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In the issue of *The International Lawyer* for July, 1970, George Jackson Eder commented on the recent rash of expropriations and nationalizations in Latin America.[1] The article is replete with practical and valuable observations, and includes, as befits a piece by a veteran Latin-American hand of broad experience at the highest levels, a number of authoritative anecdotes and examples. The concluding summary, on the role of lawyers in these matters, should be required reading for all lawyers and corporate executives with interests in Latin America.

However, this writer found it disquieting that what appear to him to be frequent and substantial factual inaccuracies marked Mr. Eder's article, at least in those instances when he was dealing with matters within the present writer's own interest and research. It was further disquieting to find, on ennumerating the apparent errors in systematic fashion, that almost all of them would probably feed an attitude of righteous indignation on the part of United States interests; *i.e.,* they would unfairly be induced into believing that their interests and the interests of others like them had been denied by means of arbitrary, capricious, illegal and unjust actions of the foreign governments in question. Considering the source of these errors, and the authority which his reputation unquestionably commands, this is an unfortunate circumstance.

In the interests of keeping the record in good order, this author offers to the same readership reached by Mr. Eder's article, some corrections based on his own independent research touching on some of the same matters with which he dealt.

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[1]Eder, *Expropriation: Hickenlooper and Hereafter,* 4 INT'L LAWYER 611 (1970). For Mr. Eder's response to this reply see p. 354, *infra.*

IPC and Peru

Mr. Eder implies that the Peruvian government evaluated its total debt to International Petroleum Company (presumably for the expropriation of the Talara refinery and other industrial installations on the La Brea y Pariñas property, plus the petroleum exploitation rights in the neighboring "Lima" concession, plus the wholesale and retail marketing network for ESSO-brand products in Peru) at approximately $71 million, when the company's holdings were really worth approximately $190 million.[2]

In fact, the decree-law fixing the $71-million figure makes it clear that it represents the value only of the "Talara industrial complex," *viz.*, those IPC installations which physically form a part of the disputed La Brea y Pariñas property.[3] The Peruvian government has recognized that IPC's total holdings were worth closer to the figure which Mr. Eder cites;[4] in no instance has Peru claimed it owed only $71 million for the IPC properties it expropriated throughout Peru.

Consistent with the misconception noted above, Mr. Eder states in his article that the Revolutionary Government moved immediately to take all of IPC's holdings, "whether in dispute or not," throughout Peru.[5] In fact, only the La Brea y Pariñas field and installations were taken in the first instance.[6] IPC's other properties went under government embargo three and a half months later,[7] and were finally expropriated some ten months after La Brea y Pariñas.[8]

Addressing an issue that goes to the heart of the IPC controversy in Peru, Mr. Eder unqualifiedly contends that the company's ownership of the mineral rights in La Brea y Pariñas "was expressly confirmed by arbitral judgment handed down by an international tribunal in 1922 under a treaty between Peru and Great Britain."[9] In fact, insofar as this may imply a studied decision by an international court on the basis of its careful independent consideration of the relevant law and facts, it is misleading, for the tribunal in question merely adopted an agreement by the purported

[2] *Id.*, at 619.

[3] Decree-Law (hereafter D. L.) No. 17517 of March 21, 1969. For a definition of the Talara industrial complex see the preamble to D. L. No. 17066 of Oct. 9, 1968.

The IPC has never confused the property being valued. *See* IPC's three-volume collection of documents and commentary, THE LA BREA Y PARIÑAS CONTROVERSY, especially volume III at 5, 8, 21-22 (1969) (hereafter CONTROVERSY).

[4] IPC indicates the official value in addition to the $71 million was $62 million, making a total of over $133 million. *See* III CONTROVERSY at 8.

[5] Eder, *op. cit. supra*, at 620.

[6] D.L. No. 17066, *supra*, note 3.

[7] Supreme Decree (hereafter S.D.) No. 014-EM/DGH of Aug. 22, 1969.

[8] *See Notice to the Manager of IPC*, Jan. 28, 1969, in II CONTROVERSY, Exhibit 78.

[9] Eder, *op. cit., supra*, at 619.

agents of the two countries, of questionable validity, which may have dodged the issue of ownership.[10] In the same vein, the article in question refers to IPC's 1968 agreement "to give up its lands, mineral rights and producing facilities."[11] In fact, it was IPC's alleged mineral rights which were the issue; it gave up its *claim* to such rights, not a clear an unencumbered title.

Mr. Eder's article refers to a "purge" of the Peruvian judiciary following the summary dismissal of the "legally-constituted" Supreme Court and the naming of sixteen new justices to replace those taken off that court.[12] In fact, the action of the Revolutionary Government was primarily for the purpose of improving a judiciary generally recognized for its incompetence and corruption, and a judicial system generally known for its inefficiency and delay.[13] The recent new appointments to the Supreme Court were most notable for their uniformly proven high level of competence, achievement and—yes—even independence of thought and action.

It is true that the President of the Supreme Court, prior to its "reorganization," was an exceptionally capable jurist who was probably removed for his marital ties to the family of the deposed President Belaúnde and for his outspoken public statements concerning the illegality of *de facto* government; but, overall, there has been an improvement in the Peruvian judiciary since the Revolutionary Government's action, and the Supreme Court has proved to be far from a rubber stamp for the *de facto* government's actions.[14] IPC's options before the Peruvian bench and administrative agencies were far more varied than Mr. Eder indicates, and, in fact, the company did carry out numerous appeals on several levels and several legal theories.[15]

W. R. Grace and Peru

Mr. Eder notes that two foreign firms with extensive, highly-efficient coastal sugar plantations and processing plants—W. R. Grace & Co. and Gildemeister—lost their entire holdings to the Agrarian Reform as carried out by the Revolutionary Government. Mr. Eder properly points out that

[10]*See* analysis in Furnish, *Domestic Law Aspects of the La Brea y Parinas Controversy* in Peru, KY. L. J. 1971.

[11]Eder, *op. cit. supra*, at 620.

[12]*Id.*

[13]*See* preamble to D.L. No. 18060 of Dec. 23, 1969.

[14]The government's so-called Freedom-of-the-Press Law, D.L. No. 18075 of Dec. 30, 1969, to which Mr. Eder also refers, was upheld by one vote in a split decision. First *Sala* of the Peruvian Supreme Court of June 30, 1970 (3-2-1 vote). Now the court is apparently deadlocked over the constitutionality of the Revolutionary Government's actions under the Agrarian Reform Law in another case, brought by the Tucumán hacienda.

[15]*See* all three volumes of CONTROVERSY and the exhibits; Furnish, *op. cit. supra*, note 10

not only the foreign interests, but also those of the Peruvian sugar plantation-owners—including some of the most powerful landed families in the country—were expropriated in the name of Agrarian Reform.[16]

The reason for the junta's action is well known and is almost totally unrelated to the question of ownership to the land in question: the farm workers on the coastal sugar haciendas are highly organized, and had been faithful supporters of APRA, the political party which has a traditional blood-feud with the Peruvian military, and which stood to win the elections of 1969 had they been held—thus the party which lost the most with the advent of military government. By taking over the administration of the coastal haciendas, the military transferred the loyalty of their working force from APRA to the Revolutionary Government.

It is doubtful whether any extraneous influences could have saved W. R. Grace's sugar lands, or those of anyone else caught in the cross-fire of so important an engagement in Peruvian politics. The military wished to crush APRA's seat of power and did so; W. R. Grace, Gildemeister, and the other landholders were standing directly in the line of fire and were coincidental—if not unpopular—victims of the Revolutionary Governments' major aim.

Mr. Eder's expressed opinions concerning the Agrarian Reform in general, and as specifically applied to W.R. Grace & Co.,[17] demonstrate the sort of attitude which leads to the unpopularity of foreign interests in Latin America: the idea that if a program to bring about social change touches United States investments, it is tinged with communism, ill-conceived, and arbitrarily administered.

Implying that the Peruvian Agrarian Reform is under the sway of communist advisers, Mr. Eder seems to ignore the fact that most of the institutions and mechanisms of the Agrarian Reform Law[18] are consistent with those of other programs throughout Latin America.

Agrarian reform is an irresistible force in Latin America, and is now being carried out under carefully-drafted comprehensive laws drawn in the light of more than a decade of experience with the problem in several countries. It ill serves United States business interests in Latin America to view the phenomenon, which is the result of powerful social and economic stresses within the complex context of Latin American society, as the arbitrary and capricious work of crackpot dictators or left-wing régimes.

The "manager of a Colombian sugar mill"[19] who had visited Peru after

[16]Eder, *op. cit. supra*, 622.

[17]*Id.*, 622–23.

[18]D.L. No. 17716 of June 24, 1969. This law was recently designated a model for Latin American agrarian reform by an FAO convention in Caracas.

[19]Eder, *op. cit. supra*, 623 n. 23.

the sugar-plantation seizures notwithstanding, the action against the owners of a company who withdrew funds from a New York bank was fitting, proper, and consistent under the Peruvian Agrarian Reform Law.[20]

Mr. Eder's question as to "what kind of land-distribution program . . . not only seizes a farmer's land, but confiscates his livestock, growing crops, installations and equipment and even his money in the bank?"[21] is probably prejudicial in its implication of arbitrary seizure without compensation,[22] but even more, would probably elicit the following answer from anyone generally familiar with the course of agrarian reform in Latin America over the past ten years: Virtually every "land-distribution program" now operative in Latin America does these things to something near the same extent that Peru does. One might well contrast Mr. Eder's comments with those of W. R. Grace's representatives (at least in public) in Peru following the loss of its sugar lands. Significantly, W. R. Grace, consistent with the Agrarian Reform law, kept its secondary processing installations reliant on the sugar property for raw materials.

Hickenlooper and Peru

The Hickenlooper Amendment had an effect in Peru from 1963 to 1968, in the form of reduced aid to the country pending a satisfactory resolution of the La Brea y Pariñas question, and may well have the factor which prevented an earlier nationalization of the property.[23] Unfortunately, the period of reduced aid coincided with the administration of a progressive, visionary and scrupulously constitutional president, Fernando Belaúnde Terry. The United States policy hampered Belaúnde's political stock by freezing a high-priority issue into an impasse, while popular concern and discontent continued to build, at the same time it withheld funds which otherwise might have allowed him to achieve more in his domestic programs.

After the semi-freeze had been applied for five years, there were Peruvians who had learned the lesson that United States aid was not entirely necessary (there are other sources of funds and technical assistance) and/or the political price for it, detrimental, or at least oblivious, to the social and economic and political needs of Peru, was too high. Hickenlooper's amend-

[20]D.L. No. 17716 of June 24, 1969, arts. 37, 61; D.L. No. 17719 of July 11, 1969; D.L. No. 17808 of Aug., 1969.

[21]Eder, *op. cit. supra*, 623.

[22]In fact, the Peruvian Agrarian Reform Law provides for the payment of cash for expropriated livestock and installations. D.L. No. 17716 of June 24, 1969, arts. 178-179. Owners may also harvest crops planted before expropriation becomes final. D.L. No. 17719 of July 11, 1969, art. 5.

[23]*See* Goodwin, "Letter from Peru," New Yorker, (May 17, 1969), p. 41.

ment is like a gun with only one round in it against a crowd: no good when you have to use it.

And in Latin America today, in what concerns instances of foreign investment popularly regarded as wrongs, old and deep, the crowd will not be bluffed.

REPLY

The Editor-in-Chief of *The International Lawyer,* has very kindly given me the opportunity of replying to Professor Furnish's criticism of my article on "Expropriation: Hickenlooper and Hereafter," in the July issue of that publication.

It has generally seemed to me unfair to give the author of an article two cracks at a subject while his critics are given only one. I shall therefore refrain from refuting, point by point, what appear to me to be fallacies in Professor Furnish's criticism. I trust that readers who might be inclined to concede some merit to the professor's comments will read the original article and then conclude that, nit-picking aside, my article is factually sound, and that the sole basis for criticism is a divergence of opinion and point of observation.

It is my assumption that the professor has never been threatened by expropriation without compensation and can view the subject from an ivory tower of academic isolation, as distant from him as the murder of one African tribe by another, or the extermination of the Russian kulaks. My clients and I, to the contrary, have been on the spot in more ways than one.

It is my sincere belief that the taking of property without compensation is robbery, and I disapprove of it. Professor Furnish takes a contrary view and, with reference to agrarian "reform," sees it as "an irresistible force in Latin America," which presumably makes it right. I disagree, if "reform" means confiscation.

While I have for years advocated reforms in Latin American land tenure and agricultural goals and practices, *International Competition in the Trade of Argentina,* Carnegie Endowment for International Peace, 1931, pp. 140-145; "How a Sound Land Program Can Raise Living Standards in Latin America," D.S. Inter-American Council, 1960; I have not hesitated to castigate the confiscation of private property, whether by politicians for their own ends or under the guise of social reform, as in Mexico, Brazil, Bolivia, and elsewhere, "Urban Concentration, Agriculture, and Agrarian Reform," *The Annals,* American Society of Political and Social Science, July 1965, pp. 27-47; *Inflation and Development in Latin America,* University of Michigan, 1968, pp. 63, 71-78.

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