

U.S. Court Holds Argentina Liable for Conduct Related to 2012 Nationalization of YPF

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Key Takeaways

1. **Certain YPF shareholders opted to sue the Argentine state in U.S. court under New York/Argentine law rather than commence investment-treaty arbitration (as other YPF shareholders did before ICSID in 2012).** When sovereign conduct harms a foreign investment, if corporate bylaws govern such conduct and are subject to New York law, the investor might have a contractual claim in U.S. court that could yield the same damages as an investment-treaty claim.
2. **YPF shareholders prevailed on their good faith and fair dealing claim.** Good faith and fair dealing was the sole claim for which the court held Argentina liable. Therefore, that cause of action alone yielded a potential multibillion dollar judgment, which may prove to be the largest ever judgment against a foreign sovereign in a U.S. court. Potential claimants may therefore be advised to look to the purpose and not just to the text of agreements like corporate bylaws when considering similar litigation.
3. **Litigation financiers may elect to focus more on suits against foreign sovereigns.** The Parties agreed that without litigation financing, the suit against Argentina would not have proceeded. Given the potential size of judgments to be attained from suing foreign sovereigns for expropriation, suits against foreign sovereigns in U.S. courts may prove to be fertile ground for litigation financing investments.

Background

In 2012, Argentina re-nationalized the oil and gas operator YPF SA. YPF was originally a state-owned enterprise that privatized in 1993. As of 2012, YPF's bylaws provided that nationalization triggered an obligation to make a tender offer for outstanding shares. No such tender offer occurred, and, consequently, the plaintiffs never received the compensated exit that the bylaws promised. Notably, the plaintiffs-shareholders elected to sue under the "commercial activity" exception to the Foreign Sovereign Immunities Act (FSIA), not its expropriation exception, under which suits against foreign sovereigns may proceed where the sovereign expropriated the property of a foreign citizen.

Repsol, the Spanish company from which Argentina acquired the requisite shares to take majority ownership of YPF, commenced arbitral proceedings in 2012 against Argentina before ICSID under the 1991 Argentina–Spain Bilateral Investment Treaty (BIT). Repsol argued that Argentina's acquisition of 15% or more of Repsol shares required Argentina to acquire Repsol's entire 57% stake in YPF (rather than the 51% that Argentina sought). Spain settled all claims against Argentina for approximately \$5 billion in 2014.

In April 2015, former YPF shareholders Petersen Energía Inversora/Petersen Energía sued YPF and Argentina in the U.S. District Court for the Southern District of New York for breach of contract, anticipatory breach of contract, breach of the implied duty of good faith and fair dealing, and promissory estoppel. On September 9, 2016, the court denied the defendants' motions to dismiss, which sought dismissal on the basis of the FSIA, the act of state doctrine, *forum non conveniens*, and failure to state a claim but dismissed the shareholders' promissory estoppel claims against both the defendants and the good faith and fair dealing claim against YPF (*Petersen Energía Inversora, SAU v. Argentine Republic*).

Argentina and YPF filed an interlocutory appeal as to the district court's denial of the motion to dismiss, arguing, among other things, that the FSIA deprives U.S. courts of jurisdiction over "sovereign acts of expropriation." The Second Circuit held that Argentina had a commercial obligation under the bylaws to commence a tender offer for outstanding shares and that such obligation existed separate and apart from Argentina's expropriation of Repsol's shares. The suit therefore fell within the "direct effect" clause of the FSIA's commercial activity exception. Argentina and YPF petitioned for a writ of certiorari on the sovereign immunity issue, which the Supreme Court denied.

Eton Park, another YPF shareholder, sued YPF and Argentina on November 3, 2016, alleging the same non-dismissed claims as Petersen. The court consolidated *Petersen* and *Eton Park* and denied a motion to dismiss both cases on grounds of *forum non conveniens*. Of note, since at least 2016, Burford Capital—a litigation-finance firm—has been funding the shareholders' claims, and the parties have agreed in briefing that this litigation would not exist without Burford's financing. Burford is poised to recover 35% of the potential billions in damages.

Subsequently, the plaintiffs moved for summary judgment on their breach of contract claim or, alternatively, their anticipatory breach claim, and the defendants sought summary judgment on all claims. On March 31, 2023, the court granted the plaintiffs' motion for summary judgment, and denied Argentina's motion, as to the good faith and fair dealing claim.

Decision

In granting summary judgment against Argentina, the court first held that YPF's bylaws do constitute a valid and enforceable contract that required Argentina to make a tender offer for YPF's outstanding shares if the State expropriated more than 49% of YPF stock. The court explained that the "bylaws are careful to specify who owes what obligations and under what circumstances" and that under the bylaws, no affirmative obligation to enforce the bylaws attaches to the corporation itself.

Next, the court held that the plaintiffs-shareholders *were* security holders under the bylaws' definition—as required for standing—because YPF's expropriative "control" of majority ownership, as defined in the bylaws, occurred no later than May 7, 2012, when the plaintiffs were undisputedly security holders of YPF.

Holding Argentina liable for breach of the YPF bylaws and that the plaintiffs had standing to bring their claims, the court analyzed Argentina's remaining arguments. For instance, the court examined Argentine public law, which provides that "[n]o action by third parties may impede the expropriation or its effects" such that the expropriated asset is "free of any encumbrance." Argentina argued that the court's enforcing the YPF bylaws against Argentina would impermissibly impede expropriation of the YPF shares. The court rejected this

argument, reasoning that Argentina is not a “third party” because it drafted the YPF bylaws and that Argentina’s violating the bylaws did not “encumber” the shares themselves but rather established a contractual right of action that the plaintiffs could pursue. The court also rejected Argentina’s argument that enforcing the YPF bylaws would infringe on Argentina’s sovereign authority to expropriate assets, finding that the plaintiffs’ damages theory “does not implicate [Argentina’s] sovereignty in any way.”

Finally, the court concluded that outstanding factual disputes precluded summary judgment on the plaintiffs’ damages.

Implications

Depending on how the dispute is ultimately resolved, Argentina is potentially subject to more than \$7 billion in damages in what might turn out to be the largest ever damages award against a foreign sovereign in U.S. court. That proposition is remarkable in itself, but the YPF case is also poised to have the following notable impacts on transnational disputes and foreign investment.

1. Sovereigns now face a potential added hurdle when nationalizing private enterprises with exacting bylaws and foreign (particularly American) shareholders; the YPF case stands for the proposition that recourse may exist in U.S. courts for foreign sovereigns’ depriving American shareholders of the fair value to which they are entitled in a compensated exit. Equally, prospective shareholders may be more likely to invest in companies susceptible to state ownership where potential recourse in U.S. courts cabins risk. And prospective litigants may seek to vindicate their rights under corporate bylaws against foreign sovereigns in U.S. court rather than via investment-treaty arbitration.
2. Sometimes considered a longshot claim, good faith and fair dealing was the sole claim for which the court held Argentina liable in YPF, paving the way for billions in damages claims in what may mark the largest ever award against a foreign sovereign in U.S. court. This holding enables prospective claimants to more seriously consider the purpose rather than just the text of agreements such as corporate bylaws when weighing potential litigation.
3. The YPF case will no doubt have implications for litigation financing in the international disputes arena. Given the scope of potential damages for which Argentina may be liable in the YPF case—and to which foreign sovereigns may be liable generally for expropriation—U.S. court suits against foreign sovereigns could be an attractive option for litigation financiers that have cooled attitudes towards backing investor-state arbitration claims.