

Aurora Macro Strategies – Public Debt Report: DOJ backs Milei re YPF stay, September 25, 2024

The Tearsheet

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| <ul style="list-style-type: none"> ▪ The U.S. government has now expressed its intention to intervene in the case, marking a strategic win for Milei's administration. While the statement of opinion — which is expected before November 6 — may cover several topics, we anticipate that the Biden administration will advocate for the \$16.1 billion judgment against Argentina to remain stayed. | <p>Sep 30</p> | <p>Republic must respond subpoenas and information requests in Discovery</p> |
| | Oct 2 | Both parties must file response briefs in Discovery |
| | Nov 6 | Deadline for DOJ Statement of Interest |
| | Dec 14 | Republic completes Discovery |
| | Q3 2025 | Argentine midterm elections |
| | Q4 2025 | Court of Appeals decision |
| | Q4 2026 | SCOUTS hearing the case |
- This DOJ intervention further diminishes the viability of the turnover petition, which aims to transfer Argentina's YPF shares to the plaintiffs as part of the judgment enforcement. The petition already faced considerable legal obstacles, and now, with the potential political support from the U.S., the plaintiffs' position becomes even more challenging.
 - Despite these developments, the *alter ego* discovery process remains the plaintiffs' main route for enforcing the first-instance judgment. Judge Loretta Preska has allowed the plaintiffs to obtain emails and chat records involving key officials from Milei's administration, which should serve as a serious warning for the government.

1. When DOJ met YPF

- As predicted in previous [Aurora reports](#), on September 9, the U.S. government, through the Department of Justice (DOJ), filed a letter indicating it is considering submitting a Statement of Interest. This move underscores the diplomatic sensitivity the case holds for the U.S. administration.
- U.S. government opinions are typically given significant weight by U.S. courts, as they help avoid decisions that might negatively impact U.S. foreign policy. One potential rationale for the Biden administration could involve supporting Milei's efforts to manage Argentina's debt crisis. Specific actions might include advocating for the stay on enforcement to remain in place, thereby rejecting the turnover petition.
- Judge Loretta Preska approved the DOJ's suggested deadline of November 6 for the government to submit its official position. As a result, any decisions on the pending issues will be postponed until after that date.
- The U.S. government's submission could address how Argentina's policy decisions are influencing the debt litigation process, especially the provisions of Argentine law that, according to the defense, prevent any actions ensuring payment of the judgment. Based on the comity principle, U.S. courts generally defer to the Executive branch regarding the effects of foreign government actions within the U.S.
- However, despite the weight given to the comity principle and deference to Statements of Interest, Judge Preska will not be bound by the DOJ's opinion. It will be crucial to see how she interprets Argentina's stance on securing payment for the judgments.

2. The Turnover Petition: Legal and Political Hurdles

- Before the DOJ became involved, Judge Loretta Preska recognized the significant legal complexities and potential political ramifications surrounding the case. As a result, she decided to indefinitely postpone the key conference scheduled for September 6.
- This conference was set to address two major issues: YPF's opposition to both the turnover petition and the post-judgment discovery under the alter-ego theory. Judge Preska's decision followed her directive for both parties to submit briefs aimed at narrowing their disagreements, signaling her intent to promote a resolution.
- YPF's defense hinges on the argument that, since it wasn't directly condemned in the initial judgment, the principle of res judicata should shield it from post-judgment discovery and any enforcement action. Additionally, YPF maintains that its shares are protected from turnover under the Foreign Sovereign Immunities Act (FSIA). Conversely, the plaintiffs argue that YPF's shares are not protected by sovereign immunity and that turnover is a valid method to enforce the judgment.
- For the turnover petition to succeed, three key hurdles must be cleared:
 - 1) The stay on enforcing the judgment would need to be lifted. Given the DOJ's recent involvement, this seems increasingly unlikely in the near future.
 - 2) Even if the stay were lifted, the petition would still face significant legal obstacles, as Aurora [outlined in a previous report](#). These include YPF's strong defense under the FSIA, making a straightforward resolution difficult.
 - 3) Perhaps most importantly, the potentially irreversible consequences of ordering the transfer of YPF shares while the judgment remains under appeal add another layer of caution for the court. This greatly reduces the immediate likelihood of turnover.
- Considering these factors, as Aurora has consistently noted, it is more likely that Judge Preska will explore alternative enforcement mechanisms, such as advancing the ongoing *alter ego* discovery process.
- With these challenges in mind, Judge Preska has opted to delay any ruling on the pending injunction and turnover requests until after the DOJ submits its Statement of Interest. As a result, we do not expect any decisions on the turnover matter for the remainder of 2024.

3. Alter Ego Discovery touches Milei's inner circle

- The plaintiffs, Petersen Energía and Eton Park, have increasingly turned to the *alter ego* discovery process as their primary strategy for enforcing the \$16.1 billion judgment. By focusing on the connections between the Argentine government and various state-owned enterprises (SOEs), they are hoping to find additional pathways to secure payment.
- This discovery process is not aimed at directly declaring these SOEs as *alter egos* of the Argentine government for liability purposes. Instead, the plaintiffs are working to gather evidence showing the degree of control the government exerts over these entities.
- If the court eventually lifts the stay and the process succeeds in declaring these SOEs as *alter egos* of Argentina, asset seizures could become possible. This makes the discovery process a crucial element in strengthening the plaintiffs' case. Notably, the court has allowed documents gathered in the U.S. to be used abroad as well.

- In June 2024, Judge Preska permitted discovery to proceed specifically regarding YPF and the Banco Central de la República Argentina (BCRA), while rejecting similar requests concerning other SOEs at that time.
- However, as noted in our [most recent report](#) on the subject, the scope of discovery has since broadened to include Aerolíneas Argentinas, Banco de la Nación Argentina, and ARSAT. This expansion reflects the plaintiffs' ongoing efforts to demonstrate the Argentine government's influence over these entities and Judge Preska's openness to this strategy for securing payment.
- Recent developments have brought high-profile officials from both the previous administration of Alberto Fernández and the current government under President Milei into the spotlight. Notable figures including former Economy Minister and presidential candidate Sergio Massa, current Economy Minister Luis Caputo, and other key officials have been identified as custodians of critical evidence.
- The plaintiffs have requested a wide range of evidence from these officials, including emails, chats, and other forms of electronic communication, with the intent of uncovering the extent of governmental control over the SOEs.
- Argentina has raised objections to this discovery process, citing privacy concerns under Argentine law. The country recently reinforced these protections with President Milei's Decree 780/24, which limits access to the personal communications of officials. Argentina further argues that accessing personal devices without legal authorization would breach both U.S. and Argentine laws.
- These issues have highlighted the ongoing disputes between the parties, with a discovery deadline currently set for December 14.
- Argentina's approach in this *alter ego* discovery process will be crucial to monitor. Rather than mounting aggressive defenses, the most effective strategy may be to demonstrate a commitment to addressing the claims transparently and promptly.
- This strategy would mirror Sri Lanka's recent case in the same New York court, where a moderate approach earned U.S. government support and a favorable ruling from the court.
- Ultimately, we expect Judge Preska to allow broad post-judgment discovery based on the *alter ego* arguments, likely disregarding any restrictions under Argentine law. Since the turnover petition is unlikely to be resolved in the short term, the discovery process remains the only immediate means for the court to apply pressure.

4. Onwards the appeal

- Progress continues in Judge Preska's court, while the parties have concluded final arguments before the Court of Appeals.
- YPF is asking the Court to uphold Judge Preska's decision, which absolved the company of any liability related to the 2012 expropriation and its aftermath. Meanwhile, the Republic is appealing to either overturn the \$16.1 billion ruling or reduce the damages, arguing that Judge Preska misapplied both public and private Argentine law. Conversely, the plaintiffs are pushing for confirmation of the original judgment.
- The next step is a hearing before a panel of three judges (date still to be determined), with a final ruling anticipated by Q4 2025.

- We anticipate that the appeal will affirm the Republic's breach of contract in the 2012 YPF takeover, though the compensation amount may be reconsidered, possibly sending the case back to the SDNY for further evaluation.
- In light of these developments, it is crucial for Argentina to continue working cooperatively with Judge Preska. Maintaining a constructive approach will be critical not only for managing the turnover petition and the *alter ego* discovery process—both of which hinge on Preska keeping the stay in place—but also if the case is remanded to the SDNY to reassess damages.
- Moving forward, Preska's rulings will continue to play a central role in shaping Argentina's legal strategy, underscoring the importance of positive engagement with the court.

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