STATUTES & TREATIES

EXPROPRIATION—COMPENSATION—AGREEMENT REACHED BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF PERU ON $76 MILLION AS COMPENSATION FOR EXPROPRIATED PROPERTIES OF UNITED STATES NATIONALS.*

In a joint statement issued on August 9, 1973,[1] the governments of the United States and Peru announced an agreement to seek a resolution of questions concerning the status of certain private United States investments in Peru. As a preliminary condition to talks, Peru stipulated in the announcement that under no circumstances would the claims of the International Petroleum Corporation (hereinafter referred to as IPC)[2] be a subject of the conversations.

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* The author of this recent development acknowledges his indebtedness to Mr. David A. Gantz, Assistant Legal Adviser to Inter-American Affairs, Department of State, for his cooperation in obtaining up-to-date information.

INT'L LEGAL MAT'LS 392 (1974).

[1] This statement forms the introduction to the settlement agreement itself. Agreement with Peru, Feb. 19, 1974, T.I.A.S. No. 7792 reproduced in 13 INT'L LEGAL MAT'LS 392 (1974) [hereinafter cited as Agreement]. The Agreement is reprinted p. 310 *infra*.

[2] The current dispute between IPC and the present military junta of General Juan Velasco Alvarado derives from the unique type of ownership claimed by IPC in northern Peruvian oil fields. Ownership of property in Latin America extends, almost universally, only to the surface; the subsoil is owned by the state and is worked on a concession granted by the state. However, IPC claims full title on the basis of a deed in fee simple, given in 1826 by Simon Bolivar to a citizen of Peru, which included rights to both the surface and the subsoil of the oilfields. The property was subsequently transferred twice more before it was sold in 1888 to a group of British citizens who leased it to the London and Pacific Petroleum Company which subleased the property to IPC. In 1922, a dispute between the British citizens and Peru over ownership of the subsoil was apparently settled by an arbitral award which recognized the British citizens' ownership of the subsoil and settled important questions of taxation. In 1924, IPC bought the land outright.

Comment, *The Hickenlooper Amendments: Peru's Seizure of International Petroleum Company as a Test Case*, 11 B.C. IND. & COM. L. REV. 77-78 (1969) [hereinafter cited as *Hickenlooper Amendments*].

The settlement agreement [of 1922] was later subjected to endless attacks and nullification proposals by succeeding revolutionary governments who maintained that it represented, in effect, a sellout to foreign interests depriving the country of its just tax revenue and that it was, therefore, invalid. Nullification proposals called for the progressive nationalization of IPC's interests in La Brea y Parinas and for exploitative concessions renouncing IPC's ownership rights in favor of the Peruvian State upon termination of the concession agreements. In August 1963, following Fernando Belaunde's inauguration as President, negotiations were initiated with IPC representatives to resolve the La Brea y Parinas problem. IPC's ensuing draft proposal essentially would have had the company cede its mineral rights on the La Brea y Parinas property to the Peruvian Government in return for an exclusive right to explore and develop 100,000 hectares of the property to be chosen by IPC, with the rest of the property to be immediately ceded to the State. Peru's counterproposal would have required disavowal of the 1922 arbitral award and payment by IPC of $50 million of tax debts, reputed to be the result of the

The United States took no position on this issue but merely acknowledged that it recognized Peru's position with regard to this particular corporation.[3]

The resulting settlement agreement,[4] signed on February 19, 1974,[5] defined

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illegal award, in addition to more stringent tax provisions for the future. A stalemate in negotiations resulted, and on November 6, 1963, the Peruvian Congress passed Law No. 14695, revoking the original authorization granted to the President to reach a negotiated settlement with the British Government in 1922, and Law No. 14696, confirming the nullification of both the 1922 Agreement and the 1922 arbitral award.

The problem of settlement guidelines, however, was not resolved in 1963, and a new negotiated agreement to that end was finally reached in September 1964; the new agreement would have allowed IPC to operate under a 25-year concession contract, while ceding its surface title to the La Brea y Parinas property and certain installations to the Government. But, the 1964 Agreement was short lived, and on July 8, 1967, amidst a deteriorating economy and unsuccessful efforts by the United States to pump loans into Peru through the Alliance for Progress, the Peruvian Congress enacted Law No. 16674, which, in addition to affirming state ownership of the La Brea y Parinas oil fields, provided executive measures for exploitation of the oil fields and specifically authorized the Executive, taking into account the debts of IPC, to carry out expropriation in conformity with article 29 of the Constitution. In assessing IPC's debt, the Peruvian Tax Board on November 17, 1967, declared IPC's title in La Brea y Parinas to be void as the result of the nullification of the arbitral award and set the amount of IPC's illegal profits from exploiting the property at $144,015,582.22.

With the 1969 general elections approaching, IPC again entered into new negotiations with President Belaunde's government, culminating in an agreement by which IPC would have renounced its mineral rights and ceded its surface rights to the State in return for the government's renunciation of all alleged past debts and claims and certain concession contracts. Like the previous settlements, however, this agreement was disregarded, allegedly because of failure to reach an accord on IPC's maintenance of oil field services until the State enterprise could assume control. In the meantime, adverse publicity over the controversy intensified, leading to the ouster of President Belaunde on October 2, 1969, and the installation of a military junta that promptly nullified the 1969 settlement agreement. IPC's productive equipment was subsequently seized for failure to pay the State an alleged debt of $11.7 million. To further complicate the dispute, the Peruvian Government on February 6, 1969, had ordered IPC to pay the State $690,524,283, the net value placed on IPC's oil production from La Brea y Parinas since acquisition in 1924. Moreover, collection procedures set up to effect payment subjected the properties of IPC to forced sale if payment were not tendered within ten days and there was no provision for judicial review before payment. The final peg was hammered home on August 22, 1969, when the Government issued a decree authorizing the takeover of the remaining assets of IPC.

Wesley, *Expropriation Challenge in Latin America: Prospects for Accord on Standards and Procedures*, 46 TUL. L. REV. 232, 235-37 (1971) [hereinafter cited as Wesley]. For an excellent reporting of the IPC affair and the sociological and political factors involved, *see* Goodwin, *Letter from Peru*, NEW YORKER, May 17, 1969, at 41.

[3] The meticulous wording of both the statement and the agreement deserves special attention under the circumstances. Here, for example, the United States does not agree that the IPC claim shall not be a subject of the conversations, nor does it agree that the IPC claim shall not be considered by the United States in the process of negotiations or in distribution of compensation awards. Instead, it simply recognizes the position of the Peruvian government.

[4] Special notice should be taken of the fact that the settlement agreement is an executive agreement, rather than a treaty which would be subject to submission to the Senate for its advice and consent.

[5] James R. Greene and Taylor G. Belcher were signatories on behalf of the United States

its scope to include (a) the prior-existing claim of United States nationals[6] arising from expropriation[7] or other forms of permanent taking of property and interests in property by the government of Peru, (b) the claims of the government of Peru against these United States nationals, and (c) the disputes between United States nationals and the government of Peru over certain road construction contracts.[8] It was agreed that the sum of $76 million be paid by Peru and distributed among the United States claimants as a final and complete resolution of all the claims. This amount was to be delivered by the government of Peru to the government of the United States upon signature of the agreement.[9] The settlement payment was then to be deposited in a trust account in the United States Treasury for allocation[10] by the Secretary of State in accordance with statutory provisions.[11] This payment cancelled any obligations of the government of Peru to United States nationals[12] and at the same time discharged the corporations from any further liability for payment of taxes and other assessments. Peru agreed to pursue no further legal actions based upon its prior claims against the United States nationals,[13] and, as a necessary adjunct to this promise, also assumed the legally valid contractual and pecuniary obligations of the United States nationals which arose out of their operations in Peru.[14] Additional provisions served to clarify the methods of administration and the scope of this agreement which was intended to be a

government and Miguel A. de la Flor Valle served in the same capacity for the government of Peru. Agreement, art. VIII.

[6] United States nationals are defined as being:

> . . . corporations organized under the laws of a state of the United States which (a) own individually or collectively, directly or indirectly, 50 per cent or more of the outstanding stock or other property or interest in property or contract rights, upon which the claims referred to . . . are based, and (b) have made their claims known to the United States Government prior to the date of this Agreement.

Agreement, art. I, para. B.

[7] Expropriation, nationalization, and confiscation are each a separate concept, but, nonetheless, the terms are often confused. Expropriation involves the taking of property for the public welfare through state action, with some type of compensation given for the property. Nationalization is the taking through state action, which may or may not involve compensation, of direct control of industrial facilities in order to establish new economic policies or state security. Confiscation involves a direct taking by the state in conjunction with a penal sanction or attainder. Note, *The Peruvian General Law of Industries of 1970*, 4 N.Y.U. J. INT'L L. & POL. 106, n.5 (1971).

[8] Agreement, art. I, para. A.

[9] Agreement, art. II.

[10] For an excellent discussion of methods of assessing the value of expropriated properties, *see* Wesley, *Establishing Minimum Compensation Criteria for Use in Expropriation Disputes*, 25 VAND. L. REV. 939 (1972).

[11] The Secretary of State is required to deposit all money received from foreign governments due citizens of the United States into the Treasury. The Secretary shall use his discretion to determine the amounts due respective claimants, and he shall so inform the Secretary of the Treasury who will pay these amounts. 31 U.S.C. § 547 (1896).

[12] Agreement, art. IV.

[13] Agreement, art. V.

[14] *Id.*

final resolution of all claims. The United States government undertook to obtain all pertinent documents or titles relating to the claims of the United States nationals and to deliver them to the government of Peru.[15] Both governments agreed that neither would present to the other, on its behalf or on the behalf of another, any claim or demand with respect to the matters specified in the agreement.[16] Annexes to the agreement named the companies to which the government of Peru referred[17] and contained a recognition by the United States of the position of the government of Peru with regard to the listed companies.[18] *Agreement Between the Government of the United States of America and the Government of Peru*, Feb. 19, 1974, T.I.A.S. No. 7792.[19]

The present agreement is the first indication of a rapprochement between the United States and Peru's ruling military regime after five years of continuous political and economic confrontation. The Revolutionary Government's nationalization of $200 million worth of oilfields, refineries, and other installations of the International Petroleum Corporation only one week after its ouster of President Belaúnde-Terry on October 3, 1968,[20] was only the beginning of a campaign of expropriation and harrassment of private United States interests in Peru.[21] In February of 1969, the Revolutionary Government of Peru an-

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[15] Agreement, art. VI.

[16] Agreement, art. VII.

[17] Gold Kist S.A., subsidiary of Gold Kist, Inc., which has annual sales of $387 million, 6,500 employees, and varied interests (subsidiary was in fish and fishmeal industry); Brown and Root, Inc., subsidiary of Halliburton Company, with sales of under $945.64 million, 24,102 employees, in engineering and construction; Morrison-Knudson, Inc., sales of $200-400 million, 1,600 employees, in construction and engineering. DUN AND BRADSTREET, MILLION DOLLAR DIRECTORY (1974). Cerro de Pasco Corp., subsidiary of Cerro Corp. of N.Y., sales of $150-200 million, 15,000 employees, in metals and chemicals mining and refining; Sociedad Paramonga Limitada S.A., subsidiary of W.R. Grace & Co. of N.Y., sales of 2,446,162 M Peruvian soles, 2,070 employees, manufactures paper, cardboard, paper products, and chemicals; Compañía Papelera Trujillo S.A., subsidiary of Sociedad Paramonga Ltda., sales of 646,856 M Peruvian soles, 250 employees, manufactures paper and cardboard; Envases Sanmarti S.A., subsidiary of W. R. Grace & Co., sales of 100,000 M Peruvian soles, 139 employees, muanufactures cardboard boxes, cellophane and plastic packaging specialties. DUN AND BRADSTREET, PRINCIPAL INTERNATIONAL BUSINESSES (1974). Cargill Peruana, subsidiary of Cargill, Inc., which has 6,000 employees and among other varied interests, is in the fishmeal industry. STANDARD & POOR, REGISTER OF CORPORATE DIRECTORS AND EXECUTIVES (1974). Cartavio S.A., held sugar plantation. N.Y. Times, Nov. 12, 1969, at 10, col. 1. Other companies listed are Gloucester Peruvian S.A., Pesquera Meilan S.A. (fishing), Compañía Pesquera de Coishco S.A. (fishing), Refinería Conchan-Chevron S.A. and Compañía Petrolera Conchan-Chevron S.A. (oil and refining), and Zachary International, Inc. and its associates. Agreement, Annex A.

[18] Agreement, Annex B.

[19] The Agreement is included as Appendix to this Recent Development. *See* p. 310 *infra*.

[20] BUS. WK, Oct. 12, 1968, at 36.

[21] An agreement had been negotiated between the Belaúnde government and IPC over rights to the La Brea y Pariña oilfield in northwestern Peru. BUS. WK, Oct. 12, 1968, at 38. But then Carlos Loret da Mola, president of the Peruvian state petroleum company, suddenly resigned a month after Belaúnde's settlement with IPC announcing that a final page to the agreement had not been made public that gave more, extraordinary concessions to IPC. RAMPARTS, Nov. 30, 1968, at 18. Belaúnde's dealings with IPC were a principal reason given by the Revolutionary Government for its takeover. BUS. WK, Jan. 12, 1974, at 19.

nounced an extension of its claim for national rights in the natural resources of the sea to a 200-mile limit.[22] The United States policy recognizes only a 12-mile limitation, and its extensive fishing interests off the South American coast made conflict inevitable. When, in 1971, United States fishing vessels persisted in commercial fishing within that limit, one boat[23] was boarded, taken into port, fined, and released.[24] Another such boat refused to be boarded, sent out a radio message for help, and headed out to sea. It escaped only with the aid of other fishing boats and only after being fired upon by the Peruvian patrol boat.[25]

Subsequent action taken by the Peruvian government illustrated that expropriation was not a transient policy, but a clear effort on the part of the regime to expedite complete social reform and elimination of the strong American influence in their economy. The next event occurred in June of 1969 when extensive sugar holdings, particularly those of W. R. Grace & Company, were nationalized.[26] On June 15, 1970, the Banco Popular del Perú was nationalized, giving the government control of companies owing money to Peru's second largest bank.[27] One month later President Juan Velasco Alvarado announced the General Law of Industries,[28] a comprehensive measure designed to force companies to give their workers ten percent of the companies' profits and fifty percent of their stock. Under its provisions, the Peruvian government would control all basic industries and be able to direct industrialization. Foreign companies were required to sell 51 percent of their capital to Peruvians.[29] A fisheries law was issued in March of 1971, reaffirming Peru's control of marine resources up to 200 miles from the coast and providing for nationalization of the fishmeal industries,[30] which was eventually implemented in May of 1973.[31] The final act preceding the agreement was Peru's seizure of the holdings of Cerro de Pasco Corporation,[32] a mining industry,[33] on January 1, 1974.

Despite these actions, which were prompted by the domestic pressures for social reform, Peru's regime maintained an active interest in the encouragement of foreign investment. On October 29, 1969, the Peruvian government

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[22] NEWSWEEK, Feb. 24, 1969, at 50.

[23] Ecuador seized fifty United States fishing boats in 1971; Peru apprehended only one. Grayson, *Peru Under the Generals*, CURRENT HIST., Feb. 1972, at 92 [hereinafter cited as Grayson].

[24] *Id.*

[25] *Id.*

[26] Rodman, *Day of the Generals*, NAT'L REV., Oct. 20, 1970, at 1105 [hereinafter cited as Rodman].

[27] *Id.*

[28] 9 INT'L LEGAL MAT'LS 1-25 (1970).

[29] N.Y. Times, July 29, 1970, at 9, col. 1.

[30] Grayson, *supra* note 23, at 116.

[31] N.Y. Times, May 13, 1973, at 15, col. 1.

[32] So far Peru has not put pressure on Peru's other big metals producer, Southern Peru Copper Corporation, which is plowing all profits back into a $500 million expansion and any nationalization move at this time could upset the program. BUS. WK, Sept. 29, 1973, at 31.

[33] TIME, Jan. 21, 1974, at 72 [hereinafter cited as TIME].

initiated a new policy of statism designed to attract foreign investment and encourage Peruvian capital.[34] Its first attempt at implementing such a policy was to buy for $18 million the controlling shares in International Telephone and Telegraph's Peruvian operations, with stipulations that the monies paid be reinvested in local industries.[35] A new law on mining[36] was issued in June of 1971 providing for active governmental participation in the extracting and refining of mined resources and for monopolistic control over their marketing. It encouraged, through tax incentives, mixed enterprises between Peruvians and foreigners, multinational ventures, and reinvestment of earnings.[37] Recognizing the need for better bilateral relations and perceiving Peru's interest in foreign investment, the United States dispatched Mr. James R. Greene[38] as special emissary[39] to the Peruvian-United States conversations which culminated in the present agreement. Peru is paying, in addition to the $76 million settlement, $74 million directly to five companies[40] which had previously been conducting talks on their own with the Peruvian government. All of the companies involved in the settlement had conducted talks of some nature with the Peruvian government.[41]

The tone of the introductory joint statement contrasts with that of the body of the agreement. The introductory statement reflects certain emotional, politi-

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[34] Rodman, *supra* note 26, at 1105.

[35] *Id.*

[36] 8 INT'L LEGAL MAT'LS 1187 (1969).

[37] Grayson, *supra* note 23, at 116.

[38] Mr. Greene is a Manufacturers Hanover Trust Company senior vice-president who holds a Ph.D. in Economics and has been a United States foreign service officer in Latin America. TIME, *supra* note 33. Mr. Greene operated under the auspices of the Council on International Economic Policy with particular, close collaboration with the Departments of State and Treasury. 70 DEP'T STATE BULL. 273 (1974).

[39] 69 DEP'T STATE BULL. 310 (1973).

[40] The five companies are the Cerro Corporation, W. R. Grace & Company, the Star-Kist Foods subsidiary of the H. J. Heinz Company, Gold Kist Incorporated, and Cargill, Incorporated. N.Y. Times, Feb. 20, 1974, at 11, col. 1.

[41] Letter from David A. Gantz to William M. Phillippe, Dec. 30, 1974. W. R. Grace and Company had been negotiating, off and on, with a Peruvian interministerial commission since 1969. BUS. WK, Jan. 12, 1974, at 18. Peru had offered the Cerro Corporation only $12 million for the entire operation, which had a book value of $175 million, and was expected to produce net profits of around $24 million in 1973. Cerro decided to call off the talks after the Peruvian government refused to grant export licenses for products which the company already had sold. Cerro had initiated negotiations to sell all or part of the company in 1971 with proposals that provided for extended payment terms and arrangements by Cerro to obtain financing for a big expansion of operations. The company offered to help manage Peruvian operations as long as requested. BUS. WK, Sept. 29, 1973, at 31. Compañía Petrolera Conchan-Chevron S.A. had gone through court proceedings in the Peruvian judicial system, and had held informal negotiations with the Peruvian government. The fishmeal companies had taken a few steps in negotiation (being only recently nationalized). The road construction companies had negotiated on and off for five years. Letter from David Gantz, *supra*.

cal issues[42] and ideological differences,[43] whereas the articles reflect a more organized and businesslike approach to the solution of the problem[44] reminiscent of other settlement agreements.[45] The pragmatic approach of the document may be illustrated by the fact that the United States only recognized the exclusion of the IPC case from the conversations as being the position of the Peruvian government. The failure of the United States to agree to this proposition takes on a particular significance since the IPC claims are neither expressly included nor even impliedly excluded in the articles of the agreement.[46] This juggling and juxtaposition of statements and agreements could leave the door open for the United States to arrange some type of compensation for IPC without leaving Peru in the embarrassing position of possibly having abandoned its ideological stance of aggressive nationalization.[47] The other outstanding feature of the agreement is the lack of any provision for cooperation or description of a method of ascertaining the validity and amount of submitted

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[42] "The seizure of IPC was a nationalist gesture that the Peruvian junta used to justify its 1968 coup. Any compensation, Peruvian officials insist, is politically out of the question." BUS. WK, Jan. 12, 1974, at 19. However, reference in the joint statement to the IPC claims as "a matter which has been *definitively* resolved" (emphasis supplied) could perhaps be interpreted as a backhanded recognition that the IPC claim is still outstanding, depending on the gloss one might place on the word "definitively." Agreement, Joint Introductory Statement.

[43] "The conversations will observe the most complete respect for . . . the profound transformations being carried out by the Revolutionary Government of the Armed Forces of Peru." Agreement, Joint Introductory Statement.

[44] Article I describes the scope; Article II describes the settlement amount and arrangements for payment; Article III provides for distribution; Articles IV and V provide for the cancellation or assumption of liabilities and obligations of the respective parties; Article VI provides for procurement and transfer of documents and title; Article VII is in the nature of a disclaimer; and Article VIII gives the effective date.

[45] *See* Agreement with Poland Regarding Claims of United States Nationals, July 16, 1960, [1960] 11 U.S.T. 1953, T.I.A.S. No. 4545 [hereinafter cited as Poland Agreement]. The articles are practically the same except that the agreement with Poland contains articles providing for cooperation in assessing claims and for release of United States government blocking controls on Polish property in the United States.

[46] Article I, which defines the scope of the agreement, refers to:

> *the* claims of United States nationals arising prior to the date of this Agreement as a result of expropriation or other forms of permanent taking by the Revolutionary Government of the Armed Forces of Peru of property and interests in property, direct or indirect, and the claims of the Government of Peru against such United States nationals . . . (emphasis supplied).

Agreement, art. I. IPC could also be included in the definition of United States nationals. *See* note 3 *supra*. Also, Annex A (written by Peru) excludes IPC in its listing of companies affected by this agreement; however, the annex is not a part of the signed articles of agreement, and, in Annex B, the United States once again simply recognizes such listing simply as being the position of Peru. Agreement, Annex A and B.

[47] "Peru apparently wants to sweep Exxon's claim for IPC . . . under a diplomatic rug." BUS. WK, Jan. 12, 1974, at 19. In the eyes of the other Latin American countries, the negotiations between the United States and Peru were "pressures" that Peru had to withstand in confronting the United States. Niedergang, *Revolutionary Nationalism in Peru*, FOR. AFFAIRS, Apr., 1971, at 455.

claims.[48] Distribution of the settlement sum was left within the exclusive competence of the United States government,[49] and, according to the laws of the United States, would be determined by the Secretary of State.[50] The Secretary of State has at his disposal the services of the Foreign Claims Settlement Commission, either for the ascertainment of the validity and amounts of claims for negotiation purposes,[51] or for the distribution of monies paid in *en bloc* settlement agreements.[52] However, according to the Agreement the amounts to be paid in compensation are to be determined by the Secretary of State,[53] and the claims will therefore not be processed by the Foreign Claims Settlement Commission.[54]

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[48] As are contained in the following: Poland Agreement, *supra* note 45; Agreement with Canada concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam, Mar. 25, 1965, [1966] 17 U.S.T. 1566, T.I.A.S. No. 6114.

[49] Note the emphasis in Article III on the exclusivity of the distribution process and the exculpation of responsibility on the part of Peru:

> The distribution of the sum referred to in Article II hereof falls within the exclusive competence of the Government of the United States, without any responsibility arising therefrom on the part of the Government of Peru from the exercise of this authority by the Government of the United States. In accordance with internal procedures falling within its exclusive competence, the Government of the United States will deposit said sum in a trust account in the United States Treasury until distribution, with interest, pursuant to the determination by the Secretary of State of the United States of America in accordance with the laws of the United States.

Agreement, art. III.

[50] 31 U.S.C. § 547 (1896).

[51] [The amendments to the Foreign Assistance Act of 1961, as amended (Pub. L. 88-205, 77 Stat. 379), approved Dec. 16, 1963] extend the jurisdiction of the [Foreign Claims Settlement] Commission from determination and adjudication of claims to functioning in an advisory capacity in the area of foreign nationalizations and seizures of American-owned property.

1972 FOR. CLAIMS SETTLEMENT COMM'N ANN. REP. 25 [hereinafter cited as ANN. REP.]. The Commission was similarly used to assess claims prior to negotiations for damages caused by the construction and maintenance of the Gut Dam in the St. Lawrence River in 1951 and 1952 by the Canadian government. *Id.* at 16.

[52] Under Title I of the International Claims Settlement Act of 1949, the former International Claims Commission was given authority to adjudicate claims of nationals of the United States for the nationalization or other taking of property " . . . included within the terms of any claims agreement hereafter concluded between the Government of the United States and a foreign government . . . providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in *en bloc* settlement thereof."

Id. at 10.

> All functions of the International Claims Commission of the United States . . . and of the members, officers, and employees thereof are hereby transferred to the Foreign Claims Settlement Commission of the United States.

Reorganization Plan No. 1, § 2(b) 68 Stat. 1279 (1954). For a discussion of the distribution of funds obtained from settlement agreements with Yugoslavia, Panama, Bulgaria, Hungary, Rumania, Italy, the Soviet Union, Czechoslovakia, and Poland, *see* ANN. REP., *supra* note 51, at 7-16.

[53] Letter from David Gantz, *supra* note 41.

[54] Therefore, although a formal system for filing, verifying, and adjudicating claims does exist,

These investment disputes have clouded relations between the two governments for the past five years.[55] The United States, as a political and economic superpower, could have exerted more pressure on Peru to give speedy and adequate compensation.[56] Under the Hickenlooper Amendments to the Foreign Assistance Act of 1961,[57] the President of the United States is required to suspend foreign assistance funds[58] to a foreign government that has not taken

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and has been used under similar circumstances in the past, it is being by-passed in this case. It is the contention of this author, however, that the services of the Foreign Claims Settlement Commission are not being utilized because of their formality. As has been previously noted, United States-Peruvian relations have been tenuous at best, and the Peruvian military regime is adamant in its political policy of no compensation for IPC. Therefore, the provision in the agreement seeks to avoid the political embarrassment which would face Peru if IPC had to file a formal claim with the Foreign Claims Settlement Commission, and the prescribed process of verification and adjudication were then implemented. Of course, an announcement must be made even under the present procedure, and if IPC is included for compensation, as this author contends it will be, the military regime will be unavoidably somewhat embarrassed on its home front. However, one swift announcement would cause less friction in United States-Peruvian relations than long, formal claims and adjudications.

[55] Statement by President Nixon, 70 DEP'T STATE BULL. 272 (1974).

[56] Which is not to say that the United States did not perhaps exert some pressures. For example:

> [Special emissary Mr.] Greene is said to have told the Peruvians that their applications for loans at the U.S. Export-Import Bank would be welcomed [if there were a 'sweetening of terms' for compensation]. Additionally, there are reports in Lima of U.S. banks offering Peru a large ten-year credit line at 11% interest; [Mr.] Greene denies any connection with such an offer.

TIME, Jan. 21, 1974, at 72. Another subtle pressure is brought to bear by the fact that

> . . . an over-all settlement will open the way to credits to Peru from the U.S. and from international agencies. Under the Gonzalez Amendment to legislation authorizing U.S. contributions to the World Bank and Inter-American Development Bank, the Administration is required to oppose all loans by international agencies to a country that has expropriated U.S. properties, unless it is negotiating compensation.

BUS. WK, Jan. 12, 1974, at 18.

[57] 22 U.S.C. § 2370 (e)(1) and (2) (1964).

[58] Possible United States retaliatory responses include implementation of the Hickenlooper Amendments, which provide for blocking and freezing regulations, and economic and trade measures (raising tariffs, lowering quotas, etc.). However, consider the following criticism of each of these responses:

> From the United States viewpoint, it is unlikely that blocking regulations, designed in part to ensure funds for set-off of American claims with the hostile country while promoting economic isolation, would be used in situations not involving serious political as well as economic threats.

Wesley, *supra* note 2, at 250.

> For purposes of overall assessment, while there are favorable signals of an awakening need for more creative, expansive techniques for handling expropriation disputes, United States reprisal efforts to strengthen extraterritorial respect for the treatment of American property interests have borne few encouraging results to date.

Id. at 252.

> . . . [I]n the case of Hickenlooper No. 1, the State Department has on several occasions demonstrated a reluctance to employ it for fear of upsetting the delicate foreign relations balance. The Sabbatino Amendment, too, has major weaknesses hampering its effectiveness, such as the improbability of frequent occurences where nationalized property

"appropriate steps" in compensation for expropriated properties of United States nationals.[59] These "appropriate steps" include not only speedy compensation[60] but also a good faith effort[61] in order to avoid the suspension of aid. However, although some of the expropriations in question took place five years ago, there has as yet been no implementation[62] of the Hickenlooper Amendments.[63]

On the other hand, Peru might also have been less flexible. It might have brandished the Calvo doctrine,[64] favoring the exhaustion of local avenues of redress within the foreign country before implementation of government-to-government negotiations,[65] but it did not.[66] Or Peru could simply have claimed

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> somehow finds its way back to the United States, the great difficulty of obtaining jurisdiction over the foreign government for attachment, and judicial refusal to extend the amendment's application to various forms of "creeping expropriations" and to property not the subject of the original expropriations as a basis for set-off of prior claims.

Id. at 246. The Sabbatino Amendment reversed the effects of the decision of the United States Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), where the Court denied the suit of an American merchant who was attempting to obtain the proceeds from the sale of sugar expropriated from him by the government of Cuba. The Court reached its decision without looking to the merits of the case or considering the domestic or international law concerned, but simply relying on an elaboration and affirmation of the act of state doctrine. The Sabbatino Amendment, which states that:

> . . . [n]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party . . . based upon . . . a confiscation or other taking . . . by an act of that state in violation of the principles of international law including the principles of compensation . . . set out in this subsection . . . 22 U.S.C. § 2370 (e)(2) (1964),

was enacted to insure the right to seek compensation for expropriated property in United States courts. *Hickenlooper Amendments, supra* note 2, at 84-85.

[59] 22 U.S.C. § 2370 (e)(1) and (2) (1964).

[60] *Hickenlooper Amendments, supra* note 2, at 82.

[61] *Id.* at 83, n. 42.

[62] Soon after the coup in 1968, the United States recognized the regime but withheld foreign aid. A government spokesman cited military pledges to return to a constitutional government and honor international obligations; however, he declined to link the government's position on aid to the Hickenlooper Amendments and the IPC affair. N.Y. Times, Oct. 26, 1968, at 15, col. 4.

[63] For a good discussion of the applicability of the Hickenlooper Amendments in the IPC case, *see Hickenlooper Amendments, supra* note 2. For a discussion of the effects of United States sanctions under the Hickenlooper Amendments, *see* N.Y. Times, Apr. 5, 1969, at 3, col. 5. For an indication of a move to repeal the Hickenlooper Amendments, *see* N.Y. Times, Apr. 8, 1969, at 46, col. 1; N.Y. Times, Apr. 17, 1969, at 9, col. 1. Of course, the present agreement, under the specific wording of the Hickenlooper Amendments, removed the necessity of considering suspension of foreign assistance funds.

[64] 8 WHITEMAN, DIGEST OF INTERNATIONAL LAW 916 (1967).

[65] At least one company, IPC, has gone through the last avenue of redress under current Peruvian law. *Hickenlooper Amendments, supra* note 2, at 78, 79. The interpretations of the Calvo doctrine by the United States and by the Latin American countries vary greatly. The view stated in the text is that of the United States; whereas, the Latin American countries champion the Calvo doctrine as being a bar to foreign diplomatic intervention or negotiation between the two govern-

the rights of sovereignty and have refused to negotiate.[67] As a practical matter, however, both countries were desirous of improving their relations.[68] The United States was seeking compensation of its nationals[69] while Peru desired to reap the benefits of a normal economic relationship with the United States.

The result was a compromise which disposed of all monetary claims of both parties, salvaging a portion of the investments of United States nationals[70] without sacrificing the ideology of the Peruvian government.[71] There must have been a certain amount of cooperation and willingness to listen on the part of both governments in order to draft such a document that would serve the desired purposes and yet be acceptable in its format to both sides. This cooperation itself was a big first step toward better relations.

William M. Phillippe

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ments. *See* Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law*, 40 AM. J. INT'L L. 121 (1946).

[68] Letter from David Gantz, *supra* note 41. "Such a government-to-government package deal is more palatable politically to the Peruvians than individual negotiations with U.S. companies that have become targets of political agitation." BUS. WK, Jan. 12, 1974, at 18.

[67] Such a course of action would have been dangerous not only from the international point of view, but also particularly from Peru's economic point of view. For an overview of Peru's economic problems, *see* FORTUNE, Oct. 1969, at 99. For a history of the Peruvian nationalization of IPC, ensuing negotiations between the United States and Peru, and United States reductions of loans and grants to Peru, *see* N.Y. Times, Apr. 18, 1973, at 8, col. 1.

[68] Joint Statement on Negotiations, 69 DEP'T STATE BULL. 310 (1973).

[69] Statement by President Nixon, *supra* note 55.

[70] For the reactions of some of the executives of affected companies, *see* N.Y. Times, Feb. 20, 1974, at 11, col. 1.

[71] While a package settlement with Peru will remove a sore spot in U.S. business relations with Latin America, it seems unlikely to set a precedent for other nationalization disputes. In Chile, U.S. companies are negotiating privately on compensation — or in some cases, on restoration of their properties — with the military junta that took over last September. The Overseas Private Investment Corporation . . . tries to keep the U.S. government out of direct involvement in expropriation disputes by requiring companies to exhaust all negotiating possibilities.

BUS. WK, Jan. 12, 1974, at 19.

EDITOR'S NOTE: After the submission of this Recent Development for publication, the Department of State announced distribution of the amount specified in the Agreement in a press release, the text of said release being as follows:

> The Department of State, acting under the authority of Section 547 of Title 31 of the U.S. Code, distributed on December 19, the $76 million received from the Government of Peru under the agreement of February 19, 1974, with interest. A list of recipients and the amounts received by each is attached. Under Article 3 of the agreement, the distribution of the proceeds is the sole responsibility of the U.S. Government. The eligible claimants were determined by the Department in accordance with the terms of the agreement. All the amounts have been agreed to by the recipients. We understand that the Government of Peru does not concur in the distribution of the proceeds as determined by the Department.

1.	Brown & Root Overseas, Inc.	$100,000*
2.	Cargill Incorporated	$1,300,000*
3.	Cerro Corporation	$10,000,000*
4.	Esso Standard (Inter-America) Inc.	$22,000,000*
5.	General Mills, Inc.	$1,200,000*
6.	Gold Kist Inc.	$600,000*
7.	H. B. Zachry Company	$1,200,000*
8.	International Proteins Corporation	$8,000,000*
9.	Morrison-Knudsen Company, Inc.	$2,000,000*
10.	Standard Oil Company of California	2,200,000*
11.	Star-Kist Foods, Inc.	$7,300,000*
12.	W. R. Grace & Co.	$19,200,000*

*plus 6.34% per annum from February 19, 1974, to date of payment.[72]

The reaction of the Peruvian government to this distribution was communicated to the Embassy of the United States, saying ". . . the Ministry of Foreign Affairs considers that the fact that ESSO-Standard (Inter-American), Inc., a company widely and publicly known to have ties with IPC of Toronto, Canada, is included in the document annexed to the aide-mémoire sent by the Embassy of the United States, implies a distortion of the spirit and the letter of the agreement," and asked for

[72] Letter from David Gantz, *supra* note 41.

an amendment of the list of recipients.[73] The Department of State of the United States replied by stating it "regrets that the distribution of the proceeds as determined by the Department of State did not meet with the approval of the Government of Peru. However, as the Ministry has pointed out, Article III of the agreement provides that the distribution falls within the exclusive competence of the Government of the United States, without any responsibility arising therefrom on the part of the Government of Peru from the exercise of this authority by the Government of the United States. In the view of the United States, the distribution made falls well within the terms of the agreement . . . ."[74]

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[73] *Id.*, which included a translation of a note dated Dec. 18, 1974, from the Ministry of Foreign Affairs of Peru, accompanying the return of the United States Embassy's aide-mémoire of Dec. 17, 1974, advising the Peruvian government of the distribution.

[74] Reply of the State Department of the United States to the note from the Ministry of Foreign Affairs of Peru, supra note 73, contained in Letter from David Gantz, *supra* note 41.

APPENDIX

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF PERU*

The Government of the United States of America and the Government of Peru issued the following statement on August 9, 1973:

> At the initiative of the Government of the United States of America, the Revolutionary Government of the Armed Forces of Peru has agreed to hold conversations with the objective of considering certain aspects of some United States investments. For this purpose, President Nixon has designated Mr. James R. Greene as his special emissary.
>
> It has been clearly established by the Government of Peru that the IPC case will not for any reason be a subject of said conversations inasmuch as this is a matter which has been definitively resolved. The Government of the United States recognizes that this is the position of the Revolutionary Government.
>
> The conversations will observe the most complete respect for the autonomous and sovereign decisions of both governments as well as for the profound transformations being carried out by the Revolutionary Government of the Armed Forces of Peru.
>
> The two governments agree that the conversations will contribute to the improvement of their relations, making them more cordial and constructive.

As a result of those conversations, the Government of the United States and the Government of Peru, desirous of arriving at a solution of pending problems, and with the objective of definitively concluding them and avoiding the presentation of future claims on these matters, have decided to conclude the following Agreement:

ARTICLE I

A. The pending problems to which this Agreement refers are the claims of United States nationals arising prior to the date of this Agreement as a result of expropriation or other forms of permanent taking by the Revolutionary Government of the Armed Forces of Peru of property and interests in property, direct or indirect, and the claims of the Government of Peru against such United States nationals, as well as the claims of United States nationals and the Government of Peru over certain road construction contracts arising prior to the date of this Agreement.

B. "United States nationals" as used in this Agreement means corporations organized under the laws of a state of the United States which (a) own individually or collectively, directly or indirectly, 50 percent or more of the outstanding stock or other property or interest in property or contract rights, upon which the claims referred to in paragraph A are based, and (b) have made

* Reproduced from the text provided by the United States Department of State, 13 INT'L LEGAL MAT'LS 392 (1974).

their claims known to the United States Government prior to the date of this Agreement.

C. The provisions of this Agreement shall not affect in any way any claims of citizens or corporations of the United States or Peru against the other government which, because of the provisions of this article, do not come within the scope of this Agreement.

ARTICLE II

A. In order to resolve these pending problems and as a total and definitive solution, a settlement is agreed upon, after taking into account the claims of the Government of Peru against the aforesaid United States nationals or their subsidiaries, branches or affiliates in Peru, in the amount of $76,000,000 which sum will be delivered to the Government of the United States in settlement for the properties, interests, or rights forming the subject of the Agreement, and in discharge of any liability or obligation of the Government of Peru with respect to the claims of the United States nationals referred to in Article I.

B. The aforesaid amount, $76,000,000, will be delivered by the Government of Peru to the Government of the United States upon signature of this Agreement, thus resolving any claims of nationals of the United States against the Government of Peru regarding the matters covered by this Agreement.

ARTICLE III

The distribution of the sum referred to in Article II hereof falls within the exclusive competence of the Government of the United States, without any responsibility arising therefrom on the part of the Government of Peru from the exercise of this authority by the Government of the United States. In accordance with internal procedures falling within its exclusive competence, the Government of the United States will deposit said sum in a trust account in the United States Treasury until distribution with interest, pursuant to the determination by the Secretary of State of the United States of America in accordance with the laws of the United States.

ARTICAL IV

The Government of the United States declares that the payment of the sum referred to in Article II cancels any liability or obligation of the Government of Peru to United States nationals, their subsidiaries, branches and affiliates, in respect of the problems and claims referred to in Article I.

ARTICLE V

In view of the intergovernmental nature of this Agreement, the Government of Peru declares that there no longer exist any liabilities for the payment of taxes, other charges, or obligations, or legal actions, civil or otherwise, against the United States nationals referred to in Article I, their subsidiaries, branches or affiliates in Peru, or against the present or former officials of any of them,

regarding their activities as employees of said nationals, their subsidiaries, branches or affiliates prior to the signing of this Agreement, nor will any claims or proceeding based upon such taxes, charges, obligations, liabilities, or legal action affecting the natural or juridical persons referred to above be asserted, continued, or enforced in the future. The Government of Peru will also assume the legally valid contractual and other pecuniary obligations (including pensions and other employee benefits) of the United States nationals, their subsidiaries, branches or affiliates in Peru referred to in Article I, which arise out of their operations in Peru and are communicated to the Government of Peru.

ARTICLE VI

The Government of the United States will undertake to obtain, where pertinent, from the United States nationals referred to in Article I the documents or titles related to their claims or to the satisfaction thereof and deliver them to the Government of Peru.

ARTICLE VII

After the entry into force of this Agreement, neither government will present to the other, on its behalf or on behalf of another, any claim or demand with respect to the matter referred to in Article I of this Agreement. In the event that such claims are presented directly by nationals of one country to the government of the other, such government will refer them to the government of the national concerned.

ARTICLE VIII

This Agreement shall enter into force upon signature and upon payment in accordance with Article II. (See Annexes A and B.)

Done at Lima this 19th day of February, 1974, in duplicate, in the Spanish and English languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

James R. Greene Taylor G. Belcher

FOR THE GOVERNMENT OF PERU:

Miguel A. de la Flor Valle

ANNEX A

Without modifying the provisions of this Agreement, the Government of Peru expressly states that the matters covered by this Agreement refer to the problems and claims arising from the activities carried on in Peru by the following companies:

Peruvian Branch of Cerro de Pasco Corporation incorporated in the State of Delaware, United States

Sociedad Paramonga Limitada S.A.
Compañía Papelera Trujillo S.A. (TRUPAL)
Cartavio S.A.
Envases Sanmarti S.A.
Cargill Peruana S.A.
Gloucester Peruvian S.A.
Pesquera Meilan S.A.
Gold Kist S.A. and Pesquera Salinas S.A.
Compañía Pesquera de Coishco S.A.
Refinería Conchan-Chevron S.A. and Compañía Petrolera Conchan-Chevron S.A.
Brown and Root Overseas Inc. and Brown and Root S.A.
Morrison Knudsen Company Inc. (EMKAY) and its associates Conselva
Zachry International Inc. and its associates

ANNEX B.

The Government of the United States recognizes that the position of the Government of Peru is stated in Annex A and notes that this position is stated without modifying, by interpretation or otherwise, the provisions of this Agreement.