National Grid plc v Argentina
(case comment)
by J.D. Cayre

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National Grid plc v Argentina - Case Comment

Executive Summary

*National Grid plc v Argentina* deals with one of a series of claims made by foreign companies with regards to their investment in Argentina, as a result of the economic crisis which affected the country from 1999 to 2001. *National Grid plc* made investments in the Argentinean electrical power industry, following privatization measures introduced by Argentina in 1989 and 1991. The British company subsequently brought a claim alleging that the measures taken by Argentina in 2002 as a result of the economic crisis which hit the country, had resulted in various breaches of the bilateral investment treaty between the United Kingdom and Argentina, including the expropriation of the company’s investment, the breach of the standard of “fair and equitable treatment”, and the breach of the duty to provide “protection and constant security” to foreign investment.

This note examines the different aspects of the UNCITRAL award rendered on 3 November 2008 and made public in February 2009. In particular, the significance of the Tribunal’s findings in relation to the duty to provide “protection and constant security” is examined, as well as the decision of the Tribunal with regards to the necessity defence raised by Argentina.

Article

In an UNCITRAL award rendered on 3 November 2008 and made public in February 2009, an arbitral tribunal composed of Alejandro Miguel Garro, Judd L. Kessler and Andrés Rigo Sureda awarded more than $53.5 million to *National Grid Plc* in the context of the arbitration between the company and the *Argentine Republic*¹, which arose out of the 2001 economic crisis in Argentina. National Grid brought proceedings in 2003 alleging that as a result of the measures taken to combat the economic crisis in 2002, Argentina had: (i) expropriated its investment in the Argentine electrical power industry contrary to undertakings and assurances which were given to it in order to encourage its investment, and in breach of Article 5(1) of the Treaty between the United Kingdom and Argentina; (ii) breached the standard of “fair and equitable treatment” contained in Article 2(2) of the Treaty by failing to respect the assurances and undertakings relied upon by National Grid in its decision to invest; (iii) breached the duty to provide “protection and constant security” to National Grid’s investment in contravention of Article 2(2) of the Treaty; and (iv) discriminated against it in comparison to other industry sectors as a result of the measures taken.

¹ *National Grid plc v Argentine Republic, UNCITRAL (UK/Argentina BIT) – Award, 3 November 2008* [http://ita.law.uvic.ca/documents/NGvArgentina.pdf](http://ita.law.uvic.ca/documents/NGvArgentina.pdf)
The Tribunal found that neither direct nor indirect expropriation had occurred: National Grid had not been deprived of the title to its property, which was central to proving expropriation, and the measures taken by Argentina to deal with the crisis were not tantamount to expropriation in their effect either.

However, the Tribunal did find that the standard of “fair and equitable treatment” had been breached by Argentina for the following reasons: Argentina (i) had fundamentally changed the legal framework put forward to and relied upon by National Grid in making its investment; (ii) had not meaningfully negotiated with National Grid in between implementing the measures and the disposal of the investment; and (iii) had requested that National Grid renounce its legal remedies in respect of the renegotiation of its investment. Importantly however, the Tribunal found that the difficult economic circumstances in which Argentina had implemented the measures at issue had to be taken into account, and decided that the breach of the fair and equitable standard only occurred from the date National Grid was asked to renounce its rights (25 June 2002), and not from the date the emergency measures were taken by Argentina (6 January 2002), thus not making Argentina liable for losses incurred by National Grid the during the first six months of the crisis.

The decision is also interesting because of its interpretation of the duty to provide “protection and constant security” to investments under Article 2(2) of the Treaty. The Tribunal adopted National Grid’s interpretation of the duty by finding that it extended beyond the mere protection of an investor’s physical property, and in doing so, found that Argentina had breached its duty in relation to National Grid’s investment from the same date it had breached its undertaking to treat the investment fairly and equitably. The Tribunal pointed out that, despite the fact that the duty had traditionally been interpreted as protecting purely tangible assets, such a limitation was not contained in Article 2(2) of the Treaty, and that the close association with the standard of fair and equitable treatment (which is not limited to the treatment of physical assets under Article 2(2)) meant that this duty would extend beyond that realm as well.

This finding by the Tribunal is notable in that it goes beyond the interpretation of the duty made in other cases, which have held that the duty is limited to preserving the physical security of investors and of their investments. In particular, in the 2007 award in BG Group Plc v The Republic of Argentina, the Tribunal (on which Alejandro Garro also sat as an arbitrator) expressed its reluctance to extend the duty beyond physical protection to the obligation to provide a stable legal framework for the investment: “By relating the standard of “protection and constant security” and “fair and equitable treatment” […] tribunals have found that the host State is under an obligation to provide a “secure investment environment”. However […] the Tribunal finds it inappropriate to depart from the originally understood standard of “protection and constant security”.

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Finally, the Tribunal found that Argentina’s measures were not discriminatory either in relation to nationality or industry sector.

The Tribunal did not consider a claim that Argentina had breached the umbrella clause under the Treaty, which provides for the adherence to obligations entered into in relation to a contracting party’s investment, since this was not raised in the Statement of Claim.

Despite the Tribunal not making Argentina liable for losses incurred by National Grid during the first six months of the crisis, it rejected Argentina’s argument that the measures were taken in reaction to a state of necessity, and that it should therefore not be held responsible for any of the losses incurred by National Grid. The availability of the necessity defence, although missing from the Treaty, was recognised by the Tribunal in accordance with the necessity defence under customary international law on which Article 25 of the Draft Articles on State Responsibility is based. However, the Tribunal found that Argentina had failed the first cumulative threshold needed to be satisfied in order to use the defence, which requires the party invoking it not to have contributed to the state of necessity in the first place. The Tribunal took into account the factors presented by the Respondent as having contributed to the crisis and found those to be internal as well as external. In addition, the measures entered into by Argentina in response to the crisis had further contributed to it. The Respondent therefore failed the first of the cumulative requirements for the defence to be used, and could not invoke a state of necessity in defence of its actions in the present case.

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**Education and professional background**