



School of International Arbitration

School of International Arbitration, Queen Mary,  
University of London

# International Arbitration Case Law

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## REPUBLIC OF ARGENTINA

V.

## BG GROUP PLC

## CIVIL ACTION No. 08-485 (RBW)

## MEMORANDUM OPINION

Case Report by Ana Carolina Simões e Silva\*\*

Edited by John Barcelo\*\*\*

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In a Memorandum Opinion issued on 21 January 2011 the United States District Court for the District of Columbia, ruling on a cross-motion for recognition and enforcement of an award, held that the U.S. Federal Arbitration Act and the New York Convention required the Court to recognize and enforce a 24 December 2007 Arbitral Award rendered against Argentina in the UNCITRAL case *BG Group Plc v. Argentina*.

**Tribunal:** United States District Court for the District of Columbia – Reggie B. Walton – United States District Judge.

**Claimant’s counsel:** On Argentina’s 20 March 2008 “Petition to Vacate or Modify Arbitration Award”: Gleason & Koatz, LLP, New York and Haar & Associates, Washington, D.C.

**Defendant’s Counsel:** Not informed.

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## *Digest*

### *1. Facts of the Case*

BG Group, a UK Company, invested in Argentina within the framework of Argentina's program of privatisation of its gas industry. BG Group acquired 54,67% in Gas Argentino S.A., a consortium of investors that in turn owned 70% of MetroGAS, a local gas distribution company. In 2001, Argentina began to suffer an economic crisis and had to adopt emergency measures to deal with this situation. According to BG Group, Argentina's measures negatively impacted its investment in MetroGAS. BG Group initiated an UNCITRAL arbitration proceeding against Argentina under the Argentina/UK BIT (*BG Group Plc v. Argentina*). On 24 December 2007, the arbitral tribunal rendered an award against Argentina for breach of Article 2(2) of the BIT (fair and equitable treatment, unreasonable measures, and obligations under the "umbrella clause") and awarded damages to BG Group (the "Award").

On 21 March 2008, Argentina filed a motion before the United States District Court for the District of Columbia (the "Court") to vacate or modify the Award, relying on the U.S. Federal Arbitration Act ("FAA") and the New York Convention. BG Group responded with its own cross-motion to have the Award confirmed or recognized and enforced. First, in a Memorandum Opinion of 7 June 2010, the Court dismissed Argentina's motion to vacate or modify the Award. In the later Memorandum Opinion of 21 January 2011 that is the object of the present commentary, the Court decided in favour of BG Group's cross-motion to confirm or recognize and enforce the Award.

Argentina had asked the Court to dismiss BG Group's cross-motion. Relying on Articles V(1)(c) and V(2)(b) of the New York Convention, Argentina asserted that (i) the arbitral tribunal had exceeded its powers and completely disregarded the terms of the parties' agreement to arbitrate by allowing BG Group to bring its claims before an arbitral tribunal without Argentina's consent thereto; (ii) the award violated US public policy by allowing BG Group to assert derivative claims through its ownership of shares in the corporation damaged by Argentina's actions; and (iii) the tribunal had both exceeded its powers and contravened US public policy in the way it had calculated the damages awarded to BG Group.

In its Memorandum Opinion, the Court decided as follows:

- The Court must accept the arbitral tribunal's interpretation of the Argentina/UK BIT, according to which BG Group's failure to make recourse to Argentine courts for eighteen months (a condition stated in the BIT) was not a bar to the tribunal's jurisdiction and hence was not inconsistent with Argentina's consent to arbitration (pages 15-19).

- As a third-party beneficiary of the Argentina/UK BIT, BG Group is authorized to bring a direct action against Argentina for diminishing the value of a corporation in which BG Group held shares. This conclusion is consistent with, rather than contrary to, principles that are well-settled in US case-law. As a consequence, Argentina’s “derivative claim” argument is rejected (pages 19-21).
- The Court is not authorized to conduct a review of the factual elements relied on by the arbitral tribunal to calculate the damages awarded to BG Group (pages 21-25).
- Argentina’s argument that the arbitral tribunal’s Award itself violated the Fifth Amendment’s Taking Clause and hence US public policy fails because an arbitral tribunal is not an arm of government and because no clear standard exists for a judicial or quasi-judicial taking (pages 25-26).

## 2. *Legal Issues Discussed in the Decision*

### 2.1 **The standard of review of an arbitral award by a Court (pages 8-11)**

Judicial review of arbitral awards is extremely limited. The grounds for relief enumerated in Article V of the New York Convention are the only ones available to the Court for refusing recognition and enforcement of a foreign arbitral award. The Court cannot examine claims of factual or legal error by the arbitral tribunal. Instead, the Court must confirm the award where some colourable support for the award can be found in the record.

### 2.2 **Even if Article V(1)(c)’s “beyond the scope of submission” standard reaches so far as to include the whole of the “excess of power” exception under Section 10(a)(4) of the Federal Arbitration Act—which is seriously doubtful—the Court’s previous rejection of the Section 10(a)(4) claim settles the issue under Article V(1)(c) of the NY Convention (pages 11-14)**

The New York Convention Article V(1)(c) “beyond the scope of submissions” ground for refusing recognition and enforcement mentions one specific example of a broad category of acts that can be considered an excessive use of power by an arbitrator—the broad standard under Section 10(a)(4) of the Federal Arbitration Act. Thus, Section 10(a)(4) includes and seems to extend further than the V(1)(c) “beyond submission” standard, encompassing, for example, “manifest disregard of the law”, not a ground under the New York Convention. Hence, even if V(1)(c) could be interpreted to reach all cases of “excess of power”—which is seriously doubtful—the Court’s previous rejection of Argentina’s Section 10(a)(4) claim settles the matter under Article V(1)(c) as well.

### **2.3 The “public policy” exception under Article V(2)(b) of the NY Convention must be interpreted narrowly (pages 14-15)**

According to US jurisprudence, the public policy defence under the New York Convention is to be construed narrowly, and the threshold for establishing that an arbitral award is contrary to public policy is a high one.

This ground for denying recognition applies only where enforcement would violate the forum state’s most basic notions of morality and justice.

Public policy is to be defined by reference to specific laws and legal precedents and not through general considerations. However, not every violation of the state’s laws represents a violation of its most basic notions of morality and justice.

### **2.4 The Court cannot review the arbitral tribunal’s decision on whether the parties have consented to arbitration (pages 15-19)**

A party cannot invoke the absence of consent to arbitrate as a ground to deny the recognition and enforcement of an arbitral award by a court when the arbitral tribunal had ruled on the matter and in a way compatible with public policy requirements.

In other words, when the arbitral tribunal has interpreted the BIT and has identified in it the existence of the State’s consent to arbitrate, the Court must accept the arbitral tribunal’s decision.

### **2.5 A shareholder is a third-party beneficiary under the BIT and can claim for damages suffered by the corporation (pages 19-21)**

Under US corporate law, as an exception to the general rule, the parties to a contract may choose to allow their respective shareholders to bring an action in their own name for indirect or derivative claims for harm inflicted on the corporation.

The BIT creates such an exception. In this sense, the BIT is considered an agreement between states (here, Argentina and the UK) providing for special duties towards a third-party beneficiary (the investor nationals of the other State party to the BIT; here, BG Group).

As a consequence, the claims brought by the investor (BG Group) under the BIT do not contravene US public policy.

### **2.6 The Court cannot review the assessment of damages made by the arbitral tribunal under the public policy defence if the challenge is directed against its factual conclusions (pages 21-25)**

A party’s challenge to an arbitral award on the ground that it is being held accountable for something more than just “the actual pecuniary loss sustained as a direct result of the wrong”, may appear colourable if the arbitral tribunal

has chosen a date to start measuring the damages that is improper from a legal point of view (for example, a previous date instead of the date when the act causing the injury has occurred).

However, a party cannot challenge an arbitral award if the challenge is directed against the factual elements taken into account in determining the fair market value of the investment at the time the damage occurred—even if the evidence supporting the tribunal’s factual conclusions stems from a date before the act causing the damage.

**2.7 A party cannot state a viable claim that an arbitral tribunal’s assessment of damages violates public policy by transgressing the “just compensation” principle of the Fifth Amendment’s Taking Clause (pages 25-26)**

A party cannot challenge an arbitral tribunal’s damages award as a violation of public policy on the ground that it contravenes the principle of “just compensation” as set forth in the Taking Clause of the Fifth Amendment because an arbitral tribunal is not an arm of government and hence cannot accomplish a taking. Moreover, because no clear standard exists as to what constitutes a “judicial taking”, the public policy claim is not based on a “well defined and dominant” public policy and hence fails.

**3. *Decision***

The Court dismissed Argentina’s request to deny recognition and enforcement of the Award because the Argentina failed to demonstrate the strict conditions required by New York Convention Articles V(1)(c) and V(2)(b). Therefore, the Court concluded that the Award should be recognized and enforced, and that BG Group is entitled to damages, along with interest, arbitration costs and attorneys’ fees.