The United States-Peruvian Claims Agreement of February 19, 1974

On February 19, 1974, the United States and Peru concluded an agreement which represented a milestone of sorts, not only in United States relations with Peru, but in relations with Latin America in general. For the first time since the settlement of the Mexican oil nationalization claims in 1942, the United States and a Latin American government had agreed on a comprehensive settlement of all outstanding claims between United States citizens and a foreign government. Under the terms of the agreement the government of Peru paid to the United States $76 million for subsequent distribution by the United States government to the claimants covered by the agreement; the proceeds were distributed with interest on December 19, 1974.

Given the value of American equity investment in Latin America, and the frequency with which significant expropriation disputes continue to occur, the settlement is a significant one both for the United States government and the business community. This article reviews the experience with the Peruvian settlement and reflects upon its implications for the future.

I. Background

Although in the postwar years lump sum settlements between the United States and Eastern European countries have become commonplace, few have...
been concluded in Latin America. The principal reason is, of course, the Calvo Clause which has been enshrined in the laws and constitutions of most Latin American states. Thus, Article 17 of the Peruvian Constitution provides that:

Commercial companies, national or foreign, are subject, without restrictions, to the laws of the Republic. In every state contract with foreigners, or in the concessions which grant them in the latter's favor, it must be expressly stated that they will submit to the laws and courts of the Republic and renounce all diplomatic claims.\(^6\)

Such provisions have commonly been interpreted as barring any right of formal diplomatic representations on behalf of foreign investors involved in investment disputes with a host country government and precluding any form of settlement other than specifically provided under local law. Nevertheless, these constitutional restrictions appear to be intended to restrict foreign companies rather than the state per se, thus providing a legal basis for the state to determine, notwithstanding the existence of such provisions, that its own best interest will be served by agreeing to submit such claims to diplomatic negotiations. This obviously was the case in Peru.\(^7\)

The series of expropriations and related disputes in Peru resolved by the February 1974 agreement began in October 1968 when the revolutionary government of Peru canceled all contracts and expropriated the property of the International Petroleum Company, Inc., a Canadian corporation that was 99.95 percent beneficially owned by the Exxon Corporation.\(^8\) Despite sporadic efforts for more than four years,\(^9\) no significant progress was made in resolving the IPC dispute, and the Peruvian government in fact presented claims against IPC


Constitution of the Republic of Peru (1933).

Since the time of the agreement, the government of Peru has on several occasions agreed to provisions in contracts on loan agreements that call for settlement of disputes by international arbitration.

In November 1974, in explaining a clause in a Peru-Japanese pipeline agreement calling for dispute settlement by the International Chamber of Commerce in Geneva, the Peruvian government defended the constitutionality of such provisions under Article 17 of the Peruvian Constitution. It was argued that financing, as contrasted with construction, contracts were not subject to the constitutional prohibition.

The government of Peru also noted that the contract was with a foreign government rather than a "commercial company." Department of State telegram, Lima 9616 (November 14, 1974), unclassified.

The International Petroleum Corporation was expropriated, and its concession canceled, under the following decrees: Law No. 16674, July 26, 1967 (7 I.L.M. 1211); Decree No. 3 (renumbered 17065), October 4, 1968 (7 I.L.M. 1255); Decree Law No. 4 (renumbered 17066), October 9, 1968 (7 I.L.M. 1257); Supreme Decrees No. 014-EM/DGH, August 22, 1969 (8 I.L.M. 1064). Affidavit of C.P. Cormier, October 25, 1974. 99.95% of the stock of IPC was owned by Esso Standard (Inter-America), Inc., which in turn is a wholly owned subsidiary of Exxon.

Among the efforts were a series of visits by John Irwin, II, later undersecretary of state. See George M. Ingram, Expropriation of U.S. Property in Latin America (1974) at 65-66.
totaling more than $650 million, some six times the total value of IPC’s Peruvian assets by the company’s valuation.10

The IPC expropriation resulted in a further cooling of bilateral relations that had been strained sporadically by the IPC problem since the early 1960s.11 Bilateral economic assistance, except for humanitarian assistance following the earthquake of 1969, was virtually halted, consistent with the spirit, if not the letter, of United States law.12 Whether because of the IPC dispute or as a result of the revolutionary government’s general views on the role of foreign capital under the revolution and control of its natural resources, other major American firms such as the Cerro Corporation and W. R. Grace Company began to experience serious problems with their operations in Peru. Perhaps more significantly from a foreign policy point of view, a fiscally responsible, although not democratically elected government with an obviously determined and sincere interest in bettering the lives of its people was, in effect, excluded from full participation in the United States bilateral assistance program; and the failure of IPC and the Peruvian government to reach a settlement adversely affected Peru’s credit rating insofar as the international financial institutions, especially the World Bank and the Inter-American Bank, were concerned.13

II. Negotiations

In November 1972, largely on the initiative of Mr. Peter Flanigan, at that time President Nixon’s adviser for international economic affairs, an inter-agency group decided that a new effort should be made to engage the Peruvian government in a series of negotiations which might result in the resolution of major outstanding investment disputes between American citizens and that government. As a result of that decision, early in 1973 President Nixon appointed a vice-president of Manufacturers Hanover Trust, James R. Greene, as his special representative to discuss with the president of Peru and high Peruvian officials the possibility of settling a variety of uncompensated expropriations and other investment disputes. After extended discussions the United

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10Estimates provided by different sources vary from $20-100 million or more. IPC valued the assets at $120.3 million in 1969; the Peruvian courts arrived at a valuation (before off-setting deductions) of $71 million. Id.

11U.S. policy toward Peru in the 1960s had in many respects been determined largely by U.S. government efforts to encourage fair treatment by Peru of IPC. Id. at 43, 51-52.

12Section 620(e)(1) of the Foreign Assistance Act of 1961, as amended, (22 USC 2370(e)(1)) the “Hickenlooper Amendment” provides for the suspension of assistance to any country which expropriates American-owned property if the country fails to take appropriate steps to discharge its obligations under international law to pay prompt, adequate and effective compensation. While the provision was never formally invoked, bilateral assistance to Peru subsequently consisted of continuing grant technical assistance and humanitarian food distributions. Following the disastrous earthquake of May 1970 a number of substantial loans and grants were authorized. See Ingram, supra note 9, at 84.

13Id. at 83-84.
States government and the government of Peru agreed in August 1973 on a public statement announcing the opening of formal negotiations on investment problems.\footnote{U.S.-Peruvian press communique, August 9, 1973:}

Discussions began in earnest in August and continued into February 1974. Originally the United States believed that any settlement should include compensation for the Grace properties; Conchan, a Standard Oil Company of California subsidiary; several road-building contracts; and the International Petroleum Corporation. (As discussed below, the government of Peru took the position that the IPC matter was \textit{not} among the subjects of the negotiation.) Subsequently, at the request of the Peruvian government and with Cerro's approval, the Cerro de Pasco Corporation's Peruvian properties were brought within the scope of the negotiations, and Cerro de Pasco was in fact expropriated on January 1, 1974,\footnote{Decree Law No. 20492, January 1, 1974; Supreme Decree No. 419-EM/SD, December 31, 1973.} some seven weeks before the agreement was finally concluded. Peru also requested that the negotiations include five United States citizen-owned fishmeal companies which had been nationalized in May 1973,\footnote{Decree Law No. 19999, May 7, 1973; Decree Law No. 20000, May 7, 1973.} and the United States Government agreed (with the concurrence of the companies) in December 1973.

After more than six months of discussions, the United States and Peru reached basic agreement on a lump sum settlement consisting of $76 million to be paid in cash at the time of signature of the agreement. Another approximately $74 million in previously owed direct remittances from the government of Peru to several of the companies (Cerro, W. R. Grace, Cargill, Starkist, and Gold Kist) was paid or transferred at or about the time of the signature of the agreement. The United States government was not directly involved in these transfers, although it used its good offices to assist the companies in arranging them.

After further negotiations on the text, the agreement was signed on February 19, 1974, and the government of Peru, having borrowed the funds a few days
earlier from a consortium of New York banks, presented the United States Treasury with a check for $76 million.

III. The Agreement

From the United States point of view it was essential that any settlement of outstanding claims cover IPC as well as others; for purposes of the Hickenlooper Amendment, for example, any unresolved claim would have the same effect on the future aid relationship as leaving all such claims unresolved. Peru, on the other hand, steadfastly adhered to the position that the IPC matter was not among the subjects of this negotiation. The nature and form of the claims agreement was largely dictated by this difference in views and objectives.

Once it was clear that the Peruvian government would not acknowledge any responsibility for compensating IPC, it became clear that an agreement simply listing the companies which were to share in the proceeds would not be sufficient, and that it was essential that the United States government bear all responsibility and have full authority for distributing the proceeds. The result was a text which in its principal provisions (a) defines the scope of the agreement in terms of a class rather than a specific list of companies, and (b) gives the United States "the exclusive competence" to distribute the proceeds "without any responsibility arising therefrom on the part of the government of Peru." The class of claimants defined in Article I includes, of course, the Exxon Corporation by virtue of its indirect ownership of the International Petroleum Company, Inc. Nevertheless, the Peruvian government insisted on presenting its position within the text of the agreement. Thus the preamble includes the complete text of the August 1973 press statement, including the

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1 Under the Hickenlooper Amendment (See note 12, supra), a single unresolved expropriation case precludes the furnishing of assistance. Thus any settlement that left a case outstanding would have been ineffective in assuring the legal basis for a full resumption of assistance, and in avoiding other legislative restrictions such as the Gonzalez Amendment (Section 21 of the Inter-American Development Bank Act, as amended, 86 Stat. 59 (1972)), and Section 502(b)(4) of the Trade Act of 1974 (88 Stat. 2067).

2 See the August 9, 1973 press communique, supra, note 14, the preamble and Annex A of the Agreement, and the Peruvian notes of December 18 and December 31, 1974 (14 I.L.M. 36).

3 Article I(A) reads as follows:
   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.

4 Article I(C) states that:
   [T]he provisions of this Agreement shall not affect in any way 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.

5 Article III.

6 See note 8, supra.
Peruvian disclaimer on IPC, and an "annex" in which the government of Peru's understanding as to the coverage of the agreement is expressed "without modifying the provisions of this agreement."

However, Annex B states as follows:

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.

The disclaimer in Annex A and the wording of Annex B give the United States the legal basis for interpreting the annexes as having no effect on the scope of Article I, and for distributing a portion of the proceeds to IPC, thus resolving the IPC claim insofar as international law and the law of the United States are concerned.22

The other provisions of the agreement resemble standard provisions of previous claims settlements. Article II specifies the amount which is to be paid in settlement of all rights covered by the agreement and in discharge of all liabilities and obligations of the government of Peru respecting the claims covered by Article I. In Article IV the United States government declares that payment of the agreed amount cancels all Peruvian government liabilities to the United States nationals included within the covered class (Article I). In Article V the government of Peru agrees that the conclusion of the agreement eliminates all liabilities or other charges against the United States nationals referred to in Article I and affirms that no further claims—"civil or otherwise"—will be brought on their behalf. The Peruvian government also assumes legally valid contractual obligations of United States nationals, their subsidiaries, and branches, arising out of their Peruvian operations and which are communicated to the government of Peru.

Under Article VI the United States government agrees to obtain where pertinent the documents, titles, or stock certificates related to the claims and deliver them upon request to Peru. Under Article VII both governments agree not to present any further claims to the other with respect to the matters covered by Article I.

IV. Distribution of Proceeds

The intent of Article III was to provide the United States with sole discretion in the distribution of the proceeds, in accordance with its own laws and procedures. Thus, as a matter of international law the government of Peru had no control whatsoever over the companies which received a portion of the lump

22Under Article II, payment by Peru of the proceeds discharges Peru from any liability to the claimants covered by Article I, including, in the U.D. view, the International Petroleum Corporation.
sum settlement; and the chief issues concerning distribution of the proceeds were matters of domestic United States law.

The United States government had undertaken to resolve the various investment disputes with Peru with the consent and encouragement of the companies involved on the assumption that each would receive an “acceptable” predeter-
mined amount in satisfaction of their claims. Officials of the United States and the companies whose property had been or was in the process of being expropriated by the government of Peru had discussed the compensation question prior to the date of the agreement. Each company had indicated its minimum requirements for settlement and agreed to accept that amount in satisfaction of its claims. This approach to settlement of claims and the distri-

bution thereunder was carried out in accordance with Section 547 of Title 31, United States Code.

As an alternative, the funds received from the government of Peru could have been transferred to the Foreign Claims Settlement Commission (FCSC) for distribution to the claimants in accordance with existing legislation and the FCSC’s regulations and procedures. However, since the amounts of each claim had been consented to by the covered claimants prior to signature of the agreement and received for their benefit, and there were no unknown claimants entitled to share in the distribution (see below), there was no administrative or judicial determination to be made by the FCSC. Under these circumstances, it was decided to rely on the independent authority of the secretary of state under Section 547 to receive the funds in trust, to determine the amounts due claimants from such trust funds, and to certify the same to the secretary of the treasury for payment.

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23 The amount in each case was essentially the minimum amount each claimant was willing to accept in exchange for relinquishing its claims against Peru. Each amount was agreed to in writing prior to February 19, 1974 (State Department files).

24 This written acceptance amounted to a contractual arrangement with the Department of State. In each case the claimant indicated the amount he was willing to accept in full and final settlement of all his claims; his familiarity with the agreement, including the total amount of indemnity; his understanding that Article 1, and not the Peruvian annex, defines the class of claimants; and his awareness of the department’s intent to distribute the proceeds within a year from the date of signature. Notwithstanding the historical unwillingness of the courts to countenance such chal-
lenges, the purpose of this arrangement was to protect the Department of State from a legal challenge to the distribution as to the settlement as a whole. (See Aris Gloves v. United States, 420 F.2d 1386 (Ct. Cl. 1970).)

25 31 U.S.C. 547—

All moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury. The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the Secretary of Treasury, who shall, upon the presenta-
tion of the certificates of the Secretary of State, pay the amounts so found to be due.

Each of the trust funds covered into the Treasury as aforesaid is appropriated for the payment to the ascertained beneficiaries thereof of the certificates provided for in this section. (Feb. 27, 1896, ch. 34, 29 Stat. 32.)

As the amounts due each known claimant had in effect been determined prior to the conclusion of the agreement and agreed to by the known claimants, the certification process under Section 547 was relatively simple: each claimant was simply required to provide appropriate legal evidence of its status as a United States corporation (as is required under Article I) and of its ownership of the property expropriated or otherwise taken by the government of Peru falling within the terms of Article I(a). Nevertheless, and despite the efforts of the United States government to assure that all of the claims possibly falling within the scope of Article I had been identified prior to the signing of the agreement, there remained a possibility that one or more such claims existed. In order to assure that no qualified claimant would be deprived of his rights to share in the distribution simply because the United States was not aware of the existence of his claim, each of the known potential claimants was asked to indicate his awareness that the settlement applied to a class, rather than to a list of known claimants.

The Department of State also placed a notice in the Federal Register formally announcing that an agreement on claims had been reached, quoting the article defining the class of claimants, and requesting any party which had not communicated a claim that might be covered to the department to advise the legal adviser of the State Department by June 15, 1974. The Federal Register notice produced no responses, although several inquiries were in fact received from parties learning of the agreement from newspaper accounts or other sources. In those cases it was determined that the alleged claims did not come within the scope of Article I.

Once it had been determined that the Department of State was aware of all of the claims falling within the scope of the agreement and each participant had furnished the necessary legal documentation, the Department of State certified each of the claims to the Department of Treasury for payment, and the $76 million was distributed with interest to the claimants on December 19, 1974, in the following amounts:

<table>
<thead>
<tr>
<th>Company</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brown &amp; Root Overseas, Inc.</td>
<td>$100,000</td>
</tr>
<tr>
<td>Cargill Incorporated</td>
<td>$1,300,000</td>
</tr>
<tr>
<td>Cerro Corporation</td>
<td>$10,000,000</td>
</tr>
<tr>
<td>Esso Standard (Inter-America) Inc.</td>
<td>$22,000,000</td>
</tr>
<tr>
<td>General Mills, Inc.</td>
<td>$1,200,000</td>
</tr>
<tr>
<td>Gold Kist Inc.</td>
<td>$600,000</td>
</tr>
<tr>
<td>H. B. Zachry Company</td>
<td>$1,200,000</td>
</tr>
<tr>
<td>International Proteins</td>
<td>$8,900,000</td>
</tr>
<tr>
<td>Corporation</td>
<td></td>
</tr>
<tr>
<td>Morrison-Knudsen Company, Inc.</td>
<td>$2,000,000</td>
</tr>
<tr>
<td>Standard Oil Company of California</td>
<td>$2,200,000</td>
</tr>
<tr>
<td>Starkist Foods, Inc.</td>
<td>$7,300,000</td>
</tr>
<tr>
<td>W. R. Grace &amp; Co.</td>
<td>$19,200,000</td>
</tr>
</tbody>
</table>

27 Federal Register, Vol. 39, No. 75—Wednesday, April 17, 1974.
In addition to these sums, interest was paid at 6.34% per annum from February 19, 1974, to date of payment.  

V. Peruvian Reaction to the Distribution

Because Esso Standard (Inter-America) Inc., was to be a participant in the distribution, the United States government informed the government of Peru several days in advance of its intent to distribute the funds on December 19, 1974, and of the fact that the owner of IPC was among the companies to be compensated. The Peruvian government reacted strongly, by presenting a diplomatic note to the United States which it simultaneously published in the Peruvian newspapers on December 18. In the note the government of Peru reiterated its position regarding the negotiations that “the IPC case would not, for any reasons, be a subject of the conversations, inasmuch as that was a matter which had been definitively resolved.” The note made reference to the preamble to the agreement incorporating the August 9, 1973 press release, and to Annex A to reinforce its position. It also charged that notwithstanding the existence of Article III, the inclusion of Esso Standard (Inter-America) in the distribution “implies a distortion of the spirit and the letter of the agreement.” Finally, the note called upon the United States government to “correct the inclusion of Esso Standard Inter-America, Inc., in the list of companies” which were to receive a portion of the proceeds.

Nine days later—after the distribution had been completed—the United States government responded indicating its regret that the distribution of proceeds “did not meet with the approval of the government of Peru.” The United States note went on to state that,

. . . 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 within the terms of the agreement, and the Government of the United States therefore regrets that it is unable to accede to the request of the Government of Peru that the list of recipients be amended . . .

The government of Peru responded with a second note on December 31 reiterating its position and maintaining that the United States action “distorts” the implementation of the above-mentioned bilateral instrument.

Since that time there has been relatively little discussion of the settlement agreement either in the United States or Peru, and both countries have appeared content to allow any controversial aspects of the matter drop. The
government of Peru had steadfastly maintained its position that the agreement did not cover IPC, and the United States government had successfully resolved all then-outstanding expropriation disputes with the government of Peru through the distribution of the proceeds of the agreement.

VI. Implications of the Agreement

First and foremost, the conclusion of the February 1974 agreement and distribution of proceeds made it possible for the United States and Peru to eliminate all then-pending expropriation disputes and provided the potential basis for a more constructive relationship. However, in April 1975 the government of Peru expropriated the property of the Gulf Oil Corporation in Peru, apparently because it considered allegations of illegal payments or bribery by Gulf officials elsewhere in the world demonstrative of the fact that Gulf could not be a good corporate citizen of Peru. In July of that year, and even though negotiations had been continuing for more than a year, the Peruvian government expropriated the interests of the Marcona Mining Corporation. Despite a change of government at the end of August, discussions between Marcona and the government of Peru on a settlement broke down, and in October the United States government, with some reluctance, accepted a direct role in seeking to arrange a settlement. At this writing (April 1976) the Marcona negotiations were continuing, and Gulf appeared to have negotiated an agreement in principle with Peruvian officials.

The settlement may ultimately have more significance with respect to United States relations with Latin America in general. Like the salinity agreement with Mexico in August 1973, it demonstrated that the United States government has the will to settle outstanding bilateral problems with Latin American nations and to do so in a spirit of good faith and compromise.

The Peruvian settlement is also the first post-World War II claims settlement between the United States and a Latin American government. As such, it constitutes clear recognition of the obligation to compensate for expropriated property and may make it easier to obtain compensation under similar circumstances elsewhere in Latin America, even where settlements are negotiated by the host government and the company whose interests are directly involved.

Insofar as United States government policy with respect to foreign investment

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33 Decree Law No. 21144 of May 14, 1975, refers to the admission of Gulf before the Senate Banking Committee of $4 million in improper contributions, characterizes the companies' practices as "offensive to public order," cites the responsibility of the government of Peru to "maintain public morality," and proceeds to expropriate all of Gulf's property (a retail gasoline and petroleum sales operation) in Peru. There were no allegations by the Peruvian government of any improper or illegal activity by Gulf in Peru.

34 Under Decree Law No. 21228 of July 22, 1975, all of Marcona Mining Company's properties in Peru were expropriated.
is concerned, the agreement also has several important implications. While some may consider it less than fully satisfactory in that the amount of compensation paid was less than might have been considered fully adequate under international law standards, it is the writer's view that under the circumstances the amounts received were not unreasonable. Because of the number of companies involved, and the diversity of their holdings, it is not possible to make any generalizations with respect to the relation between fair value and actual compensation. However, if the $75 million in direct remittances is treated along with the $76 million lump sum settlement as part of the total compensation package, the ultimate figures are believed to fall within the upper range of the lump sum settlements achieved in most of the Eastern European cases. In any event, the amounts of compensation agreed to and received by the included companies under the agreement were almost certainly more than they could have hoped to have received without the direct assistance of the United States government.

Nevertheless, government-to-government settlements of expropriation claims will probably remain the exception rather than the rule. Given the frequent reluctance of Latin American governments to recognize either implicitly or explicitly that the United States government may properly play a direct role in such matters, the problem the United States faces in seeking to verify the validity of a claim and the amounts involved, and the time and expertise which would be required of United States officials if such settlements were to become the rule, the traditional United States company-to-host-government approach is likely to remain predominant. Even in the Peruvian case, a government-to-government settlement was not possible until certain of the disputes had continued unresolved for more than five years. The Department of State has had similar experience with its Eastern European settlements. In practice, direct United States government involvement is probably not feasible until all reasonable possibilities of a direct settlement have been exhausted. Further developments in Peru may well reinforce these conclusions.


Study by Office of the Assistant Legal Adviser for International Claims, of claims under the International Claims Settlement Act of 1942, as amended (January 18, 1972).