

## Aurora Macro Strategies – Public Debt Report: YPF's Alter Ego Allegations Tango, June 17, 2024

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### The Tearsheet

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- Despite Argentina appealing to the Second Circuit Court of Appeals to dismiss the \$16.1 billion awarded in the YPF Expropriation Case, plaintiffs Petersen Energía and Eton Park supported by litigation financier Burford Capital, have filed a motion to proceed with the turnover and execution of Argentina's 51% stake in YPF.

Jun 24	Argentina and YPF brief to Court of Appeals
Jul 24	Plaintiff's counter-defense to Court of Appeals
Q3 2025	Argentine midterm elections
Q4 2025	Court of Appeals decision
Q4 2026	SCOUTS hearing the case
- Two weeks ago, after Argentina stalled and ultimately refused to produce documents evidencing its relationship with YPF. In response the Court ordered Argentina to turn over not only the YPF documents but also ordered document production for other Argentinian state-owned enterprises as well.
- We note the growing similarities in this proceeding with the infamous *Argentina v NML* case, wherein judicial frustration with Argentina's stalling and obfuscatory tactics in relation to paying a judgment resulted in the Court ordering drastic and unprecedented measures to enforce the judgment.
- In recent years the trend has likewise been one of increasing success for judgment creditors in securing alternative payment assurances in U.S. courts. Absent a change in Argentina's current defense strategy, we believe a frustrated Court will seek alternative methods to enforce its orders. These could include expanding the scope of the turnover and execution process to other assets, lifting the stay of execution granted Argentina in November 2023, or pushing the parties towards a negotiated settlement.
- Against this backdrop, we assess recent plaintiff arguments aimed at establishing YPF's alter ego status in the turnover and execution process as being primarily a move to pressure Argentina into a negotiated settlement – an outcome the Court would favor.
- We anticipate that Judge Preska will continue to push for a negotiated settlement to ensure that some of the judgment is paid, while maintaining the stay.
- Any such settlement would likely require approval from Argentina's legislature, potentially posing a challenge for President Milei's administration given the complexities of Argentina's polarized political landscape.
- Only if such a settlement is not reached, and the Court considers that Argentina is not acting in good faith, this will heighten the risk that the stay is lifted, after which the alter ego argument would become the key to enforcing the judgment against Argentina's YPF's assets.

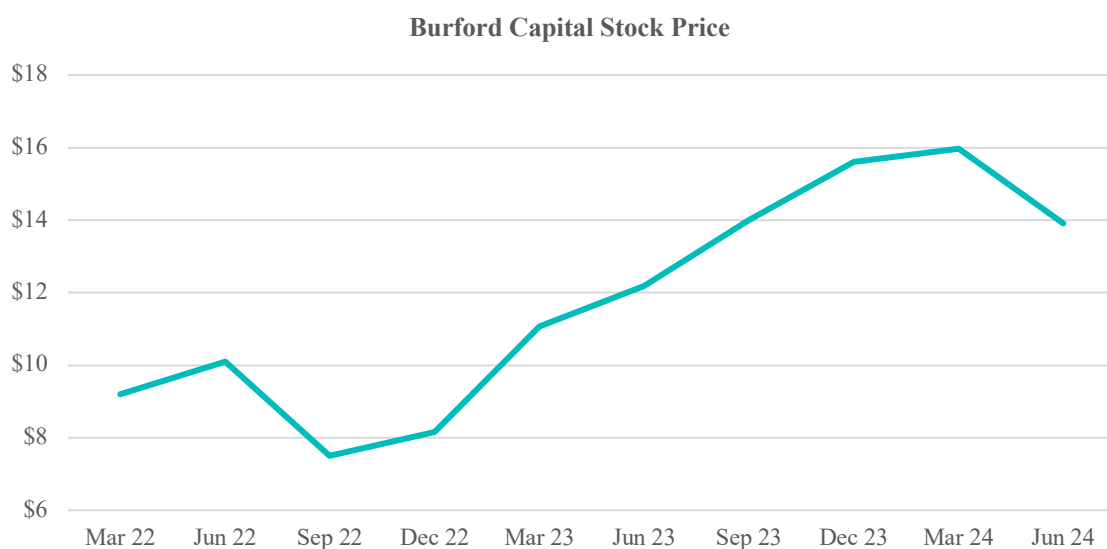
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### 1. High-Stakes Showdown: \$16.1 Billion YPF Expropriation Contract Breach Case

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- The current turnover and execution proceedings, overseen by Judge Loretta A. Preska in the U.S. District Court for the Southern District of New York (S.D.N.Y), stems from an award for contractual breaches following Argentina's 2012 expropriation of YPF, the majority state-owned energy company.

- The plaintiffs are Petersen Energía and Eton Park, which previously owned stakes in YPF. Burford Capital is providing financing for the litigation.
- The plaintiffs obtained the judgment after successfully arguing that Argentina violated YPF's statutory clauses by not making a public tender-offer after acquiring control of YPF's shares. The deciding question revolved around whether the takeover of YPF triggered a contractual obligation to conduct such an offer.



*Source: Bloomberg*

- Following years of litigation, the S.D.N.Y. granted summary judgment on March 30, 2023. On September 15, the Court awarded compensation of \$16.1 Bn.
- Argentina appealed the decision and requested a stay of execution of the final judgment in October 2023. This appeal is still proceeding in parallel and as a separate matter to the S.D.N.Y. case.
- The Court granted a stay extension on November 21, 2023, to accommodate the transition period from President Alberto Fernández to President Javier Milei but has ordered that Argentina propose alternative means of payment security, such as "its equity interest in YPF."
- In the meantime, the appeal is slowly winding its way through the Court of Appeal for the Second Circuit, where we do not expect any final decision this year.

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## 2. Alter ego ergo es?

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- On April 1, 2024, the plaintiffs filed a turnover and execution petition for Argentina's 51% stake in YPF arguing that Argentina uses these shares to control YPF and to direct commercial activities in the U.S. – and are therefore not subject to sovereign immunity under the Foreign Immunity Sovereign Act (FSIA).
- While this petition did not argue that YPF is the alter ego of the Republic, it did reference the *Crystallex* case, where the Third Circuit found that PDVSA (the Venezuelan national oil company) is the alter ego of Venezuela. Since then, the proceedings have partially evolved into a debate on the plaintiffs' alter ego arguments and whether Argentina's 51% share in YPF is protected by sovereign immunity.

- In keeping with their opposition to the alter ego argument more generally, Argentina and YPF have strongly resisted – and repeatedly challenged – the discovery process related to the turnover.
- The plaintiff's request that Judge Preska compel YPF to provide documentation concerning its relationship with the Argentinian government was met with a flat YPF refusal. Subsequently, the plaintiffs filed a discovery motion on April 30 seeking to force production of the documents.
- On May 9, the plaintiffs also requested Judge Preska to order Argentina to provide information of a similar nature relating to other state-owned enterprises (SOEs) including Aerolíneas Argentinas, ARSAT, Banco Central de la República Argentina (Argentine Central Bank), Banco de la Nación Argentina, and ENARSA.
- In a discovery conference held on May 28, Judge Preska stated that, of the various discovery requests made by plaintiffs of the SOEs, those pertaining to YPF and the Argentine Central Bank were valid, and thus ordered Argentina to present documentation evidencing its relationship with them over the past two years.
- On May 30, in a memorandum replying to Argentina's defense, the plaintiffs clarified that the turnover petition does not rely solely on the alter ego argument, but rather on Argentina's commercial use of the shares.
- They also suggested that Judge Preska compel Argentina to reach a negotiated settlement in the YPF case. The plaintiffs also promised that they would consent to suspending the turnover and execution proceedings if Argentina agreed to negotiating a settlement.
- The Argentina parties presented another opposition on June 14, which the plaintiff challenged two days later. This demonstrates that the parties will maintain contentious litigation that may influence the Court's approach.

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### 3. Egos aside, is the claim relevant?

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- Our base case is that, at least at this stage, Judge Preska will not rule on the alter ego claim but rather on the property of the shares. As the plaintiffs explained in their petition filed on May 30, the turnover petition is not based on the alter ego claim.
- In a nutshell, a successful alter ego argument would allow the Court to disregard the legal personality of an instrumentality for liability purposes and instead look beyond to another entity exercising control of the instrumentality.
- When the U.S. District Court for the District of Delaware (the Delaware Court) ruled in 2018 that PDVSA was the alter ego of the Venezuelan Republic, it allowed the Republic's creditor (Crystallex) to enforce its judgment against properties of PDVSA, specifically the shares of PDV Holding, the controlling shareholder of the American oil refining company Citgo.
- The turnover and execution motion currently pending in the S.D.N.Y. was filed against Argentina and YPF to secure payment of the aforementioned \$16.1 Bn judgment via Argentina's shares in YPF. In this case, the Court does not have to rule on corporate separateness or alter ego to grant that petition because the plaintiffs are not trying to enforce their judgments against YPF's properties (as in the *Crystallex* case), but rather against Argentina's assets. Hence, the alter ego argument is likely irrelevant, at least at this stage.
- Because Argentina is a foreign sovereign state, it is protected by jurisdictional immunity, which, per the FSIA, does not apply to assets used by a state for non-commercial purposes.

- The *Crystallex* case was referenced as precedence primarily in supporting the argument that Argentina is using its YPF shares to direct commercial activity in the U.S. (as PDVSA does PDV Holding) and is therefore not immune under FSIA.
- To order the turnover petition, among other conditions, the S.D.N.Y. must not only find that Argentina uses the YPF shares to directly conduct commercial activities in the U.S., but also that the shares are ownership interests of Argentina in the U.S.
- Additionally, the court must find that those shares are used for commercial purposes “upon which the claim is based,” that is, that the commercial use of the shares relates to the tender-offer obligations violated by Argentina.
- In summary, it is not necessary to rule that YPF is the Republic's alter ego to deal with the turnover petition. The alter ego precedents are only relevant to determine whether Argentina uses the contested shares for commercial purposes in the U.S.

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#### 4. Schrödinger's alter ego?

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- We do not believe that the S.D.N.Y. will rule on the alter ego claim at this stage, preferring instead to keep it as a nuclear option. Judge Preska has explicitly cautioned, the plaintiffs still face a long road ahead in enforcing the judgment, pending a separate ongoing appeal.
- During discovery, the parties discussed the conditions for deciding the alter ego claim based on the *Bancec Test* set forth by the U.S. Supreme Court. However, the Delaware cases concerning PDVSA demonstrate that district Courts do not always follow this precedent.
- Indeed, in the PDVSA cases, the Delaware Court has ruled on the alter ego question twice, in 2018 and 2023, based on two different standards.
- In [2018](#), the Delaware Court treated alter ego conditions as requiring more than mere political control over the instrumentality, in a [ruling](#) similar to one in [2015](#) regarding the Argentine Central Bank). The Court held that overcoming the presumed corporate separateness of PDVSA required robust day-to-day control. The intense politicization of PDVSA since 2004 was considered by the Delaware Court and the Third Circuit as a clear demonstration that PDVSA was not autonomous.
- In [2023](#), the Delaware Court indirectly lowered this standard to consider the ordinary constitutional and statutory controls over PDVSA as evidence of alter ego, which was later reaffirmed by the Third Circuit.
- Under the 2018 standard, declaring YPF as the alter ego of Argentina would require demonstrating intense control over YPF's day-to-day operations. That standard will be hard to pass.
- However, under the 2023 standard, it becomes easier to argue that YPF is the alter ego of Argentina, considering the constitutional and statutory controls that Argentina's government exerts over the company. Indeed the 2023 standard introduces significant legal risk for all national oil corporations, which are usually subject to unique controls that could be interpreted as undermining their claim to corporate separateness
- The 2023 standard was influenced by the long series of cases against PDVSA rather than a reinterpretation of the alter ego standard. Hence, the S.D.N.Y. could be more inclined to adopt a more conservative approach based on a stricter interpretation of *Bancec*.
- To summarize, while the Court does not currently need to determine if Y.P.F. is the alter ego of the Republic for the turnover petition, it's possible that the plaintiffs may attempt to leverage this argument to enforce Y.P.F.'s assets in the future.

- If and when this situation arises, we anticipate that the S.D.N.Y. will apply strict interpretations of the alter ego standards, which would increase the plaintiffs' burden.

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## **5. Will the Court order the turnover?**

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- The alter ego argument became increasingly an issue during the discovery process precisely because the Argentina parties strongly opposed providing any information based on that argument.
- However, the turnover petition's final decision will not directly depend on the discovery outcomes, meaning that we need to avoid any distraction based on the contentious nature of the alter ego incident.
- At least for now, our read of the plaintiffs is that they remain less interested in delving into the complexities of the alter ego argument than they are in convincing Judge Preska to grant the turnover and execution petition.
- That petition would likewise not be an easy claim to grant, as the plaintiffs will need to overcome three barriers.
  - First, they must demonstrate that the shares are not immune because they are used for commercial purposes in the U.S. and are related to the breach of the tender-offer obligations on which the judgment is based. Although the petition would be based on PDVSA precedents, there is an important difference to consider: PDVSA is the final shareholder of Citgo Petroleum Corporation, a U.S.-based refinery corporation, while in contrast, YPF does not operate any such business in the U.S.
  - Second, the plaintiffs must demonstrate that the Court has jurisdiction to grant such a petition. After all the PDVH shares turned over were registered in Delaware and, given that shares of YPF are not registered in the U.S., the PDVSA precedent may not ultimately be applied.
  - Finally, there are important considerations regarding the comity principle, the act-of-state doctrine, and the Argentine Law 26.741, which governs the expropriation of YPF and explicitly prohibits share transfers without approval from the Argentine Congress via a two-thirds majority vote.
- Regarding the final barrier, the S.D.N.Y. could decide to request the opinion of the U.S. government as to how the turnover petition could influence foreign policy towards Argentina, or U.S. policy on contract enforcement.
- In Argentina's appeal, separately progressing in the Second Circuit Court of Appeals, Latin American governments such as Chile, Ecuador, and Brazil, have all filed amicus briefs in support of Argentina, demonstrating that this case is escalating to the foreign relations arena, where U.S. courts historically tend to defer to the U.S. government.
- Given the thorniness posed by such issues, Judge Preska could find that the turnover petition is not the only means available to secure payment of the YPF judgment. To this end the S.D.N.Y. has suggested other, less conflict-inducing alternatives, for example using the receivables generated from the Yacretá project.
- Here again, much is likely to depend on Argentina's attitude towards the litigation process moving forward, as this will influence the outcome of this motion. A key lesson of the Argentina-NML saga before the late Judge Griesa is that a hostile defense denying any pledge to ensure payment of an award incentivizes unconventional remedies. These could escalate into a lifting of a stay or other more dramatic measures.

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**6. Alter Ego as a negotiation tactic**

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- For the plaintiffs, the alter ego argument, and even the turnover and execution petitions, currently appear to be primarily negotiating tools intended to gain leverage and induce settlement.
- We presently perceive no immediate risks regarding the judgment itself. The appeal before the Second Circuit will take months to decide, after which the parties will likely appeal again to the U.S. Supreme Court.
- The *Crystallex* case, still going in its eighth year, is demonstrative of just how long these battles can take.
- With this in mind, the only immediate risks that Argentina likely faces are (i) that the S.D.N.Y. grants the turnover and execution petition, or (ii) that the Court lifts the stay.
- Either way, Argentina will likely be forced to the negotiating table.
- The plaintiffs know that Argentina lacks funds at hand to pay the judgments and only has limited access to international financial markets. Considering this, as shown in the May 30 brief, the plaintiffs want to negotiate an out-of-court settlement.
- Any such settlement would nonetheless have to gain formal approval in the difficult political environment in Argentina, which will be particularly challenging considering the current dynamics between President Javier Milei and the Argentine congress.
- One possible scenario could see negotiation of a set sum to settle the claim, with an offer to assist Argentina in issuing a bond with an intermediary bank that takes the security and then sells it on in the secondary market. An operation similar to this was carried out by Argentina with Petersen in 2012.
- Given limited access to debt markets, we expect that there would have to be a double guarantee secured by the operation of the Argentine oil company in Vaca Muerta. While such a guarantee would also likely have to be approved by Argentina's Congress, as it could be considered a "national public debt operation," unlike the actual delivery of YPF shares, it would require only a simple majority vote for approval.
- Milei has recently proven able to secure these under the right circumstances – with the recent passage of the Minibus in the Senate.





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