.S. and Australia, Chile, and Singapore respectively, investment agreements, containing many substantive guarantees comparable to those in the *U.S.–Argentina BIT*, are now also concluded among developed nations.[463]

More important for our purposes is that, even if the *U.S.–Argentina BIT* or other investment agreements can be analogized to contracts of adhesion, it is unclear that this would or could have any impact as a matter of currently applicable law.

International law, unlike many national laws relating to contract, does not have distinct rules of interpretation for different types of treaties, whether bilateral or multilateral, however "unequal" the parties to them. It relies on the same rules of interpretation, namely those codified at Articles 31 and 32 of the Vienna Convention on the Law of Treaties, for all treaties irrespective of the negotiating leverage exercised by the respective parties. As is well known, although some states argued for a doctrine of "unequal treaties" in the course of negotiating the Vienna Convention on the Law of Treaties,

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460 *Cf.* Harris, *supra* note 452, at 724.

461 Perhaps this, as well as the disturbing message such a claim sends to other treaty partners, explains why the contract of adhesion contention was not made by Argentina in any of the *Argentine Gas Sector Cases*.

462 *See* Lisa Sachs & Karl P. Sauvant, *BITs, DTTs and FDI flows: an overview*, in The Effect of Bilateral Investment Treaties and Double Taxation Treaties on Foreign Direct Investment Flows, at xxxiv (Karl P. Sauvant & Lisa Sachs eds. 2009).

463 It is worth noting, however, that the Australia-United States Free Trade Agreement does not provide for investor-state dispute settlement. For analysis of the possible consequences for the investment regime, *see* William D. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 Vand. J. Transnat'l L. 1 (2006).

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and even suggested that "economic coercion" be recognized as a legitimate basis for rendering such treaties either void or voidable, these possibilities were rejected in favor of *pacta sunt servanda*.[464] Although there is some authority for the proposition that treaties are subject to the *contra proferentem* rule,[465] we are not sure that this remains the case after the conclusion of the Vienna Convention.[466] We are also skeptical of Harris's alternative claim that a single "contract of adhesion doctrine" (and specifically the *contra proferentem* canon of construction) exists as a "general principle of law."[467] Drawing analogies from national contract law to agreements among sovereigns has always been a risky enterprise.[468]

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464 *See, e.g.*, Richard Kearney and Robert Dalton, *The Treaty on Treaties*, 64 AJIL 495, 533–5 (1970) (discussing the rejection of proposals to include economic coercion among the permitted exceptions for invalidating, terminating, withdrawing from or suspending treaty obligations in the negotiations on the Vienna Convention on the Law of Treaties).

465 *See, e.g.*, Jennings and Watts, *supra* note 448, at 1279 ("[i]f two meanings are admissible, the provision should be interpreted *contra proferentem*, i[.]e[.,] that meaning which is least to the advantage of the party which prepared and proposed the provision, or for whose benefit it was inserted in the treaty, should be preferred," citing international decisions from the 1920s and 1930s); International Thunderbird Gaming Corporation v. The United Mexican States, Award, January 26, 2006 (UNCITRAL), *at* http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf, at Para. 50 (referring to *contra proferentem* as the "traditional international law principle" and citing, among other things, OPPENHEIM'S INTERNATIONAL LAW, 9th ed. 1279 (1992)).

466 Articles 31–2 of the Vienna Convention make no mention of the possibilities of treaties as contracts of adhesion or of the *contra proferentem* principle. The Vienna Convention rules of treaty interpretation would appear to contemplate, on the contrary, that absent specific evidence, deference to the meaning intended by the drafter of a treaty or of the particular clause is appropriate if only because that party is likely to have made publicly available greater material, including diplomatic exchanges, directly on point. Certainly that evidence, provided it was available to the other party, might be part of the treaty's negotiating history. Apart from the Vienna rules, it is also not clear how the *contra proferentem* principle ought to apply to a treaty based on reciprocal application and premised on reciprocal benefits, such as the *U.S.–Argentina BIT*. In principle, the benefits of Article XI are applicable both to its drafter, the United States, and to Argentina.

467 Indeed, Harris's own evidence with respect to national contract laws on point cast doubt on his conclusion that there is "sufficient consensus" on what a contract of adhesion is or its consequences. Even Harris's cursory survey of national laws suggest differences with respect to, for example, whether national courts will enforce contracts of adhesion at all, whether an offending clause is void or merely voidable, or the relevance of other factors to such determinations (such as surprise, gross unfairness, undue oppression, unconscionability, or the "reasonable expectations" of the weaker party). It is also not clear from Harris's survey of national laws why the *contra proferentem* canon of interpretation is a general principle of law but not, for example, the principle often stated in many of the same national laws that "unfair terms" are non-binding. *See, e.g.*, Harris, *supra* note 452, at 698 (discussing the European Union's Unfair Terms Directive). Of course, there is nothing in the Vienna Convention that permits a treaty to be rendered void or voidable because of inequality among its parties.

468 *See, e.g.*, Evangelos Raftopoulos, THE INADEQUACY OF THE CONTRACTUAL ANALOGY IN THE LAW OF TREATIES (1990). Raftopoulos considers the many ways treaties that partake, in his view, of the "nature of legislation," differ from private contracts. Thus, Raftopoulos surveys many ways that the rules in the Vienna Convention on the Law of Treaties reflect more general interests than those of the individual parties to a treaty, including with respect to its rules for

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Our arguments that existing international law does not appear to favor a finding that the *U.S.–Argentina BIT* is a contract of adhesion do not address the more basic question of whether the traditional rules of treaty interpretation, which do not specifically address treaties whose purpose is to create third-party beneficiaries, themselves merit re-examination. Nor do we address here more general questions about whether other state-centric rules of international law need to be reconsidered in the context of investor-state disputes. Some might question why the rules governing *state* responsibility, including the defense of necessity, remain appropriate when it comes to determining the liability states owe not to one another but to private parties under investment agreements.[469] These questions, of potential interest to academics and the public critics of the investment regime, were not considered by the arbitrators in the *Argentine Gas Sector Cases*. Their mandate was limited to examining and applying existing law. Accordingly, we leave those issues—symptomatic of legitimacy concerns prompted by the substance of the law applied within the investment regime—to another day.

But we cannot resist drawing one final lesson from the *Argentine Gas Sector Cases*. Even if assume, contrary to what we argue here, that treaties such as the *U.S.–Argentina BIT* are relatively "heartless" because they are "imbalanced" in terms of what they protect, one of the advantages of a regime largely built on bilateral agreements is that exit remains more of an option than under a multilateral regime such as the WTO. BIT parties can change the treaties that they ratify (as the United States itself has) to incorporate more sovereignty-protective provisions. Changing the texts of future international investment agreements may indeed be a good idea to protect the regime as a whole from the political backlash now evident in countries such as Ecuador and Bolivia. If states want their investment agreements to protect their "sovereign" prerogatives more than they now do or to accord them greater rein, their best route is surely to restrict the scope of investors' rights or otherwise modify their agreements to so provide—or, to the extent permitted by their terms, to amend their existing BITs. Demanding that arbitrators recalibrate BITs by rewriting them for the state parties is not the best route to legitimizing the investment regime.

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reservations, anticipated impact on third parties, jus cogens, and limits on treaty formulation and termination.

469 *See*, *e.g*., Van Harten, *supra* note 12, at 106 (suggesting that the reciprocity of the rights and duties between states reflected in the Articles of State Responsibility break down in the adjudication of investor-state disputes). But it is not clear which way such arguments cut. Van Harten appears to assume that the inapplicability of such traditional rules would benefit host states defending claims under investment agreements. This may not be so. *See*, *e.g*., BverfG [Federal Constitutional Court] July 5, 2007, 75/2007 *Argentinien-Anleihen: Staatsnotstand berechtigt nicht zur Zahlungsverweigerung gegenüber privaten Gläubigern (F.R.G.)* (finding Argentina did not have available the affirmative defense of necessity vis-à-vis private parties). For a summary of the decision, *see* Stephen W. Schill, German Constitutional Court Rules on Necessity in Argentine Bondholder Case, ASIL Insights, July 31, 2007, *at* http://asil.org/insights/2007/07/insights070731.html. *See also BG Group v. Argentina*, *supra* note 306, at Para. 408 (suggesting that the customary defense of necessity applies only to states and might not apply to disentitle and investor from compensation under the U.K.-Argentina BIT).