

## Aurora Macro Strategies – Public Debt Report: YPF Case Update, July 19, 2024

### The Tearsheet

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| <ul style="list-style-type: none"> <li>▪ The Southern District Court of New York (SDNY) decided to reopen the briefing regarding the YPF turnover petition after Argentina introduced new arguments.</li> </ul> | <p>Aug 2024</p> <p>4Q24</p> <p>3Q25</p> <p>4Q25</p> <p>4Q26</p> | <p>Decision about the turnover petition</p> <p>Possible new IMF program</p> <p>Argentine midterm elections</p> <p>Court of Appeals decision</p> <p>SCOTUS hearing the case</p> |
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- Aurora previously [argued](#) that the SDNY is considering a turnover petition over YPF shares to maintain the stay on the judgment that awarded \$16.1BN compensation in favor of Petersen Energía and Eton Park based on the YPF Expropriation Case. This reopening could signal that Judge Preska is aware of the legal challenges facing the petition.
  - This new briefing, known as a sur-reply, was centered on Argentina's immunities and the comity principle. Eventually, the Court could decide to request the favorable opinion of the U.S. Department of Justice, delaying the decision.
  - Taking into consideration the legal and international challenges, we do not consider it likely that the SDNY will order the turnover of the shares at this stage. Instead, a plausible scenario would be the Court asking Argentina to provide another payment guarantee or, in an extreme case, lifting the stay of the \$16.1BN compensation judgment.
  - Given the need for fresh dollars and the IMF's conditions, the Milei administration will likely adopt a cooperative stance in the U.S. courts.
  - This position, likely to be supported by the U.S. Government, would increase the probability of maintaining the stay while the Second Circuit decides on the appeal filed against the compensation judgment.

### 1. The sur-reply arguments and the abandonment of the alter ego doctrine

- On June 26<sup>th</sup>, the SDNY allowed Argentina to file its sur-reply by June 28, 2024, with plaintiffs permitted to respond by July 8, 2024. Based on discretionary powers, that decision could signal that Judge Preska is aware of the legal challenges of the turnover of YPF's shares.
- On June 27<sup>th</sup>, Argentina argued that the plaintiffs introduced new arguments not previously addressed. These new arguments include interpretations of the Foreign Sovereign Immunities Act (FSIA), New York Civil Practice Law and Rules (CPLR), and the YPF Expropriation Law that must be corrected.
- The main argument is that Argentina's privilege as a foreign state under the FSIA and the comity principle prevents the Court from issuing any order that will require the modification of Argentina's Public Law. These immunities should also be applied during the attachment or execution stage.
- To support these allegations, Argentina ratified that YPF's shares are not placed in the U.S. or used for commercial purposes in that country. Therefore, those shares do not fall under the direct jurisdiction of New York's civil procedural laws. Notably, the sur-reply did not mention the alter ego doctrine.
- In their sur-reply on July 8, the plaintiffs defended that the comity analysis does not apply in post-judgment execution and, therefore, the FSIA does not prevent the turnover. They also maintained that Argentine law does not prevent compliance with a turnover order and

that Argentine Congressional approval is not necessary. Finally, the plaintiffs reinforced that, under the FSIA, it is only necessary that the shares are used for commercial activities in the U.S. The alter ego doctrine was not invoked either.

- The sur-reply briefing shows, as Aurora concluded, that the Court does not have to rule on the alter ego doctrine to decide about the turnover petition. Without the distractions of that doctrine, the Court now faces the case as plainly as it is: does the Court have jurisdiction to order the turnover of the shares of YPF to maintain the stay over the \$16.1 billion compensation judgment. while the appeal is pending before the Second Circuit?

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## **2. After the sur-reply, will the Court order the turnover?**

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- The sur-reply arguments reinforce our previous conclusion, according to which plaintiffs face a high bar to obtain and execute a turnover of the shares. Argentina's narrow interpretation of execution immunities under the FSIA strengthens our original point about the critical difference with the PDVSA case, given that YPF does not operate businesses in the U.S. Besides, it is unclear if the Court has jurisdiction over shares not registered in the U.S.
- The comity principle argument should be analyzed from two perspectives. On the one hand, it is unclear that the principle does not apply during the execution stage, because its fundamental objective is the protection of foreign relations, which also applies to the execution stage. On the other hand, when the comity principle is at stake, the SDNY usually requests the opinion of the U.S. Department of Justice, mainly based on the [Allied Bank](#) case. Hence, a possible outcome is Judge Preska requesting the U.S. Government's opinion to determine if Argentina's immunities and domestic law are consistent with U.S. policies.
- The turnover petition could conflict with the foreign relations between the U.S. and Argentina and, particularly, undermine Argentina's ability to advance in a cooperative relationship with the IMF. Therefore, if the SDNY decides international comity is a relevant argument, the natural consequence will be to request the opinion of the U.S. Government.
- Eventually, Argentina could ask the U.S. to file a statement of interest to support the maintenance of the stay while the country advances in its major economic reforms. To increase the likelihood of maintaining the stay, Argentina could adopt a cooperative approach with the Court rather than a confrontational one.
- These foreign relations implications demonstrate that the turnover petition has the highest cost among the many options to maintain the stay. Notably, this motion is not related to the enforcement of a final judgment but to an incident associated with the stay of the \$16.1 billion compensation judgment.
- Hence, the SDNY could avoid the legal and international challenges of the turnover by asking Argentina to supply other ideas about how to ensure the payment of the judgment (for instance, the receivables generated from the Yacyretá project, as Judge Preska had previously suggested).
- Lifting the stay seems a less conflictive decision compared with the turnover of the shares. However, Argentina could use the support of the IMF and the U.S. Government to justify the maintenance of the stay, at least for a short period (i.e., six months). An example could be the favorable position of the SDNY staying the complaint filed by [Sri Lanka](#)'s creditor to support the country's collaborative efforts to restructure its debt.

- Consequently, we do not currently expect the SDNY to order the turnover of the shares. On the contrary, the Court could maintain the temporary stay while exploring other less costly actions.
- Argentina's position will influence the outcome: a defiant position will increase the risks of unconventional measures, while a collaborative approach could pave the way to maintain the stay. If the U.S. Government's statement of opinion is requested, the case will be delayed until that opinion is filed, usually in two months. Otherwise, we could expect a decision in August.

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### **3. What to expect regarding the appeal process**

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- While the turnover decision is pending, the appellate process continues progressing slowly.
- On June 24th, Argentina filed its response-and-reply brief, arguing that the district court made significant legal errors and misapplied Argentine law. Specifically, it cited Articles 1204 of the Civil Code and 216 of the Commercial Code of Argentina, arguing that these mandatory articles require the plaintiffs to seek specific contract performance before claiming damages.
- The appeal before the Second Circuit will take months to decide, after which the parties will likely appeal to the U.S. Supreme Court.
- Regarding the potential decision by the Court of Appeals, which we expect within a year, we believe it will confirm contractual breaches following Argentina's 2012 takeover of YPF, holding Argentina responsible.
- As for the quantum of the award, the Court of Appeals is unlikely to delve into details. However, if the Second Circuit finds any ground to overturn the compensation, it will likely return the case to the SDNY.
- Because the appeal will not be expedited, Argentina's main interest is to maintain the stay.

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### **4. IMF's demands shape Milei's cooperative stance with Preska**

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- The recent approval of the Bases Law Project and the Fiscal Package represents a major victory for President Javier Milei's administration, highlighting their ability to navigate the political system despite a minority in Congress.
- This success ushers in a new phase focused on easing capital controls and increasing net international reserves, which the market eagerly demands and expects from the government.
- The administration's approach to these financial reforms is crucial, especially in the context of significant debt maturities totaling more than USD 8 billion due by the end of the year. Only a fraction of this can be refinanced through the World Bank, IADB, and CAF disbursements.
- Without access to international financial markets, the administration will seek fresh dollars through a new agreement with the IMF, a task that Economy Minister Luis Caputo is dedicated to and hopes to finalize by the end of 2024.
- The IMF has emphasized the need to deepen the reform process, which will aid in gradually easing capital controls. The IMF has also requested a continued engagement to resolve the ongoing sovereign debt litigation cases over time.

- Given this need for fresh dollars and the IMF's conditions, the Milei administration will likely adopt a cooperative stance in the U.S. Judiciary. This cooperative behavior is essential for maintaining a positive relationship with creditors and international financial institutions.
- While the IMF is Argentina's largest creditor, with around USD 45BN owed, the second-largest creditor is court-ordered awards, with nearly USD 20BN owed.
- The YPF case accounts for over three-quarters of this debt, with an enforcement risk of USD 16.1BN. Most of these asset seizures are expected to occur during the Milei administration, making it critical for the administration to manage this situation effectively.
- The need for fresh dollars and the potential IMF agreement explain why the Milei administration could cooperate with the U.S. judiciary, avoiding an open confrontation.



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