

London Court of International Arbitration
Case No. UN 7949

Decision on the Challenge to Mr Judd L. Kessler

in the Arbitration

NATIONAL GRID PLC

– **Claimant** –

vs/

THE REPUBLIC OF ARGENTINA

– **Respondent** –

of the Division of the LCIA Court composed of

Dr Klaus Sachs
Dr Hassan Ali Radhi
Mr Paul B. Hannon

Table of Contents

I.	INTRODUCTION	3
A.	THE PARTIES AND THEIR COUNSEL	3
B.	THE UNDERLYING ARBITRATION	3
C.	THE CHALLENGE	5
D.	THE CONSTITUTION OF THE LCIA DIVISION AND SUMMARY OF THE PROCEEDINGS	6
E.	EVENTS LEADING TO THE CHALLENGE	7
II.	SUMMARY OF PARTIES' POSITIONS	8
A.	POSITION OF ARGENTINA	9
1.	Grounds for the Challenge	9
2.	Legal Standards	10
3.	Request for Relief	12
B.	POSITION OF NATIONAL GRID	12
1.	Grounds for the Challenge	12
2.	Legal Standards	13
3.	Request for Relief	16
III.	ANALYSIS AND DECISION	17
A.	TIMELINESS OF THE CHALLENGE	17
B.	THE DIVISION'S JURISDICTION	17
C.	THE APPLICABLE STANDARD	18
D.	ANALYSIS OF THE CHALLENGE	20
E.	DECISION	24

I. INTRODUCTION

A. The Parties and Their Counsel

1. Claimant is National Grid plc ("National Grid"), 1-3 Strand, London WC2N 5EH, UK. National Grid is the Defendant in the Challenge (as hereinafter defined) proceedings. National Grid is represented in these proceedings by Mr Nigel Blackaby, Ms Sylvia Noury, Mr Greg Fullelove and Ms Philippa Chatterton, Freshfields Bruckhaus Deringer, 65 Fleet Street, London EC4Y 1HS, UK and Estudio O'Farell, Av. De Mayo 645/51 – 1° Piso, C1084AAB – Buenos Aires, Argentina.
2. Respondent is the Republic of Argentina ("Argentina"). Argentina is the Applicant in the Challenge proceedings and is represented by Mr Gabriel Bottini and Mr Adolfo Gustavo Scrinzi, Procuración del Tesoro de la Nación, Posadas 1641 - Buenos Aires, Argentina.

B. The Underlying Arbitration

3. On the basis of the Parties' written and oral submissions, the Division sets forth the following summary of the factual background in this case. The arbitration giving rise to the present Challenge arises from a number of alleged breaches by Argentina of the bilateral agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Argentina for the promotion and protection of investments, signed on 11 December 1990 and in force as of 19 February 1993 (the "Treaty").
4. In December 1992, the Republic of Argentina started a privatization process of its energy sector. At that time, there were three state-owned companies which operated the country's national electricity assets. The transmission assets of these three companies were transferred to one high-voltage electricity transmission company, *Compania de Transporte de Energía an Alta Tensión S.A.* ("Transener") and six regional electricity transmission companies. In December 1992, Argentina launched an international bidding process to sell 65 % of the shares of Transener. At the same time, Argentina and Transener signed a 95-year concession contract granting Transener the right to provide high-voltage electricity transmission services in Argentina (the "Concession").

5. In 1993, National Grid (through its Dutch subsidiary National Grid Finance BV), together with two US companies and two Argentine companies, formed a consortium to participate in the tender of the shares of Transener. The consortium incorporated an Argentine company, *Compania Inversora en Transmision Eléctrica Citelec S.A.* ("Citelec") of which National Grid acquired an initial stake of 15 %. Citelec successfully bid for the 65% stake in Transener. The Concession was signed on 30 June 1993, and Transener commenced operations on 17 July 1993. National Grid increased its stake in Citelec by a further 26.25 % at the end of 1996, according to Argentina, or in June 1997, according to National Grid, and a further 1.243 % in December 1999 following an increase of Citelec's capital.
6. In July 1997, Transener won a tender for the shares in *Empresa de transporte de Energía Eléctrica por Distribución Troncal de la Provincia de Buenos Aires S.A.* ("Transba"). Furthermore, Transener was awarded contracts to construct, operate and maintain electricity transmission lines of which the most important one was for the construction of a fourth electricity transmission line (the "Fourth Line").
7. The regulatory framework for these agreements provided for certain assurances in relation to, *inter alia*, the remuneration of the electricity transmission company, such as fair and reasonable tariffs, adjustment of remuneration every six months and review of tariffs every five years.
8. Following an economic depression beginning in mid 1998, Argentina implemented a series of measures from the end of 2001 to the beginning of 2002. *Inter alia*, Argentina passed the Public Emergency and Exchange Rate Reform Law which resulted in all contracts with some linkage to foreign currencies being converted into Argentine pesos. Furthermore, the newly-enacted law prohibited electricity transmission and public utility companies from suspending or modifying performance of their obligations under their concessions and licenses. However, the law did provide for renegotiation of public utility contracts. Since the renegotiations in relation to both Transener and Transba were not successful by the beginning of 2004, National Grid sold its stake in Transener to Dolphin Fund Management, an Argentine investor, in March 2004.
9. National Grid's allegations in the underlying arbitration proceedings are that Argentina failed to respect the provisions of the regulatory framework relating to Transener, Transba and the Fourth Line and, thus, destroyed the value of these investments. According to National Grid, Argentina has (i) expropriated National Grid's investments without compensation, (ii) treated National Grid's investments unfairly and inequitably and (iii) breached other standards of treatment under the

Treaty (full protection and security, standard of no discrimination, umbrella clause, etc.).

10. Argentina rejects National Grid's allegations and asserts that National Grid's legitimate investment expectations have been respected. According to Argentina, National Grid could not assume that the tariff agreements would not be adapted in the event of major crisis. Furthermore, Argentina submits that the measures taken were a reasonable, appropriate and proportional exercise of its police powers and that National Grid has suffered no damage since, without the measures, the value of Transener would have been even less. Finally and in the alternative, Argentina submits that it was and is in a state of emergency in accordance with customary international law and, thus, its measures can in any event not be deemed to be wrongful.

C. The Challenge

11. The Challenge was triggered by an intervention of the arbitrator Mr Judd L. Kessler during the hearing on the merits in the underlying arbitration, which was held between 9 July and 20 July 2007 in Washington, D.C. (*see* Section 31 below).
12. On 27 July 2007, Argentina filed a "Request for challenge to Mr Judd L. Kessler" (the "Challenge") to the Secretary of the UNCITRAL Tribunal pursuant to Articles 9, 10 and 11 of the United Nations Commission on International Trade Law Rules of Arbitration (the "UNCITRAL Rules") on the grounds that there had arisen justifiable doubts as to Mr Kessler's impartiality and independence.
13. By a letter to the Secretary of the UNCITRAL Tribunal dated 31 July 2007, National Grid rejected Argentina's Challenge. National Grid reserved its right to make further representations to the Arbitration Court of the International Chamber of Commerce (the "ICC Court") as appointing authority in accordance with Article 12 of the UNCITRAL Rules in the event that Argentina pursued its Challenge.
14. By letter dated 8 August 2007 to his co-arbitrators and the Parties, Mr Kessler explained the context of his intervention and his understanding of the underlying situation.
15. Further, by letter dated 24 August 2007 to his co-arbitrators, Mr Kessler proposed to include certain corrections in the transcript of the hearing on the merits in the underlying arbitration.

16. Per letter dated 14 August 2007 to the Secretary and the Members of the UNCITRAL Tribunal, counsel for Argentina elaborated on the reasons for the Challenge.
17. By letter dated 7 September 2007, National Grid informed the President of the UNCITRAL Tribunal that pursuant to Procedural Order No. 19 the Parties had reached an agreement that Argentina shall submit its Challenge against Mr Kessler for decision to the London Court of International Arbitration (the "LCIA") rather than to the ICC Court, which was the duly designated appointing authority in the case.
18. In accordance with this agreement, by an e-mail to the LCIA dated 10 September 2007, Argentina's Counsel requested that the LCIA act as the appointing authority.
19. On 26 September 2007, Argentina served the Challenge on the LCIA and National Grid.
20. National Grid responded to Argentina's Challenge on 2 October 2007 and requested that the Challenge be dismissed.

D. The Constitution of the LCIA Division and Summary of the Proceedings

21. Upon request of Argentina dated 10 September 2007, on 26 September 2007 the LCIA appointed a Division of the Court to determine the Challenge brought by the Republic of Argentina. The Division consisted of Mr L Yves Fortier CC QC as the Chairman of the Division, Dr Klaus Sachs and Dr Hassan Ali Radhi.
22. In an e-mail dated 2 October 2007, Argentina objected to the appointment of Mr Fortier, as a result of which Mr Fortier, whilst confirming his impartiality and independence, withdrew from his appointment. The LCIA accepted the resignation and, on 8 October 2007, appointed Mr Paul B. Hannon as replacement member to the Division, with Dr Klaus Sachs as Chairman.
23. Consequently, the revised Division consists of Dr Sachs, acting as the Chairman of the Division, Dr Radhi and Mr Hannon.
24. In October 2007, the Division received from the LCIA (i) a copy of an e-mail from Respondent's counsel to the LCIA dated 10 September 2007 requesting that the LCIA act as appointing authority; (ii) a copy of a letter from the Claimant's counsel

to the Secretary to the UNCITRAL Tribunal dated 7 September 2007 confirming the Parties' agreement that the LCIA act as appointing authority and setting out the basis upon which that agreement was reached, (iii) a copy of an indemnity obtained from the Parties, (iv) copies of the Respondent's challenge submission served on the Claimant and the LCIA on 26 September 2007 (the "Challenge"), together with related documents and (v) copies of Claimant's response to Respondent's Challenge submission served on Respondent and the LCIA on 2 October 2007 (the "Response"), together with related documents.

25. On 16 November 2007, the Division received summaries of the Parties setting out the background of the underlying arbitration.
26. On 19 November 2007, the Parties submitted to the Division and the LCIA a joint timetable for the oral hearing on the Challenge.
27. Also on 19 November 2007, the Parties submitted to the Division and the LCIA further legal authorities.¹
28. On 22 November 2007, the Division held an oral hearing with the Parties in London.

E. Events Leading to the Challenge

29. On 3 April 2007, Mr Whitney Debevoise, who was the arbitrator appointed by National Grid, submitted his resignation from the position of arbitrator following his appointment by the US Senate as US Executive Director to the World Bank. On 12 April 2007, National Grid appointed Mr Kessler as an arbitrator.
30. Following his appointment, Mr Kessler received a copy of all the written pleadings and evidence submitted by both Parties in the arbitration, witness statements, expert reports and other documents and legal authorities.

¹ Argentina submitted the following legal authorities: *Arbitration Act 1996*; *ASM Shipping Ltd of India v. TTMI Ltd of England*; *Lawal (Appellant) v. Northern Spirit Limited*; *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. and Another Locabail (U.K.) Ltd. and Another v. Waldorf Investment Corporation and Others Timmins v. Gormley Williams v. H.M. Inspector of Taxes and Others Regina v. Bristol Betting and Gaming Licensing Committee, Ex parte O'Callogham*; Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006; *Magill v Porter*; *Enron Corporation Ponderosa Assets, L.P. v Argentine Republic (English and Spanish version)*; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*; *Sempre Energy International v Argentine Republic (English and Spanish version)*. *National Grid submitted Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. vs The Argentine Republic* as further legal authority.

31. In the underlying case, a hearing on the merits was held between 9 and 20 July 2007 at the World Bank in Washington, D.C. The events on which the Challenge is based occurred on 12 July 2007, during the cross-examination of Dr Juan Carlos Cassagne, an expert witness on Argentine law presented by National Grid, by Mr Oswaldo Guglielmino, the Argentine Attorney General and Counsel for Argentina. During the cross-examination of the expert for National Grid, Dr Cassagne, Mr Kessler made an intervention in Spanish which gave rise to Argentina's allegations regarding Mr Kessler's impartiality and independence as an arbitrator.
32. Mr Kessler's statement expressed in Spanish to which Argentina refers in the present Challenge was as follows:

"Para tratar de avanzar, ya queda claro que hay ciertos hechos que el testigo no conoce. Pero supongo que la base de su testimonio tiene que ver con la situación hipotética, y no es hipotética porque todos los que estamos aquí sabemos los hechos en general, de que hubo un daño importante o hubo un cambio muy importante en las expectativas de la inversión".²

In English translation:

"It's now clear that there are certain facts that the witness is not familiar with, but I suppose that the basis of his testimony has to do with the hypothetical situation and it's not hypothetical because we are all here. We know the facts generally speaking that there was major harm or major change in the expectations of the investment".³

33. As a result, Argentina initiated the present Challenge proceedings.

II. SUMMARY OF PARTIES' POSITIONS

34. In the following, the Division gives a summary of the Parties' positions as set out in their filings and the oral hearing. The purpose of this summary is, therefore, not to reproduce the Parties' positions in full, which the Division has considered carefully in order to render its decision on the Challenge.

² Cross-examination of Dr Cassagne, Transcript (Spanish), Day 4, P941, L11-17 NG 4.

³ Cross-examination of Dr Cassagne, Transcript (English), Day 4, P889-890, L19-3 NG 3.

A. Position of Argentina

1. Grounds for the Challenge

35. Argentina submits that the statement in question made by Mr Kessler during the cross-examination of the legal expert Dr Cassagne by Argentina's counsel is inconsistent with the impartiality and independence that each arbitrator must guarantee throughout the entire course of the arbitration proceedings.
36. In particular, it is Argentina's view that Mr Kessler by stating that "*there was harm or major change in the expectations of the investment*" prejudices the final result of the arbitration, considering that the question whether there was "*major harm*" to the investor was at the heart of the Parties' dispute.
37. In Argentina's view, such prejudgment was even aggravated because Mr Kessler stated not only that there was "*harm*", but also that the harm was "*major*". This is all the more relevant, according to Argentina, because Mr Kessler made such statement only three months after being named as arbitrator by National Grid and before the Parties finished presenting their evidence.⁴
38. Further, Argentina submits that Mr Kessler referred to "*major change in the expectations of the investment*". According to Argentina, some tribunals have held that a change in the legitimate expectations of an investor implies a violation of the standard of fair and equitable treatment.⁵ Since one of the main issues in dispute between the Parties was whether the investor's expectations had changed significantly, Argentina perceives that this statement of Mr Kessler is another direct prejudgment.
39. In Argentina's view, Mr Kessler's statements in question are "*completely identified with the Claimant's allegations*"⁶, showing that Mr Kessler clearly lacks impartiality.

⁴ Challenge, paragraph 22.

⁵ Argentina in particular refers to *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Republic of Argentina* (ICSID Case No. ARB/97/3); *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1); *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2); *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. the Republic of Argentina* (ICSID Case No. ARB/02/1); *CMS Gas Transmission Company v. the Republic of Argentina* (ICSID case No. ARB/01/8.); *Rex v. Sussex Justices, ex parte McCarthy* ([1924] K.B. 256).

⁶ Challenge, paragraph 29.

2. Legal Standards

40. Argentina submits that the present Challenge has to be judged under Articles 9, 10 and 11 of the UNCITRAL Rules and further international rules providing for standards with respect to the challenge of arbitrators.
41. Article 10 of the UNCITRAL Rules sets forth the conditions to be met in order to challenge arbitrators:

"Article 10

- 1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality and independence.*
- 2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made".*

42. According to Argentina, the arbitrator's impartiality and independence should necessarily be maintained throughout the entire arbitral proceedings and not be limited to the moment of the arbitrator's designation. Furthermore, Argentina submits that impartiality, independence and neutrality of the arbitrator are affected not only where the proceeding is likely to be biased, but where there is an appearance of bias. This is fulfilled, according to Argentina, when a reasonable person has justifiable doubts as to the arbitrator's impartiality or independence.
43. In addition to the UNCITRAL Rules, Argentina refers to other international rules also setting forth standards on the impartiality and independence of arbitrators, such as Standard (2)(b) of the General Standards regarding Impartiality, Independence and Disclosure of the International Bar Association Guidelines of Interest in International Arbitration ("IBA Guidelines"), according to which an arbitrator shall decline to accept an appointment or refuse to continue to act as an arbitrator *"if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4)".*
44. Further, Argentina refers to the "Orange List" contained in Part II of the IBA Guidelines which sets forth the practical application of the General Standards set out in Part I. In particular, Argentina, refers to point 3.5.2. of the Orange List, which deals with situations in which the arbitrator *"has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise".*

45. Argentina further cites Rule 3 of the International Bar Association Rules of Ethics for International Arbitrators (the "IBA Rules of Ethics"). According to Rule 3.1, partiality arises where the arbitrator "*is prejudiced in relation to the subject-matter of the dispute*". Rule 3.2 provides that appearance of bias is created by facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party or if an arbitrator has already taken a position in relation to the dispute.
46. According to Argentina, the statements in question show that Mr Kessler prejudged the final result of the dispute without having based his statements exclusively on the evidence, arguments and applicable law in the case at hand, in particular, since the hearing was still in progress and both Parties still had evidence and arguments to deliver.
47. In addition, Argentina refers to a report of the United Nations Conference on Trade and Development entitled "Dispute Settlement International Commercial Arbitration 5.3 Arbitral Tribunal" (the "UNCTAD Report") that expressly addresses the situation of an arbitrator in the event of prejudice. According to Argentina, it follows from the UNCTAD Report that any statement made during the arbitration where the parties are still in the process of delivering evidence or arguments which is not exclusively based on "*the evidence, arguments, and applicable law in the case at hand*", must be regarded as prejudging.
48. Argentina cites a number of cases in support of its Challenge.⁷ Argentina refers in particular to the decision of the US Supreme Court in the case *Commonwealth Coatings Corp v. Continental Casualty Co.*⁸ according to which the Tribunal must not only be unbiased, but also avoid even the appearance of bias.
49. In conclusion, Argentina asserts that Mr Kessler's statements which are the subject of this Challenge raise justifiable doubts as to his impartiality or independence. Argentina alleges that Mr Kessler manifestly failed to show impartiality or independence of judgment with regard to the claim brought by National Grid in the underlying arbitration.

⁷ *Sarquis de Navarro, María Cecilia c/ Santiago del estero, Provincia de s/ acción declarativa*, CSJN, October 30, 2003, S. 1257.XXXIX; *Rex v. Sussex Justices, Ex parte Mc Carthy* [1924] K.B. 256, 259.

⁸ 393 U.S. 145 (1968).

3. Request for Relief

50. Argentina therefore respectfully requests "*that Mr JUDD KESSLER be disqualified from these arbitration proceedings and his replacement be ordered pursuant to Articles 9, 10 and 11 of the UNCITRAL Rules*".⁹

B. Position of National Grid

1. Grounds for the Challenge

51. National Grid submits that the contested intervention of Mr Kessler was made to advance the cross-examination because Argentina's counsel had sought concessions from Dr Cassagne on questions of fact which gave rise to a series of objections on the part of National Grid's counsel. This required frequent intervention of the Tribunal preventing progress in the questioning. Shortly before the intervention of Mr Kessler – which is the subject of this case – took place, both President Rigo and the other co-arbitrator, Mr Garro, had intervened in an attempt to facilitate the cross-examination and ensure appropriate questioning.
52. According to National Grid, Mr Kessler, in order to assist Argentina's counsel, and after the second intervention by Mr Garro, intervened in Spanish, his native language being English. Mr Kessler proposed to Argentina's counsel that he formulate questions based on assumed or hypothetical facts so that Dr Casagne's position on the Argentine law treatment of such facts could be "*tested*", rather than be the subject of continual interruptions.
53. National Grid objects to Argentina's quoting only part of Mr Kessler's intervention, since in its second part Mr Kessler made it clear that his suggestion was for questions to be formulated based on an assumption of harm:

*"No sé si podemos proceder. Si quiere hacerle preguntas, si hubiera un daño importante, entonces, ¿qué sería el resultado bajo el derecho argentino? Hay protección o no hay protección. La ley aplica o no aplica. Es solamente una sugerencia".*¹⁰

In English translation:

"Now, I don't know if we could proceed. If you want to ask him questions. If there were major harm, what would the result be under Argentine law? Is

⁹ Challenge, paragraph 50.

¹⁰ Cross-examination of Dr Cassagne, Transcript (Spanish), Day 4, P941, L18-22

there protection? Is there not protection? Does the law apply? Does it not apply? I state this merely as a suggestion".¹¹

54. Since Argentina's counsel sought immediate clarification whether Mr Kessler had stated that at that stage it was already known that there had been harm, Mr Kessler, according to National Grid, again stressed the concrete, non-abstract nature of the dispute before the Tribunal, and noted that there was an allegation of harm by National Grid as a result of the alleged "*change in the contract*". Further, Mr Kessler explained that he was only "trying to help":

"Solamente digo que estamos aquí porque hay alegato de daño, de un cambio en el contrato que resultó en problemas por el investor. Es que, como decíamos antes, no estamos hablando en el aire. No sé, estoy tratando de ayudar, pero a lo mejor no resulta de ayuda".¹²

In English translation:

"I merely say that we are here because there is an allegation of harm of a change in the contract that caused problems to the investor. As we were saying before, we are not speaking in abstract. I don't know. I'm trying to help, but perhaps what I have had to say isn't all that helpful".¹³

55. National Grid further submits that Argentina's counsel did not make any further comments concerning the intervention and appeared to accept Mr Kessler's explanations. National Grid points out that after the incident, Mr Kessler recognised that his spoken command of Spanish might lead to confusion, as a result of which he agreed to ask any further questions in English. Finally, National Grid submits that later in the proceedings Mr Kessler even made a self-deprecating joke about his language skills by stating: "*Nobody can mistake me for Garcia Marquez. Maybe I will ask you in English*".¹⁴

2. Legal Standards

56. National Grid submits that the Challenge should be restricted to the question of Mr Kessler's impartiality and not his independence. The latter arises out of the relationship between an arbitrator and one of the parties, whereas Argentina at no stage alleged that Mr Kessler's intervention had been the result of any relationship between Mr Kessler and National Grid.

¹¹ Cross-examination of Dr Cassagne, Transcript (English), Day 4, P890, L4-9.

¹² Cross-examination of Dr Cassagne, Transcript (Spanish), Day 4, P942, L4-9.

¹³ Cross-examination of Dr Cassagne, Transcript (English), Day 4, P890, L12-18.

¹⁴ Cross-examination of Ms. Caballero, Transcript (English) Day 7 P1711, L18-20.

57. National Grid agrees with Argentina that the test set out in Article 10.1 UNCITRAL Rules for whether "*circumstances exist that give rise to justifiable doubts*" is an objective one. National Grid refers to commentaries on the UNCITRAL Rules¹⁵ and relevant case law to support its position that although a party's subjective concerns about an arbitrator's bias may prompt a challenge, it is the objective reasonableness of these concerns that is decisive for a decision on the challenge.
58. National Grid also refers to the IBA Guidelines to show that they incorporate the objective test. It cites Standard 2(c) of the IBA Guidelines to clarify that the objectivity standard is further defined as the conclusion reached by a reasonable and informed third party that there was likelihood that the arbitrator might be influenced by factors other than the merits of the case.
59. National Grid objects to Argentina's allegation that Mr Kessler's intervention constitutes evidence that he has prejudged questions of liability and damages in the case and that this "*prejudgment shows a clear lack of impartiality in accordance with Article 10 of the UNCITRAL Rules*", as alleged by Argentina.
60. According to National Grid, Argentina failed in its Challenge to provide any authority in support of its arguments of prejudgment. National Grid agrees that the UNCTAD report cited by Argentina provides that arbitrator's conclusions shall be based exclusively on the "*evidence, arguments and applicable law in the case at hand*". Such test, according to National Grid, is the same as that provided by Standard 2(c) of the IBA Guidelines providing that arbitrators shall not be "*influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision*".
61. With respect to Part II of the IBA Guidelines, National Grid notes that Argentina was able to point to only one situation from the Orange List that might tangentially cover the issue at dispute in this Challenge, *i.e.*, Point 3.5.2 of the Orange List. In National Grid's opinion, this does not fit the facts of the case because Mr Kessler did not publicly "*advocate a specific position regarding the case*".
62. Further, it is National Grid's position that interventions which aim at facilitation of the proceedings, like the intervention made by Mr Kessler during the cross-examination, are a key function of the arbitrator and should not be unduly limited by the parties.

¹⁵ Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. 2004; Caron, Caplan & Pellonpää, *The UNCITRAL Arbitration Rules*, 1st ed.

63. According to National Grid, case law demonstrates that "*any judge, though he ought to have an impartial stance, is required as a matter of judicial duty eventually and on the basis of the presented arguments to become partial*"¹⁶, since this is the only way a decision in the case can be reached. As long as the views are based on the parties' conduct and evidence, National Grid submits that they cannot be claimed to amount to bias, even if they regard the merits of a dispute early in the proceedings.
64. Furthermore, National Grid maintains that a judge cannot be dependant on the parties' counsel and be precluded from asking questions with the aim of speeding the proceeding and eliminating irrelevancies and refers in particular to *Fairchild & Co., Inc v. Richmond*:

*"[A]rbitrator's legitimate efforts to move the proceedings along expeditiously may be viewed as abrasive or disruptive to a disappointed party [...] such displeasure does not constitute grounds for vacating an arbitration award.[...] [E]vident partiality is not demonstrated where an arbitrator consistently relies upon the evidence and reaches the conclusions favourable to one party. [...] The mere fact that arbitrators are persuaded by one party's arguments and choose to agree with them is not of itself sufficient to raise a question as to the evident partiality of the arbitrators".*¹⁷

65. According to National Grid, Argentina's conclusion that whereas any statements with respect to points at issue before the filing of a dispute do not necessarily give rise to a challenge, any statements made during the proceedings where the parties are still in the process of delivering evidence must be regarded as prejudging has therefore no basis.
66. National Grid further submits that Mr Kessler's intervention was made in Spanish, which is not Mr Kessler's native language, with the consequence that Mr Kessler expressed himself infelicitously. However, National Grid points out that Mr Kessler, as soon as he realized the confusion which resulted from his intervention in Spanish, immediately clarified his position. Like the remaining arbitrators, he

¹⁶ See Response, paragraph 51, citation from Decision of the Appointing Authority, Sir Robert Jennings, on the challenge of Judge Bengt Broms (7 May 2001) submitted as NGLA 5. National Grid further refers to the Challenge Decision of 11 January 1995, reprinted in (1997) XXII YCA 227, 234, submitted as NGLA 3; *Spector v. Torenberg*, 825 F. Supp. 201, 209 (S.D.N.Y. 1994), submitted as NGLA 6; *Ballantine Books, Inc. v. Capital Distributing Company* 302 F. 2d 17, 12 (2nd Cir. 1962), submitted as NGLA 7; *Hayne, Miller & Farni, Inc. v. Flume* 888 F. Supp. 949 (E.D. Wis. 1995), submitted as NGLA 8; *Health Service Mgt. Corp. v. Hughes* 975 F.2d 1253 (7th Cir. 1992), submitted as NGLA 9.

¹⁷ *Fairchild & Co., Inc v. Richmond F. & P.R. Co.*, 516 F. Supp. 1305, 1313 (D.D.C. 1981), submitted as NGLA 10.

merely sought to facilitate the conduct of the cross-examination and to move along the proceedings.

67. Even if Mr Kessler had formed any prejudgment, National Grid submits that he would have done so solely on "*the evidence, arguments, and applicable law in the case at hand*" which, as the UNCTAD Paper makes clear, would have been within his rights. In particular, National Grid points out that Argentina could not demonstrate on what basis Mr Kessler might have formed a view other than on the "*evidence, arguments and applicable law in the case at hand*". National Grid stresses that 2,166 pages of pleadings and witness evidence and 66 volumes of documentary evidence and legal authorities submitted by the Parties had been handed over to Mr Kessler following his appointment. Having considered the written motions and having heard four days of oral submissions, together with examination of witnesses and experts, he had already had ample time to consider the issues in the case and to form tentative conclusions.
68. Finally, National Grid submits that the Division should not consider the Challenge, which would otherwise constitute a precedent that would enable any party fearful of losing the case to analyse every statement of the arbitrators in hope that it proves their impartiality and, hence, provides a basis for frustrating the arbitration proceedings. It would in consequence discourage arbitrators from fulfilling their full judicial function.

3. Request for Relief

69. In view of the foregoing, National Grid requests that the Division:

- (i) Dismiss the Challenge;*
- (ii) Order that Argentina pay the LCIA's and the Division's costs in deciding on the Challenge, as agreed by the parties, pending any decision on costs by the LCIA or the UNCITRAL Tribunal; and*
- (iii) Reserve any decision on the parties' legal and other costs incurred in connection with the Challenge for the UNCITRAL Tribunal.¹⁸*

¹⁸ Response, paragraph 78.

III. ANALYSIS AND DECISION

A. Timeliness of the Challenge

70. The UNCITRAL Rules are the applicable rules in the underlying proceedings. The provisions relating to the challenge of arbitrators are Articles 9 to 12 of the UNCITRAL Rules.
71. According to Article 11.1 of the UNCITRAL Rules, a party who intends to challenge an arbitrator "*shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party*" or (if later) after becoming aware of the circumstances giving rise to the challenge.
72. It is clear from the record that the circumstances giving rise to Argentina's Challenge took place on 12 July 2007 and that Argentina filed its initial Challenge to the Secretary of the UNCITRAL Tribunal on 27 July 2007, *i.e.*, within fifteen days after the contested intervention. Hence, the time limit of Article 11.1 of the UNCITRAL Rules has been respected, and National Grid has not contested this.

B. The Division's Jurisdiction

73. According to Procedural Order No. 19 in the underlying arbitration, the Parties agreed that Argentina shall submit the Challenge for decision to the LCIA rather than to the ICC Court, subject to certain procedural conditions.¹⁹ Accordingly, the LCIA, and this Division of the LCIA Court, is the competent authority to rule on the Challenge.
74. At the end of the oral hearing, the Parties confirmed that there were no objections against the way the Challenge proceedings were handled by the LCIA as the agreed authority or by the Division.²⁰

¹⁹ These conditions are set forth in National Grid's letter to the secretary to the UNCITRAL Tribunal dated 7 August 2007. Upon request by the Division, Argentina confirmed by letter of 22 October 2007 the respective agreement of the Parties to submit the Challenge to the LCIA for decision.

²⁰ Transcript of 22 November 2007, P109 L17 et seq.

C. The Applicable Standard

75. The central provision in relation to the Challenge is Article 10.1 of the UNCITRAL Rules which provides that:

"Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence".

76. The proceedings made clear that the present Challenge is restricted to Mr Kessler's impartiality and not his independence. The concepts of independence and impartiality are often seen as distinct, although the borderline between the two concepts is not always easy to find.

77. According to Redfern & Hunter:

[i]t is generally considered that 'dependence' is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise. This is considered to be susceptible to an objective test, because it has nothing to do with an arbitrator's (or prospective arbitrator's) mind. [...] By contrast the concept of 'impartiality' is considered to be connected with actual or apparent bias of an arbitrator – either in favour of one of the parties or in relation to the issues in dispute. Impartiality is thus a subjective and more abstract concept than independence, in that it involves primarily a state of mind".²¹

78. In the present case, Argentina made clear that it does not assert that Mr Kessler's intervention was the result of any relationship or connection between Mr Kessler and National Grid:

"We are not suggesting that his [Mr Kessler's] prejudgment comes from an improper connection with claimant".²²

79. Consequently, the Division will restrict its determination to the question whether Mr Kessler acted impartially.

80. The Parties basically agree – and the Division concurs – that the test for whether "circumstances exist that give rise to justifiable doubts" is an objective one, pursuant to which it has to be determined whether a reasonable, fair-minded and informed person has justifiable doubts as to the arbitrator's impartiality.²³

²¹ Redfern & Hunter, Law and Practice of International Commercial Arbitration, 4th ed. 2004, paragraph 4-55.

²² Transcript of 22 November 2007, P27 L6-15.

²³ Response, paragraph 37, Challenge, paragraph 10.

81. The objective standard for impartiality and independence is, e.g., confirmed by the commentary of *Caron, Caplan & Pellonpää* on the UNCITRAL Rules where it is stated:

"The inclusion of the word 'justifiable' in Article 10(1) to define the kind of doubt required to sustain a challenge reflects UNCITRAL's clear intention of establishing an objective standard for impartiality and independence. While a party's subjective concerns about an arbitrator's bias may prompt a challenge, it is the objective reasonableness of these concerns that is ultimately determinative".²⁴

82. Also, Standard 2 (b) and (c) of the IBA Guidelines, to which both Parties refer, provides for an objective test:

"(b) The same principle applies, if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, [...].

(c) Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision".

83. In its explanation to Standard 2 of the IBA Guidelines, the Working Group expressly states that:

"In order for standards to be applied as consistently as possible, the Working Group believes that the test for disqualification should be an objective one. The Working Group uses the wording 'impartiality or independence' derived from the broadly adopted Article 12 of the UNCITRAL Model Law, and the use of an appearance test, based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, to be applied objectively (a 'reasonable third person test')".

84. Further support for the objective test can be found in the Challenge Decision of 11 January 1995, to which both Parties refer, and which was rendered under the UNCITRAL Rules.²⁵

²⁴ Caron, Caplan & Pellonpää, *The UNCITRAL Arbitration Rules*, 1st ed, p. 210. See also Challenge Decision of 11 January 1995, paragraph 23.

²⁵ Submitted by National Grid as NGLA 3.

85. The Challenge Decision of 11 January 1995 sets forth the following standards: "[...] *the premise of arbitration was that the tribunal must not only be unbiased and also avoid even the appearance of bias. [...]*".²⁶ It is further held that each case has to be treated *sui generis* and that "because it cannot normally be demonstrated that an arbitrator has actual bias, an objective standard has to be applied [...]".²⁷ It continues:

*"[...] One might say that under the UNCITRAL Arbitration Rules doubts are justifiable or serious if they give rise to an apprehension of bias that is, to the objective observer, reasonable. Actual bias or partiality need not be established [...] In sum the test to be applied is that the doubts existing on the part of the claimant here must be 'justifiable' on some objective basis. Are they reasonable doubts as tested by the standard of a fair minded, rational, objective observer? Could that observer say, on the basis of the facts as we know them, that the claimant has a reasonable apprehension of partiality on the part of the respondents' arbitrator?"*²⁸

86. Finally, also Argentina submitted in the hearing that the test for impartiality is based on "reasonable apprehension":

*"[i]n relation to UNCITRAL Rules, the rules that you [the Division] have to apply, actual bias is not necessary, but reasonable apprehension".*²⁹

87. Consequently, the Division will apply an objective, i.e., a reasonable third person test to decide whether Mr Kessler's intervention in the cross-examination of Dr Cassagne creates justifiable doubts as to his impartiality, within the meaning of Article 10.1 of the UNCITRAL Rules.

D. Analysis of the Challenge

88. In order to analyse the Challenge, it is important to quote Mr Kessler's intervention in full:

"ÁRBITRO KESSLER: Doctor Guglielmino: hay una norma en el contrainterrogatorio de un experto en cuanto a poner una situación hipotética. Para tratar de avanzar, ya queda claro que hay ciertos hechos que el testigo no conoce. Pero supongo que la base de su testimonio tiene que ver con la situación hipotética, y no es hipotética porque todos los que

²⁶ Challenge Decision of 11 January 1995, paragraph 16.

²⁷ Challenge Decision of 11 January 1995, paragraph 17.

²⁸ Challenge Decision of 11 January 1995, paragraphs 24, 30.

²⁹ Transcript of 22 November 2007, P33 L 16-19.

estamos aquí sabemos los hechos en general, de que hubo un daño importante o hubo un cambio muy importante en las expectativas de la inversión.

No sé si podemos proceder. Si quiere hacerle preguntas, si hubiera un daño importante, entonces, ¿qué sería el resultado bajo el derecho argentino? Hay protección o no hay protección. La ley aplica o no aplica. Es solamente una sugerencia.

SENOR GUGLIELMINO: ¿Usted dice que a esta altura del proceso ya sabemos que hubo daño?

ÁRBITRO KESSLER: Solamente digo que estamos aquí porque hay alegato de daño, de un cambio en el contrato que resultó en problemas por el investor. Es que, como decíamos antes, no estamos hablando en el aire. No sé, estoy tratando de ayudar, pero a lo mejor no resulta de ayuda".³⁰

In English translation:

*"ARBITRATOR KESSLER: Mr Guglielmino, there is a norm in conducting cross-examination of an expert that one pose a hypothetical to try to go forward. **It is now clear that there are certain facts that the witness is familiar with, but I suppose that the basis of his testimony has to do with the hypothetical situation, and it is not hypothetical because we are all here. We know the facts generally speaking that there was major harm or major change in the expectations of the investment.***

Now, I don't know if we could proceed. If you want to ask him questions. If there were major harm, what would the result be under Argentine law? Is there protection? Is there not protection? Does the law apply? Does it not apply? I state this merely as a suggestion.

MR GUGLIELMINO: You state that at this stage we already know that there was harm?

ARBITRATOR KESSLER: I merely say that we are here because there is an allegation of harm of a change in the contract that caused problems to the investor. As we were saying before, we are not speaking in abstract. I don't know. I'm trying to help, but perhaps what I have had to say isn't all that helpful".³¹

89. In its Challenge, Argentina has merely quoted that part of Mr Kessler's intervention which is printed in bold.
90. During the hearing on the Challenge, Argentina's counsel submitted a slightly different English translation of the first part of Mr Kessler's intervention which, according to Argentina, better reflects the content of what Mr Kessler said in Spanish. Such version reads as follows:

³⁰ Cross-examination of Dr Cassagne, Transcript (Spanish), Day 4, P941, L11-P942 L9.

³¹ Cross-examination of Dr Cassagne, Transcript (English), Day 4, P889 L16 – P890 L18.

"Mr Guglielmino, there is a norm in conducting cross-examination of an expert that one pose a hypothetical to try to go forward. It is now clear that there are certain facts that the witness is familiar with, but I suppose that the basis of his testimony has to do with the hypothetical situation, and it is not hypothetical because everyone present here knows the facts in general, that there has been an important damage or a very important change in the expectations of the investment".³²

91. Counsel for National Grid agreed that this translation is an accurate one and *"probably may give a better view than the formal translation that was used"*.³³ The Division shares this view.
92. Taking the statement quoted by Argentina in its Challenge in isolation, i.e., in particular that *"[...] and it is not hypothetical because everyone present here knows the facts in general, that there has been an important damage or a very important change in the expectations of the investment"*, the Division admits that a reasonable third person might indeed gain the impression that Mr Kessler had already taken a firm view on issues which are key to the final result of the arbitration.
93. However, the Division is of the opinion that it would be inappropriate under a reasonable third person test to determine Mr Kessler's impartiality by looking at the challenged statement in isolation without considering Mr Kessler's intervention as a whole and the context of the intervention.
94. The transcript shows that Mr Kessler started his intervention by suggesting, in Spanish, to Mr Guglielmino that he pose to the expert witness hypothetical questions. The preceding pages of the transcript show that this suggestion was triggered by a discussion between counsel and the Tribunal as to whether certain questions were factual and thus improper to be put to a legal expert.³⁴
95. It is true that this suggestion by Mr Kessler was followed by the challenged statement that *"[...] and it is not hypothetical because everyone present here knows the facts in general, that there has been an important damage or a very important change in the expectations of the investment"*. However, immediately after this statement, and before being asked by Mr. Guglielmino for clarification, Mr Kessler went on to explain his suggestion by formulating examples for hypothetical questions to be posed to the expert.

³² Transcript of 22 November 2007, P19 L24 – P20 L3. See also Argentina's counsel letter dated 27 November 2007 enclosing such modified translation.

³³ Transcript of 22 November 2007, P101 L1-7.

³⁴ Cross-examination of Dr Cassagne, Transcript (English), Day 4, P884 L14 – P886 L9.

"If you want to ask him questions. If there were major harm, what would the result be under Argentine law? Is there protection? Is there not protection? Does the law apply? Does it not apply? I state this merely as a suggestion".³⁵

96. From a reasonable point of view, by formulating such questions, any appearance of bias which may have been created by the challenged sentence was eliminated. Even if one were to admit remaining doubts, they were then clearly eliminated by Mr Kessler's clarification in response to Mr. Guglielmino's question.

97. Following Mr Kessler's intervention, Argentina's counsel Mr Guglielmino sought immediate clarification and asked:

"You state that at this stage we already know that there was harm?"³⁶

98. Mr Kessler responded:

"I merely say that we are here because there is an allegation of harm of a change in the contract that caused problems to the investor. As we were saying before, we are not speaking in abstract. I don't know. I'm trying to help, but perhaps what I have had to say isn't all that helpful".³⁷

99. Thus, by stating that the subject of the arbitration was "*an allegation of harm of a change in the contract that caused problems to the investor*", Mr Kessler made clear beyond any reasonable doubt that he was not prejudiced.

100. Argentina has argued that this clarification "*does not qualify or modify in any way [Mr Kessler's] previous statement as to fact*", i.e., "*[...] that there has been an important damage or a very important change in the expectations of the investment*".³⁸

101. The Division disagrees: Mr Kessler used in his clarification the words "*allegation of harm of a change in the contract*" which, reasonably interpreted, are incompatible with the assertion that he was prejudiced.

102. As a final remark, the Division wishes to state that Mr Kessler's challenged statement may have been unfortunate and could have been the result of linguistic

³⁵ Cross-examination of Dr Cassagne, Transcript (English), Day 4, P890 L4-9.

³⁶ Cross-examination of Dr Cassagne, Transcript (English), Day 4, P890, L10-11.

³⁷ Cross-examination of Dr Cassagne, Transcript (English), Day 4, P890, L12-18 NG 3.

³⁸ Transcript of 22 November 2007, P82 L25 – P83 L1.

infelicity because Spanish is not Mr Kessler's native language. The Division admits that this sentence is a sentence that could create concerns on Argentina's side, but looking at Mr Kessler's intervention as a whole and in context, such concerns cannot be reasonably entertained.

E. Decision

1. Disposition of the Challenge

103. In conclusion, the Division decides that the Challenge brought by Argentina against Mr Judd L. Kessler must be dismissed.

2. Costs and Expenses

104. The Division declares that the costs and expenses generated by this Challenge, as well as any legal fees related thereto, shall be determined as part of the final arbitral award in the underlying arbitration.

Date:

THE DIVISION

Paul B. Hannon

Dr Hassan Ali Radhi

Dr Klaus Sachs
Chairman