



From privatisation to nationalisation: Repsol-YPF, 1999–2012



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ABSTRACT

In April 2012 Argentinean Government nationalized 51% of Repsol shares in YPF. Expropriation of YPF is a new step in a broad list of protectionist and interventionist decisions, such as the nationalization of Aerolíneas Argentinas, nationalization of private pension plans, or the amendments of the Central Bank regulations to make the use of reserves more flexible. Institutions set the rules of the game for citizens and companies, allowing incentives and creating expectations. Nationalization of the above mentioned Argentinean companies has created legal uncertainty bringing a relevant increase in the risk premium as a result. Privatization of YPF and its later nationalization, together with the company shareholder composition, and resulting international disputes will be addressed in this article.

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The best business in the world is a well-run oil company and the second-best business in the world is a badly run oil company.

John D. Rockefeller

1. Introduction

The Argentine government's move to nationalise 51% of Repsol's shares in YPF in April 2012 came as no surprise. For some time Argentina's president, Cristina Fernández had been manoeuvring to regain control of the company and timed it for when political, public opinion, economic and energy factors would maximise the profitability that the Argentine government believed it would gain through nationalisation. At that time, the president was tackling internal problems derived from corruption scandals that tainted even the vice-president, Amado Boudou, and an increasingly adverse economic climate. And so she embarked on two highly nationalist campaigns: to regain control over the Falkland Islands and to return YPF to the Argentine people. Moreover, this strategy was supported by public opinion surveys, with the majority of the population backing both measures.

In an international context in which the high demand of the so-called emerging economies, particularly China and India, had

pushed up the prices of energy and other raw materials, it was tempting to renationalise natural resources. In addition, Repsol-YPF had discovered vast shale gas deposits: the world's third largest reserve of this unconventional hydrocarbon after the USA and China. However, in order to exploit and capitalise on these deposits in Vaca Muerta large investments and highly sophisticated technology will be required.

Nevertheless, the expropriation of YPF is just another step in a long list of increasingly protectionist and interventionist decisions taken by Argentina's government: firstly Aerolíneas Argentinas and private pension funds were nationalised; subsequently, the central bank charter was amended in order to make the use of its reserves more flexible and to increase non-tariff barriers to block trade; finally YPF was expropriated.³ These actions were taken within a

³ The nationalisations began in March 2006 under the government of Néstor Kirchner. The first company to be nationalised was Aguas Argentinas, the water distribution and treatment company in Buenos Aires and 17 districts that was controlled by the French company Suez and the Spanish company Aguas de Barcelona, which appealed to the World Bank for arbitration through the ICSID (still unresolved). With Cristina Fernández the nationalisations have increased: just six months after becoming president she announced the nationalization of the AFJP (private pension funds) controlled by ten companies, including the Spanish firm Consolidar de BBVA, which, together with five other companies sued the Argentine government last year filing a lawsuit with the federal courts, as a preliminary step in deciding whether to resort to international arbitration. The nationalisation of Aerolíneas Argentinas in 2008 which was controlled by the Spanish group Marsans had a greater international impact. The company had a deficit of 387 million dollars in 2011. Marsans sought arbitration through the ICSID, requesting compensation of 1100 million euros. This matter has yet to be resolved.

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context of high inflation (although Government figures claim that it was below 10%, according to private estimates it was close to 27%, placing it as the highest in Latin America), a drastic reduction in growth and increasing capital outflow.

Although in many successful emerging countries we can observe a growing government interventionism in the economy enabling what is known as State Capitalism, in Argentina this intervention has given rise to a *crony capitalism*, which seeks to increase the power of those with close connections to the government and increase the subsidies that are characteristic of clientelism.⁴ Furthermore, for quite some time Argentina's government has been intensifying these distraction operations by taking demagogic stances and actions so as to draw attention away from the severe social crisis which the government itself has generated through its ill-considered policy of consumption subsidies, its interventionism in the economy, its unresolved conflict with farmers and the insecurity generated by its lack of transparency and constant tweaking and modifications in the game rules of its pricing policy and investment.⁵ It is not surprising that inflation is on the rise, that the capital outflow, mainly to Brazil and Uruguay, is growing each day and that the international image of the country has been systematically deteriorating.⁶ This image is reflected in the country risk concept which in September 2012 stood at around 1050 basis points, higher even than Venezuela (977). However, nobody can deny Argentina's sovereign right to stabilise or nationalise its resources, in this case oil and gas, but compensation determined by appraisal is also an obligation and is recognised in its legal system; and this compensation is what Argentina's government is disputing and hindering.⁷

2. The hydrocarbon sector in Argentina and its privatisation 1989–1999

Until April 2012 Argentina, together with the USA, Great Britain, Canada and Australia was one of the five countries in the world which had a completely private oil and gas industry that was open to the free play of market forces, where both local and foreign agents could compete on a level playing field in both industrial and commercial activities. One of the identifying features of large oil corporations is vertical integration; that is, where the company undertakes all of the different business activities: exploration-production of oil and gas (*upstream*), sea transportation, refining, petrochemical processes, distribution and marketing (*downstream*). This characteristic has prevailed over time due to the economies of scale that are derived and the fact that any time difficulties experienced in one link in the chain can be compensated for during other processes.

⁴ In 2005 total energy and transport subsidies amounted to 3500 million pesos (614 million euros), in 2011 they were 76,000 million pesos (13,300 euros); in other words in 6 years subsidies through subsidised rates increased by almost 22 times.

⁵ This situation began in 2013 and with it the first negotiations between workers and employers around the salaries. In the case of national agreements, outside the orbit of the provincial and municipal public jurisdictions, the authority is the Ministry of Labour. There is a governmental strategy which consists in making wage increases nearby (albeit lower) to 19%. <http://argentina.indymedia.org/news/2013/01/829569.php>.

⁶ Marina Dal Poggetto economist, director of Estudio Bein & Asociados, confirms these data: a big part of the output of dollars from deposits in Argentine financial system has gone to Uruguayan banks accounts. On the case of Brazil we can visit: <http://www.taringa.net/posts/noticias/3070924/Fuga-de-capitales-en-Argentina-entrada-de-capitales-Brasil.html>.

⁷ Law No. 21,499, of January 17, 1977, establishes the Argentina system of expropriation. The constitutional requirements of expropriation are: 1) A reason of public interest. 2) A process, whose starting point is the passage of a law. 3) Compensation: fair compensation.

Since oil was discovered in Argentina in 1907 until the privatisation of Gas del Estado and YPF in 1992, the industry grew in cycles and the introduction of private capital was decisive in achieving an increase in production (IAPG, 2007). The petroleum industry was not an unregulated sector nor was it a sector that was subject to consistent and sustained state control. Throughout the century the private sector participated in the industry in different ways (both in the upstream and downstream businesses), but with the constant threat of an abrupt change in the rules of the game. Argentina adopted an ownership-regalist regime whereby the resource belonged to the state but could be exploited through legal concessions granted to public companies or private investors. The latter provided the investment and technology for exploring and exploiting the hydrocarbons found and operated the corresponding units, assuming the consequences of the mining risk. The principal compensation paid to the state is a royalty of usually 12% of gross production of hydrocarbons although some deductions apply. It is subject to the general tax regime applicable to economic activities in the country. For many years, following a pattern that still prevails in several countries, the monopoly of exploring and exploiting hydrocarbons was held by a state company in the same way as the transport and natural gas distribution industries. When hydrocarbons were identified with national strategy and state sovereignty, some of the political decisions that enabled the access of private capital in their exploitation were later questioned and revoked.

After decades of continuous political and economic instability,⁸ the government of Carlos Menem (Justicialist Party), who came to power in 1989, implemented a series of political and economic measures that, to some degree, contributed to generating a stable framework.⁹ These measures included, on the one hand, the passing of the Convertibility Law in 1991 which established a one-to-one peg between the Argentine peso and the U.S. dollar, and on the other hand the mass privatisation of public companies and the concession of the majority of public services. The privatisations carried out in Argentina during the 1990s were not isolated in Latin America, but formed part of a change in the general trend and in the model of state participation in the economy. This change was partly a consequence of the reform proposals which were backed by the main international bodies operating in the region such as the World Bank (WB) or the Inter-American Development Bank (IDB) and which, as a whole, can be summarised in the Washington Consensus. Early actions taken by President Menem were focused on the state reform plan (Law 23,696/89). This programme of reforms sought to: halt the existing hyperinflation, balance the budget and modernise the state, renegotiate the debt and initiate a trade policy that would stimulate the opening of the economy. The measures were successful in halting hyperinflation and putting the economy on a sustainable growth path, reinforcing the financial sector and facilitating heavy foreign investment (an average of 6.76 billion per year for the decade, approximately 2% of GDP), thanks largely to the mass privatisation of public companies (Antonelli, 2002; CEPAL, 1998). The privatisations (Fig. 1) contributed to improving the macro economy of the country due to the entry of capital flows, providing the possibility of initially reducing foreign

⁸ These problems had been occurring since the 70's when there was the first oil crisis 1973. In 1976 there was a military dictatorship. In the 80s gave hyperinflation.

⁹ Carlos S. Menem, candidate of the Justicialist Party and ex-governor of the La Rioja province, came to power in haste and at a delicate time for the Argentine economy as it was immersed in a period of hyperinflation, and he inherited a somewhat complicated scenario from his predecessor. He governed for two terms of office, 1989–1994 and 1995–1999, having to reform the Constitution in 1995 which dated to 1853 in order to do so. In this reform as well as facilitating this possibility he also reduced the duration of presidential office from six to four years.

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