



1970

Peruvian Domestic Law Aspects of the La Brea y Pariñas Controversy

Dale B. Furnish
Arizona State University

Follow this and additional works at: <https://uknowledge.uky.edu/klj>



Part of the [Comparative and Foreign Law Commons](#), [International Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

[Right click to open a feedback form in a new tab to let us know how this document benefits you.](#)

Recommended Citation

Furnish, Dale B. (1970) "Peruvian Domestic Law Aspects of the La Brea y Pariñas Controversy," *Kentucky Law Journal*: Vol. 59 : Iss. 2 , Article 5.

Available at: <https://uknowledge.uky.edu/klj/vol59/iss2/5>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Peruvian Domestic Law Aspects of the La Brea y Pariñas Controversy

By DALE B. FURNISH*

In the renowned La Brea y Pariñas controversy, the North American public has consistently assumed, Professor Furnish says, that Peru acted arbitrarily in effectively rendering the International Petroleum Corporation without compensation for the expropriated oilfield. The legal mechanism utilized was granting IPC compensatory damages, but offsetting the award with a restitutionary claim for the depletion of the resources of the tract by IPC under a claim of title which Peru deems invalid. It is Professor Furnish's view, elaborated in this article, that there is a solid basis in Peruvian domestic law for most of what Peru has done in this affair.

On August 22, 1969, the Revolutionary Government of Peru initiated the expropriation of all the property belonging to Standard Oil's wholly-owned subsidiary, the International Petroleum Co., in Peru.¹ In practical effect the decree meant that an oil

* B.A., Grinnell College, 1962; J.D., University of Iowa, 1965. Associate Professor of Law Arizona State University. Formerly Visiting Professor and Sub-Director, Chile Law Program, International Legal Center.

AUTHOR'S NOTE. The author owes a great debt to a number of people who helped provide information for this study, read drafts of the manuscript, and saved me from errors of law and fact. Probably more people spent time helping me than should be necessary for any one law review article. However, the topic is an extremely controversial one. Space does not permit a complete list of those to whom my debt extends, but I must acknowledge special attention, and immeasurable aid, from John Oldfield, Chief Counsel at the Esso Inter-America office in Coral Gables, Florida, and Alberto Ruiz Eldridge, past President of the Lima Bar Association and chief Peruvian government counsel in the controversy. Both men, and all others on the two sides of the question, were most courteous and conscientious in being sure I was provided with all the relevant information available, even when I was pressing points they strongly disagreed with.

Finally, my debt extends to the International Legal Center of New York City, which is an active and effective participant in beginning a revolution in Latin American legal institutions and gave me the opportunity to be in South America with research time to dedicate to this study.

¹ Supreme Decree [hereinafter cited as S.D.] No. 014-EM/DGH of 22 August 1969. An explanation of what a supreme decree is in the Peruvian system may be found in Furnish, *The Hierarchy of Peruvian Laws*, — AM. J. COMP. L. — (1971),

extracting, refining, and distributing enterprise that for forty-four years provided the majority of petroleum products and sales on the domestic market ceased to exist in Peru. Virtually all of IPC's property and functions are at present under the possession and administration of the State oil company *Petróleos del Perú* [hereinafter referred to as Petro-Peru].

The action of the Revolutionary Government did not come unexpectedly. A series of recent legal events moved almost irreversibly to the final, total expropriation decreed that August. The fundamental issues between Peru and IPC have revolved around the *La Brea y Pariñas* oilfields in northern Peru, where IPC began operations in 1924 as apparent owner of the subsoil rights under the terms of a 1922 international arbitration award. Sporadic political debate on the matter has continued ever since, building to a level that thrust the *La Brea y Pariñas* case to the forefront of Peruvian public issues in the late 1950's and kept it there throughout the last decade.

The issues, concepts, and language of the *La Brea y Pariñas* controversy should prove familiar to those who have studied the expropriation of foreign petroleum and other mining operations in Latin America. As in similar cases, *La Brea y Pariñas* has created a maelstrom of Peruvian law, United States and other foreign law, international law both public and private, relations between governments, relations between private enterprise and governments, and domestic politics in several countries. Since its assumption of power, the military government of Peru has applied a "Peruvian solution" which, although defining a clearcut position, has brought into sharp relief some of the most complex aspects of the case, which many had hoped to avoid through a negotiated settlement.

On October 9, 1968, less than one week after it deposed the constitutional regime of President Fernando Belaúnde Terry, the Revolutionary Government sent troops to take possession of the *La Brea y Pariñas* oilfields and the Talara industrial complex held and operated by IPC up to that time. The action was characterized as the initiation of a constitutional expropriation of private property for public purposes, save with respect to the subsoil petroleum deposits, the taking of which was carried out as revindication; or recovery by the rightful owner of property held

by another. The more important subsequent developments in the Peru-IPC case proceed directly from the October 9, 1968, actions of the revolutionary Government and are consequent upon the legal nature of the earlier action.

Perhaps the most important element in the government's case is the *reivindicación* of the subsoil petroleum deposit. The essence of the *reivindicación* action is that the government claims a right to recuperate the oil reserves *as they existed in 1924*. For the part of those reserves which was extracted and cannot be replaced, the government asks \$690,524,283 as restitution. As a direct consequence of the claim for restitution against it, IPC so far has received no money compensation for its expropriated property. The Peruvian government recognizes its constitutional duty to pay fair value for all of IPC's assets which it expropriates, and even carried out an evaluation of the *La Brea y Pariñas* installations and issued a check in IPC's favor for the determined amount, about \$70 million.² However, simultaneously with its issue, the check was embargoed to be charged against the \$690.5 million restitution claim. All future evaluation and payment probably will go through a similar process. Since its property in Peru has never reached \$690.5 million by anyone's estimate, IPC conceivably would never receive any compensation for the property it has lost.³

Throughout its handling of the controversy with IPC the Revolutionary Government has been adamant in two respects: first, that the matter is one controlled exclusively by the internal laws of Peru and, secondly, that the matter is being conducted in strict adherence to those laws. Thus, all remedies open to a private party under Peruvian domestic law are available to IPC insofar as they may apply to the instant circumstances. These propositions will serve as the point of departure for this short investigation. I propose to trace what domestic law has been applied thus far and to demonstrate as completely as possible how IPC has fared at the hands of Peruvian justice and why.

Since the Revolutionary Government took *La Brea y Pariñas* in

² The payment was made in *soles*, the Peruvian currency, in the amount of S/.2,748,292,653.37.

³ In interviews with the author in October, 1969, Petro-Peru Lawyers indicated that the rest of International Petroleum Co.'s [hereinafter cited as IPC] property had been tentatively valued at about \$100 million.

October, 1968, IPC has instituted two major appeals: (1) in the Peruvian courts, attacking the constitutionality of the method of expropriation of IPC's northern installations and the cancellation of an agreement signed by the oil company and government represented as "the complete and definite solution of the matters pending in the *La Brea y Pariñas* affair," dated August 12, 1968; and (2) in the Ministry of Energy and Mines, an administrative appeal against the declared debt of \$690,524,283 for restitution of the *La Brea y Pariñas* oil deposit of 1924 to the State. There were in addition several potential remedies under Peruvian law which IPC did not pursue. These will be developed briefly, following discussion of the two actions already instituted.

I. MISE EN SCENE: RECENT LEGAL EVENTS LEADING UP TO OCTOBER, 1968⁴

IPC began its operations as owner of *La Brea y Pariñas* in May, 1924,⁵ under the terms of an international award establishing

⁴ A number of publications deal with the *La Brea y Pariñas* controversy. Esso Inter-America has published three volumes of English translations of the primary sources. THE LA BREA Y PARINAS CONTROVERSY (1969) [hereinafter cited as CONTROVERSY]. Selections from these materials have appeared in 7 INT'L LEGAL MATERIALS 1201 (1968) and 8 INT'L LEGAL MATERIALS 264 (1969). Under IPC's auspices, the following books were published: ECHECOPAR, INFORME JURIDICO SOBRE EL CASO DE LA BREA Y PARINAS (1960); ELEJALDE *et al.*, LAUDO ARBITRAL DE LA BREA Y PARINAS (1963); ELEJALDE *et al.*, LA BREA Y PARINAS: EXAMEN JURIDICO DE LOS PROYECTOS DE LEY PRESENTADOS EN EL PARLAMENTO (1963); LONDON & PACIFIC PETROLEUM CO., HISTORIA DE LA BREA Y PARINAS (2d ed. 1960); OSORES *et al.*, LA BREA Y PARINAS: DISCURSOS ANTE EL SENADO (LEGISLATURA EXTRAORDINARIA DE 1917) Y DICTAMENES JURIDICOS (1963). Other publications relating to the case include ZIMMERMAN, LA HISTORIA SECRETA DEL PETROLEO (1968); Castañeda, a series of five studies for a Senate Special Commission charged with "studying and giving an opinion over all matters concerning the La Brea y Pariñas question," as follows: *Análisis del laudo que pretendió poner término a la controversia sobre 'La Brea y Pariñas'*, 8 REVISTA DE DERECHO Y CIENCIAS POLITICAS 5 (1964); *La anticonstitucionalidad de la Ley No. 3016, y la cuestion de 'La Brea y Pariñas'*, 22 REVISTA DE JURISPRUDENCIA PERUANA 364 (1964); *La doctrina del registro de la propiedad inmueble: La revisión internacional ordenada por Ley*, 22 REVISTA DE JURISPRUDENCIA PERUANA 871 (1964); *La prescripción en la consolidación del dominio sobre 'La Brea y Pariñas' no ha funcionado*, 21 REVISTA DE JURISPRUDENCIA PERUANA 1574 (1963); and *Análisis del derecho de propiedad sobre 'La Brea y Pariñas'* 50 REVISTA DEL FORO I (1963); Goodwin, *Letter from Peru*, NEW YORKER 41 (May 17, 1969); Zárate, Polo, *Impugnación a la Tesis de la International Petroleum Company sobre la propiedad absoluta que se atribuye, del subsuelo y de los yacimientos petrolíferos de 'La Brea y Pariñas'*, 18 REVISTA DE JURISPRUDENCIA PERUANA 458, 482 (1960). This list is not exhaustive; Peruvian law reviews and journals over the last decade have included a number of articles related to the controversy, and several other books on it have been published in Peru.

⁵ However, IPC had leased the operation from London & Pacific in 1914, and in 1916 agreed to buy the property when a satisfactory settlement of its status could be reached with the Peruvian government.

a special 50-year tax regime for the exploitation of its subsurface petroleum deposits.⁶

There is substantial disagreement as to whether the arbitration award purported to or actually did decide the question of ownership of the subsoil rights to *La Brea y Pariñas*. Although that question was a central issue set out in the Agreement for Arbitration, a second key issue was the physical expanse of the property. The first article of the Agreement of Settlement, adopted as the final arbitration award, "recognizes that the property 'La Brea y Pariñas' . . . which embraces both the surface and the subsoil or mineralized zone, comprises 41,614 claims of 40,000 square meters each. . . ." A second article recognizes private parties as "owners and users, respectively, of 'La Brea y Pariñas' . . . ," but imposes substantial annual payments "by the way of tax based on surface, tax on production, royalties and all other contributions and taxes" on the oil-extracting operation.⁷

Since the arbitration tribunal never developed substantive discussion of any issues, but simply adopted the provisions the parties agreed upon, we are not much aided in interpreting the award. Indeed, it may have been left purposely vague. Article I can mean either that both surface and subsurface are owned, or simply that the expanse of the surface coincides with that part of the subsurface subject to mineral extraction, or both. Article II establishes an advantageous tax regime, but does so by way of all taxes a concessionaire would normally pay for subsurface rights. In any case, the dispositions of the Arbitration Award gave IPC rights which, to the extent they were valid, were unique within the scheme of Peruvian petroleum operations.

Although the validity of the award and IPC's special rights in its *La Brea y Pariñas* operation became the objects of increasing concern on the part of Peruvian politicians and journalists, and later of the people in general,⁸ no concrete action was taken

⁶ The *La Brea y Pariñas* tax regime was unique in that IPC did not pay the same *canon*, or concession tax, as ordinary concessionaires. It did pay full export taxes and the normal income tax on domestic distribution of its petroleum products.

⁷ All passages from the Arbitration Award appear in 1 CONTROVERSY, Doc. No. 2.

⁸ Particularly in the late 1950's, following an increase in gasoline prices and a devaluation, several efforts were made to change the unique status of *La Brea y Pariñas*. IPC itself proposed to give up all its claims to the subsoil in return for inclusion as a regular concession under law No. 11780, the Petroleum Code of

(Continued on next page)

to change IPC's basic situation until President Belaúnde took office in July, 1963. As one of his major campaign promises, Belaúnde had declared he would submit a final resolution of the problem to Congress within ninety days of his becoming president. Although Belaúnde kept his promise, the legislature took no immediate action on his bill. Instead, it passed two laws invalidating the 1922 arbitration award and repealing the 1918 law which had authorized submission of the controversy (as it was then) to the arbitration process.⁹ The 41-year-old award was unilaterally declared null *ipso jure* and not binding in any way on the Peruvian state.

Negotiations between IPC and the Peruvian Executive to arrive at an amicable settlement were initiated, but no substantive solutions were rapidly forthcoming. As matters dragged on for almost four years without resolution, a Congress which was not entirely antagonistic to IPC's interests responded to political pressures and began to prod the Executive through legislation.¹⁰

A. Law No. 16674 of 1967

The law most plainly drafted to pressure the Executive, and the one which laid down in broad terms the steps which have been taken by the military junta, was Law No. 16674 of July 26, 1967. That act declared that *La Brea y Pariñas* had been recovered by the nullification of the 1922 award and was state property, directed the Executive to register the oilfields as a national reserve area (superseding any other registration for the same property), and finally commanded the Executive to establish for *La Brea y Pariñas*' exploitation "the regime most consistent with the national interest, adopting any of those [included in article 62 of Petroleum Law No. 11780 of 1952 for incorporating prior existing enterprises into the new scheme of concessions] or some other

(Footnote continued from preceding page)

1952. See petition of IPC to Director of Petroleum, August 9, 1957, (both in 1 CONTROVERSY, Doc. No. 3). Shortly thereafter a number of bills, most of them hostile to IPC's interests, were introduced in Congress. None was enacted at that time. However, the bills provide for virtually all of the action the Revolutionary Government followed in 1968 and 1969. See discussion of each bill in ELEJALDE *et* 1952. See petition of IPC to Director of Petroleum, August 9, 1957, in 1 EN EL PARLAMENTO (1963).

⁹ Laws No. 14695 and No. 14696, Nov. 6, 1963.

¹⁰ Law No. 14863, Feb. 12, 1964; Law No. 15252, Nov. 18, 1964; Law No. 16674, July 16, 1967; Project of Law, Nov. 1966, in J. CONTROVERSY, Dec. No. 12.

more favorable to the country.” The same law expressly authorized the Executive to expropriate “equipment, installations, and assets in general” to the extent necessary to give the State a complete petroleum mining, processing, and distributing operation. Any such expropriation was to be consistent with the Constitution, “taking into account . . . IPC’s debts to the State.”¹¹

The Belaúnde government, while it continued negotiations with IPC, began to honor the law’s mandate. The *La Brea y Pariñas* property was inscribed in the name of the State, IPC’s title registration being canceled.¹² Government ministries began feasibility studies to determine what scheme of exploitation for *La Brea y Pariñas* would be most beneficial to the State.¹³ A fiscal tribunal set guidelines for fixing IPC’s debts under an unjust enrichment provision of the Civil Code¹⁴ and the debt was thereafter tentatively established at \$144,015,582.22, representing all profits on IPC’s operations at *La Brea y Pariñas* for fifteen years, less taxes paid to the State during that time.¹⁵ The Attorney General of Peru was authorized to take the proper steps to collect that debt,¹⁶ as well as any other actions “necessary to insure restitution to the State of the value of the product extracted” by IPC from the *La Brea y Pariñas* deposits.¹⁷ Taken with language in Law No. 16674 which employed the term revindication, such an authorization becomes a harbinger of the \$690.5 million debt claimed against IPC today.

Shortly after the promulgation of Law No. 16674, IPC received express permission to continue its operations as before, but under provisional status and without prejudice to the government’s final dispositions under the law.¹⁸ In the meantime, IPC perfected the record by filing a series of appeals and exceptions to the Executive’s actions in applying Law No. 16674.¹⁹ Outwardly, nothing had changed, but legally an extensive and

¹¹ All quotations from Law No. 16674 of July 26, 1967, art. 3.

¹² S.D. No. 61-F of July 31, 1967, art. 1.

¹³ *Id.*, art. 2.

¹⁴ See Oficio No. 157 of Nov. 2, 1967 (1 CONTROVERSY, Doc. No. 24), issued under authority of S.D. No. 216-H of Aug. 25, 1967.

¹⁵ Official Communique of Nov. 17, 1967 (1 CONTROVERSY, Doc. No. 29).

¹⁶ S.R. No. 1069-H of Nov. 10, 1967.

¹⁷ S.R. No. 1240-H of Dec. 16, 1967.

¹⁸ See S.D. No. 61-F of July 31, 1967, art. 3; Directorial Resolution [hereinafter cited as D.R.] of Aug. 10, 1967.

¹⁹ See 1 CONTROVERSY, Docs. No. 15, No. 18, No. 19, No. 22, No. 27, No. 33, No. 34, No. 36, No. 40, No. 41, No. 42, No. 44, No. 47.

complicated process was well under way before the end of 1967. Of course, Law No. 16674 did not bar other solutions to the *La Brea y Pariñas* affair and negotiations toward a friendly settlement continued,²⁰ but the Peruvian Executive's application of Law No. 16674 was clearly moving toward a unilateral resolution on *La Brea y Pariñas* which IPC could only consider prejudicial to its legal rights.

B. *The August, 1968, Agreement*

If the actions initiated under the aegis of Law No. 16674 were meant to pressure IPC at the bargaining table they may have had their desired effect, for after breaking down completely for a time in early 1968, negotiations began to move rapidly toward accord.²¹ In his state-of-the-republic address on July 28, 1968, President Belaúnde announced that IPC and the government were in substantial agreement on the terms of a settlement in the *La Brea y Pariñas* case. This agreement was written into a contract signed by IPC and the Peruvian Government, registered before a Lima notary on August 14, 1968. *Empresa Petrolera Fiscal* (hereinafter referred to as EPF), predecessor to Petro-Perú, signed two additional contracts with IPC concerning the sale by EPF to IPC of crude oil and natural gas produced in *La Brea y Pariñas*.

The main contract stipulated that IPC recognized the Peruvian State's eminent domain, renounced all potential claims to the *La Brea y Pariñas* subsoil, and transferred to the State all IPC rights in the surface, including those installations used in the extracting process. The refinery and related installations were to be retained by IPC, which under the contracts signed with EPF would have purchased up to 80% of EPF's production of crude oil and all of the natural gas from *La Brea y Pariñas*. The State also agreed to cancel all money claims it may have had against IPC as a result of its administration of *La Brea y Pariñas* field since 1924, and to guarantee IPC's existing and future concessions in other parts of Peru. The parties declared that the

²⁰ See Law No. 16674 of July 26, 1967, art. 3.

²¹ See communication of IPC to Minister of Development, 12 January 1968 (1 CONTROVERSY, Doc. No. 34); Goodwin, *Letter from Peru*, NEW YORKER 41, 72-80 (May 17, 1969); 1 CONTROVERSY 33-35; 2 CONTROVERSY 1-5.

agreement had "totally and definitively resolved" all matters pending in the *La Brea y Pariñas* controversy.²²

Final resolution of the matter was not so easily achieved, however. The Executive had negotiated the agreement not only under authorization of Law No. 16674, but also under a very general delegation of powers for a 60-day period during which the Executive was empowered by law to "prescribe extraordinary measures to, *inter alia*, promote the complete development of the economy."²³ In each case of specific Executive action under the delegatory law, Law No. 17044, account was to be rendered to Congress after the fact, so that the legislature could then—consistent with Peruvian practice—debate the measure and, if it desired, exercise a veto.²⁴ No express approval by Congress was necessary, since Law No. 17044 required none. However, although a "final" agreement had been signed, the Peruvian State arguably was not fully bound until the agreement was approved—either specifically or tacitly—in Congress. In the meantime, the Executive began to implement the terms of the contract through a series of administrative decrees and resolutions.²⁵

Amid increasingly critical popular comment on the settlement, Congress had not approved the contract when it adjourned on September 6, 1968. Objections and protest were further heightened when the president of EPF resigned and then went on national television to denounce as invalid the contract with IPC for the purchase of crude oil from *La Brea y Pariñas* claiming a crucial eleventh and final page had been signed but deleted from the version ultimately made public.²⁶

On October 3, 1968, a military junta deposed President

²² The main contract is published in 2 *CONTROVERSY*, Doc. No. 51 and also in 7 *INT'L LEGAL MATERIALS* 1217 (1968); the crude-oil contract in 2 *CONTROVERSY*, Doc. No. 55 and also in 7 *INT'L LEGAL MATERIALS* 1231 (1968); the natural-gas contract in 2 *CONTROVERSY*, Doc. No. 57, 7 *INT'L LEGAL MATERIALS* 1226 (1968).
²³ Law No. 17044 of June 20, 1968.

²⁴ See Furnish, *The Hierarchy of Peruvian Laws*, — *AM. J. COMP. L.* — (1971).

²⁵ See 2 *CONTROVERSY*, Docs. No. 52-57, including S.D. No. 088-68-FO of August 13, 1968; S.R. No. 0020-68-FO-PE, and S.R. No. 0020-68-FO-PE, all of August 14, 1968. See also 7 *INT'L LEGAL MATERIALS* 1226-44 (1968).

²⁶ Whether in fact the page in question ever existed or, if it did, what may have happened to it, seems impossible to determine with any degree of reliability. Perhaps the most plausible explanation of the famous "missing eleventh page" is that of Goodwin, *supra* note 21, at 80-86, but it does not explain what happened to the page.

Belaúnde and took control of the government. As its first official act it promulgated Decree-Law No. 17063, the *Statute of the Revolutionary Government*. The first article of this brief charter of the de facto administration hinted that one of the primary reasons for its assumption of power was the junta's dissatisfaction with the settlement in the *La Brea y Pariñas* case.²⁷ In its substantive provisions, the *Statute of the Revolutionary Government* established that a junta of the commanding Generals of the Army, the Navy, and the Air Force should designate a President,²⁸ who would exercise all the functions ascribed to the chief executive under the Constitution plus, with the approving vote of his Cabinet, all those powers assigned by the Constitution to the legislature.²⁹ The Revolutionary Government pledged itself to act in conformity with the Constitution and other laws of the State "insofar as they may be compatible with the objectives of the Revolutionary Government."³⁰

C. *The Revolutionary Government and IPC*

The de facto government turned immediately to the *La Brea y Pariñas* issue. Decree-Law No. 17065 of October 4, 1968 annulled the settlement contract with IPC and all other acts and obligations of the State undertaken in consideration of it. On October 9, 1968, Decree-Law No. 17066 declared the expropriation of the Talara industrial complex, proceeding on the assumption that *reivindicación* of the subsurface oil deposits had already been initiated. The government invoked the Constitution and Law No. 16674 as the bases for the expropriation, which commenced the same day when troops were sent to Talara to take possession from IPC.

When EPF assumed the administration of the *La Brea y Pariñas* field and refineries, an ad hoc arrangement was made under which IPC took the production of the field from the

²⁷ "The Armed Forces of Peru, duly . . . conscious of the immediate necessity of putting an end to . . . the surrender of natural resources of wealth . . . as well as to the loss of the principle of sovereignty . . . assume responsibility for the direction of the State, for the purpose of moving it ahead toward the definitive achievement of national objectives."

²⁸ Decree-Law [hereinafter cited as D.L.] No. 17063, Oct. 4, 1968, art. 4.

²⁹ *Id.*, art. 6.

³⁰ *Id.*, art. 5.

refinery and retailed it through the IPC distribution network. The crude production of the contiguous "Lima" concession, which remained in IPC's possession, also continued to be processed through the Talara refinery.

No wholesale price for the petroleum products was fixed at the beginning of the period. The parties were supposed to settle their differences by accord shortly thereafter, but when EPF sent IPC an invoice for \$11.7 million in petroleum products delivered up to December 31, 1968, IPC protested that payment would have meant operating its retail network at a loss and that no special account had been made for crude oil delivered from IPC's "Lima" concession to the Talara refinery for processing.³¹

The government attempted to freeze IPC's accounts to coerce payment, as had been done successfully earlier on a tax claim,³² but discovered that IPC had run its Peruvian bank accounts into the red while repatriating \$14 million at the favorable certificate rate of exchange between January and October 1968. The repatriations paid back dollar loans from United States banks for IPC equipment purchases, and further repatriations on the same loans were authorized on November 5, 1968, by the Revolutionary Government's Minister of Finance.³³ IPC's exchange operations were unquestionably legal, but the fact that they had been permitted cost a Minister of Finance and several high officials in the Central Reserve Bank their jobs.

Closely following this episode, the Peruvian government announced on February 6, 1969, that IPC owed it \$690,524,283 in restitution for all of the mineral products it had removed from *La Brea y Pariñas* since May, 1924.³⁴ As security against the \$690.5 million and other debts, EPF physically and legally moved in as trustee of all of IPC's Peruvian operation.³⁵ Following the process to its logical termination, on August 22, 1969, the gov-

³¹ See 2 CONTROVERSY at 27-30; *Comisión Encargada de Fijar Responsabilidades en Control y Administración de los Bienes de la IPC*, INFORME 20-30 (Lima, 1969).

³² See S.R. No. 1070-H, Nov. 10, 1967; Official Communique of Ministry of Finance, Nov. 29, 1967, in 1 CONTROVERSY, Doc. No. 31.

³³ These events are detailed in *Comisión Encargada de Fijar Responsabilidades en Control y Administración de los Bienes de la IPC*, INFORME 5-19 (Lima, 1969).

³⁴ Ministerial Resolution [hereinafter cited as M.R.] No. 0017-69-FO/PE, Feb. 5, 1969.

³⁵ Notice of Preventive Embargo of Feb. 6, 1968, 2 CONTROVERSY, Doc. No. 80.

ernment moved to expropriate the "totality of [IPC's] economic activities."³⁶

II. IPC'S HABEAS CORPUS APPEAL

Less than a week after the military government took possession of *La Brea y Pariñas* and its installations, IPC filed a petition in the Superior Court of Lima, Fifth Correctional Tribunal, attacking the constitutionality of the two decree-laws under which the Revolutionary Government had acted.³⁷ IPC's petition was submitted as an "appeal of habeas corpus."

Habeas corpus is a very broad remedy in Peru, having evolved beyond the more limited application of the remedy of the same name in the Common Law jurisdictions from which it was originally adapted to the Peruvian system. Under the present Peruvian Constitution and laws,³⁸ habeas corpus has become a general summary action available to any natural or juridical person as a means of impugning any official action which may infringe his "individual and social" constitutional rights.³⁹ The action is sometimes characterized as an appeal because it is initiated at the first appellate level in the court system and is limited to issues of constitutional law.⁴⁰

IPC's habeas corpus petition specifically attacked the constitutionality of Decree-Laws No. 17065 and No. 17066 and all official acts dependant on them. Against the first decree-law, IPC's major argument was that under article 220 of the Constitution only the judicial branch legitimately could annul the *La Brea y Pariñas* settlement agreements between IPC and the deposed constitutional regime. Article 220 vests the power of administering justice in the courts, and IPC contended that the military Executive had usurped that power by promulgating a

³⁶ S.D. No. 014-EM/DGH, Aug. 22, 1969, preamble. However, because of IPC's debit accounts all money and credits in favor of or against IPC were excluded from the expropriation. See *id.*

³⁷ *Expediente* [hereinafter cited as *Exp.*] No. 969/68, Oct. 14, 1968; English translation in 2 *CONTROVERSY*, Doc. No. 67.

³⁸ CONST. art. 69; CODE OF CRIMINAL PROCEDURE, §§ 349-59; ORGANIC LAW OF JUDICIAL POWER, § 141 (7).

³⁹ See, e.g., Bustamante Cisneros, *Constitución y Habeas Corpus*, 18 *REV. DE JURISPRUDENCIA PERUANA* 244 (1960); Cooper, *Habeas Corpus in the Peruvian Legal System*, 30 *REV. DE DERECHO Y CIENCIAS POLITICAS* 297 (1967); Feitero, *Garantías Constitucionales*, 27 *DERECHO* 35, 36-37 (1969).

⁴⁰ See Cooper, *supra* note 39, at 328-32.

law invalidating a contract and other juridical acts in consideration of it. Supporting reference was made to article 19 ("Those acts are null which usurp public function. . . .") and to article 228 (" . . . terminated processes may not be revived.")

Decree-Law No. 17066, under which the government had taken immediate possession of IPC's surface rights and improvements in *La Brea y Pariñas*, was impugned as a violation of private property rights guaranteed under: (1) article 29 provisions against expropriation without prior judicial process and indemnification; (2) the freedom-of-commerce-and-industry clause of article 40; and (3) the prohibitions against confiscation of private property in articles 29 and 57.

On the above grounds, IPC asked that the decree-laws in question should be found inapplicable and that the violation of its constitutional rights should be terminated by restoring matters to their status prior to the promulgation of the decree-laws. The habeas corpus was found inadmissible by the Fifth Correctional Tribunal,⁴¹ and that decision was upheld on appeal to the Supreme Court,⁴² one judge in five dissenting.

In initiating its habeas corpus action IPC may have been attempting to follow the successful example of another Peruvian oil company, Conchan Chevron. A short time before, on August 3, 1968, Conchan Chevron had received a favorable verdict from the Fourth Correctional Tribunal of Lima in an habeas corpus action against three supreme decrees of the Belaúnde government which attempted to create special privileges for the state oil company, EPF, by discriminating against the operations of Conchan and others holding long-term concessions.⁴³ Even though it cited one of the same constitutional provisions, IPC's habeas corpus was quite different in substance. The issue in IPC's action was not discrimination. Rather possession of property, expropriation procedures, and the annulment of an agreement on petroleum rights were at issue, and the official dispositions under attack were decree-laws of a *de facto* government rather than supreme decrees.

⁴¹ *Exp. No. 969/68, R.S., Nov. 9, 1968 (Trib. Corr., 5a. Sala).*

⁴² *Exp. No. 939/68, R.S., Jan. 3, 1969 (Corte Suprema, 1a. Sala) (4-1 vote).*

⁴³ *Exp. No. 1278/67, R.S. Aug. 3, 1968 (Trib. Corr., 4a. Sala).* *Conchan Chevron* relied primarily on article 23 (equality of persons before the law) and article 40 (freedom of commerce) of the Constitution.

In rejecting IPC's habeas corpus, the Fifth Correctional Tribunal floundered into the momentous question of what limits exist on the powers of a *de facto* government in Peru and, more specifically, on that government's handling of a cause celebre such as the *La Brea y Pariñas* controversy. Read at the temporal distance of over two years from the agitated political atmosphere in which the case was submitted, argued and decided, the Fifth Correctional Tribunal's opinion is easily criticized. It is a decision unusually prolix and intemperate for a Peruvian court.⁴⁴ Ignoring the possibility that the Revolutionary Government's decree-laws might be valid under the Constitution, the Correctional Tribunal addressed itself to the broad question of whether those substantive parts of the Peruvian legal system, which may provide for judicial preference of the Constitution over conflicting laws or other official acts, applied to Decree-Laws No. 17065 and No. 17066. Thus posed, as the unique issue in a decision upholding the validity of the decree-laws in question, the problem can be resolved only by subverting the written constitution or by a non sequitur.

The Fifth Correctional Tribunal appeared to attempt both. The court found that although a number of provisions of Peruvian law seem to command an unequivocal preference for the Constitution over any other official disposition in a conflict of norms,⁴⁵ to accept IPC's habeas corpus action would have been to accept the thesis that "judicially and by resolution issued by a correctional tribunal, the decree-laws in question might be modified or repealed in whole or in part." Although the second proposition should follow quite logically from the first, the appellate court

⁴⁴ Sample passage:

. . . La Empresa ha disfrutado por much tiempo de un régimen de privilegio, incompatible con los derechos y la dignidad nacionales, llegando a establecer un verdadero monopolio inconstitucional e intolerable; régimen que en otra forma, trató de prorrogar en los contratos de agosto y septiembre último, cuando se sacudió de los costosos trabajos de extracción de petróleo, consiguió la condonación de fabulosos adeudados al Fisco, obtuvo recién concesiones y logró que, de todos modos, a título de comprador monopólico, quedará en sus manos los productos de la extracción, a cambio de renunciar a la mayor parte de la superficie de La Brea y Pariñas y de que líricamente pudiera decantarse, que esta hacienda, volvió al seno de la Patria. . . .

⁴⁵ See CIVIL CODE, PRELIMINARY TITLE, art. XXII; ORGANIC LAW OF JUDICIAL POWER, D.L. No. 14605 July 25, 1963, arts. 7-8; Furnish, *Hierarchy of Peruvian Laws*, — AM. J. COMP. L. — (1971).

found it untenable and pronounced IPC's habeas corpus petition inadmissible on that basis.

The lower court's opinion contained another, more subjective element which may have been of greater importance to the final result. Throughout the rambling language of the decision there appear references to the possibility that a *de facto* government may do no constitutional wrong so long as it acts "with true nationalistic meaning," "in the full exercise of national sovereignty," and "in adherence to the unanimous desire of the people." Whether these and similar criteria all inhered in the Revolutionary Government's action on *La Brea y Pariñas* remains a problematical point, but the court's references to an ad hoc constitutionality should not be brushed aside as lightly as one might be tempted to do on first reading. They describe a legitimacy gained not through adherence to specific provisions of a written constitution but through respect for the constituent attitude—on a given issue—of the parties to the social contract. The detection and determination of such a constituent objective in addition to or in exception to those set out in the Constitution would seem a dangerous task for a court to accept, but it may be significant in this context that on two occasions since the rejection of IPC's habeas corpus petition, the Fourth Correctional Tribunal has upheld habeas corpus actions brought by journalists who were summarily expelled from Peru for their criticism of the military government.⁴⁶ In those cases, constitutional guarantees of freedom of the press⁴⁷ and of an individual's right of residence⁴⁸ were valued above the objectives of the Revolutionary Government.⁴⁹ Thus, the courts may be disposed to withhold their approbation whenever the *de facto* government violates the Constitution in absence of constituent license. On the other hand, this may be an unwarranted interpretation of the Correctional Tribunal's in-

⁴⁶ *Exp.* 1342/68, R.S., April 28, 1969 (Trib. Corr., 4a. Sala); *Exp.* 1298/69, R.S., April 19, 1969 (Trib. Corr., 4a. Sala).

⁴⁷ CONST. art. 63.

⁴⁸ *Id.* art. 68.

⁴⁹ The Revolutionary Government did not immediately respect the court's holdings, however. The reported comment of the Minister of Government was, "May they return then, if they can." (*Que vuelvan, si pueden*). However, in February, 1970, the same minister stated all political exiles could return at will, that he had never meant to threaten or exclude any of them. See EL COMERCIO, February 12 and 13, 1970, at 4.

dependence. In the cases of the deported journalists, the only member of the Executive Cabinet directly involved was the Minister of Government, who did not receive public support for his action from either the President or his Cabinet.

In ruling on IPC's appeal from the adverse holding in the lower court, the Supreme Court majority wrote a typically short, unelaborated opinion which did not develop or expose the high court's reasoning. Such substantive discussion as it contains accounts for less than half of a 344-word opinion. The Supreme Court noted that Decree-Law No. 17065 and No. 17066 had been promulgated "in accordance" with earlier laws of Congress⁵⁰ and according to procedures fixed by the *Statute of the Revolutionary Government*, Decree-Law No. 17063. Without further elaboration, the decision stated that, "[I]t is not required for the exercise of a right by its natural owner, that a prior judicial declaration should be pronounced concerning it, since its existence, based on a law, is superior and precedent to any judicial decision and requires none to preserve it intact."⁵¹

Taken as a general proposition, the court's language might express the antithesis of the rule of law, i.e., under this rule any party could unilaterally impose whatever he considered to be his "natural rights," secure in the belief that they were "superior and precedent to any judicial decision." However, Peruvian courts do not operate on the principle of *stare decisis*. The *ratio decidendi* in a given case is not necessarily expected to stand as a precedent or to be consistent with the past cases.⁵² Supreme Court opinions often offer neither a detailed discussion of the sources relied on nor a careful exposition of the way in which its announced propositions lead to the result. Thus, the Peruvian high court, even in its most important decisions, writes almost as an oracle, in the sense that its ruling is apt to be brief and

⁵⁰ Specifically, Laws No. 9125, June 4, 1940; No. 14696, Nov. 5, 1963; No. 16674, July 16, 1967; and No. 17044, June 10, 1968.

⁵¹ In the original:

. . . el titular de un derecho no requiere para su ejercicio que, previamente, una declaración judicial se pronuncie sobre el, ya que su existencia, basada en la ley, es superior y anterior a toda decisión judicial por lo que no requiere dejarlo a salvo. . . ."

Note that "titular" might also be translated "title holder," rather than "natural owner," as the author has done here.

⁵² See Furnish, *supra* note 45.

cryptic.⁵³ Elaborating where the court did not may seem to be a fruitless exercise, but it presents the only possibility of deriving meaning which would fit a vague statement to a specific result.

IPC's argument that the military government lacked the constitutional power to nullify IPC's August 12, 1968, agreement with the deposed Executive is based on the supposition that both parties had completed all the formalities necessary to bind themselves. However, the Executive had acted under the special 60-day delegation of powers in Law No. 17044 when it negotiated and accepted the agreement.⁵⁴ Under that law, the Executive was required to "give account" to Congress of its special actions. Thus, the constitutional legislature may have had a right—still unexercised at the time of the military coup—to consider the Executive's "final solution" to the *La Brea y Pariñas* problem and reject it.⁵⁵ According to its basic statute and the recognized practice of military governments in Latin America, the Revolutionary Government has the legislative prerogative, which it exercises through the President and his Cabinet.⁵⁶ Arguably then, Decree-Law No. 17065 did no more than apply the legislative prerogative specifically reserved in Law No. 17044: the right to review and reject Executive action based upon that law.

Other of IPC's constitutional arguments simply appear untenable under the clear terms of the Constitution itself. Recent amendments to article 29, which provide for compensation in long-term bonds or by other manner of deferred payment "which the law shall establish," where expropriation of sources of energy is involved, would seem to give the government a right to possession prior to compensation.⁵⁷ Freedom of commerce and industry, as guaranteed in article 40 and upheld in the Conchan Chevron habeas corpus, would appear to be no bar to exercise of the State's right of eminent domain through proper expropriation proceedings.

No such ready explanation exists for the Revolutionary Gov-

⁵³ In its ruling on IPC's habeas corpus, the majority opinion used 344 words, less than half of which were substantive discussion.

⁵⁴ As recognized in S.D. No. 080-68-FO, Aug. 9, 1968, authorizing signature of the contract, and in the contract of Aug. 12, 1968, as well.

⁵⁵ See Furnish, *supra* note 45 at n. 12 and accompanying text.

⁵⁶ *Id.*, authority cited n. 10.

⁵⁷ Law No. 15252, Nov. 18, 1964, art. 1.

ernment's possession of the *La Brea y Pariñas* field and installations as the first step in an expropriation proceeding. Article 29 of the Constitution states that no one shall be deprived of his property without due process of law, a provision which quite clearly appears to have been violated. Although the seizure was justified in the preamble to Decree-Law No. 17066 "to ensure the administrative collection of IPC's outstanding debts," and although Law No. 16674 authorized the Executive to expropriate *La Brea y Pariñas* "taking into account . . . IPC's debts to the State," under normal circumstances such dispositions would not appear to be capable of mitigating the constitutional prerequisite of judicial process before the State may take possession of property it wishes to expropriate.⁵⁸

Perhaps the Supreme Court's holding is consistent with that part of the Fifth Correctional Tribunal's opinion which can be interpreted to mean that the Revolutionary Government enjoyed a constituent license (a right) to depart from constitutional procedures in its expropriation of the *La Brea y Pariñas* surface property. Perhaps the Supreme Court's ambiguous opinion goes even further, holding that so long as the Revolutionary Government acts through decree-laws (the right to govern according to its Statute, Decree-Law No. 17063) the court will not presume to review its action.⁵⁹ The latter might be more plausible in the light of Latin American custom and practice with *de facto* governments.⁶⁰ Further, the Peruvian Supreme Court has never held a law of Congress or a decree-law unconstitutional.⁶¹

⁵⁸ The government was probably afraid that if it did not take immediate possession of the industrial complex, it would have been left in the hands of a party faced with a large debt and possibly resentful of the government's action, thus not disposed to play the role of faithful trustee of a vital industrial resource. See address by García Montúfar, legal advisor to the Ministry of Energy and Mines, *Expropiación de Propiedad Extranjera, Protección Diplomática y No Intervención*, presented to the Lima Bar Ass'n, Jan. 9, 1969. This is not of course a constitutional justification, but a similar process was employed recently when large coastal sugar plantations were occupied by government administrators the day after it was announced they would be expropriated, probably for similar reasons. See D.L. 17716, June 24, 1969, art. 61.

⁵⁹ The *Dictamen Fiscal*, or recommendation of the Supreme Court's independent counsel, seemed to urge that construction. See *Exp. 939/68, Dictamen Fiscal*, Dec. 13, 1968 (Corte Suprema, 1a. Sala).

⁶⁰ This would be in keeping with the theory that any successful revolution brings with it a "destruction of the country's constitutional substance, for . . . no pre-revolutionary Constitution can claim validity in such circumstances; the basis of its effectiveness, its *grundnorm*, has perished before a new, superior norm-creating force." Cooper, *supra* note 39, at 306. See also Irizarry y Puente, *The*

(Continued on next page)

A definitive interpretation is made more difficult because the Supreme Court opinion is not only vague in its positive aspects, but in addition a negative element is added. It approves only the result of the Fifth Correctional Tribunal, disclaiming "the other matters contained" in its decision as "irrelevant and untenable" (*insubsistente*). Whether this refers to the intemperate and erroneous statements in the lower court's opinion, or to all or portions of its substantive discussion, is unclear. The dissent, as brief and vague as the majority opinion, sheds no light on the matter. In any event, such ruminations hold no comfort for IPC at this juncture, for whether the Revolutionary Government had only constituent approval of unique exceptions to the Constitution or an unchecked power to violate the Constitution at will, it did annul IPC's settlement agreement and possess its property unchecked by the written constitution or the judicial power.

III. THE \$690,524,283 DEBT CLAIM AND IPC'S ADMINISTRATIVE APPEAL

Perhaps the single most important aspect of the *La Brea y Pariñas* controversy is the \$690,524,283 debt the Peruvian government claims against IPC. It is this debt, and the legal basis upon which it is claimed, that make the case unique.⁶² Because of the debt, IPC may never collect any compensation for the investments taken from it by the Revolutionary Government: all indemnification for expropriated property will simply be embargoed and charged off against the debt, which surpasses all estimates of IPC's total assets in Peru prior to October, 1968.⁶³

(Footnote continued from preceding page)

Nature and Powers of a 'Defacto' Government in Latin America, 30 TUL. L. REV. 15 (1955).

⁶¹ See Furnish, *supra* note 45.

⁶² In addition, the Peruvian government has declared that IPC owed an additional amount of "more than \$54,848,308.10" for compulsory investments it did not make after 1959 and harmful production methods employed after relations with the Peruvian government worsened. Informative Bulletin No. 18 of Ministry of Energy and Mines of May 13, 1968, in 3 CONTROVERSY, Doc. No. 97.

Although other possible debts have been mentioned, and even reported (*See JOURNAL OF COMMERCE*, March 25, 1969, at 10), at this time the Peruvian government makes specific claim for: (1) \$690.5 million for restitution of *La Brea y Pariñas* petroleum deposits, (2) \$54.8 million for obligatory investments avoided, and (3) \$9.2 million for products delivered by EPF to IPC between October 9, 1968 and January 20, 1969. This study concentrates on the first debt, as both IPC and the Peruvian government have to date.

⁶³ See D.L. No. 17517, March 21, 1969; notes 2-3 *supra* and accompanying text.

Finally, most of the more difficult and central questions of law in the case are met over the issue of the debt.

The \$690.5 million debt represents restitution for all of the minerals extracted from the *La Brea y Pariñas* field during the period in which IPC claimed ownership, March 1, 1924, to October 8, 1968.⁶⁴ Stated another way, the debt restores to the Peruvian State the value it enjoyed in the *La Brea y Pariñas* subsoil petroleum deposit on March 1, 1924, which was subsequently lost through IPC's exploitation of the field. Accordingly, the amount of the debt was determined by a relatively simple method: production totals for crude oil, natural gas, and liquified propane gas during the period in question were each multiplied by a standard wholesale unit price minus freight and costs of production.⁶⁵

Legally the debt forms an integral part of the Peruvian State's *reivindicación* of the *La Brea y Pariñas* subsoil petroleum deposits. According to the classic definition, *reivindicación* refers to the right of an owner not in possession of his property to recover it from a possessor who has no property right in it.⁶⁶ The Peruvian government, claiming the right of *reivindicación* in the name of the State, takes the position that "juridically the real property constituted by a mine is the deposit of substances in solid, liquid or gaseous state . . . a property which, by its peculiar nature, disappears to the extent that it is the object of exploitation or use."⁶⁷ Thus, consistent with the concept of *reivindicación* and the special depleting nature of petroleum deposits, the State may claim not only direct possession of the mineral resources remaining in the *La Brea y Pariñas* subsoil, but also may require restitution for the part which has been removed. Good faith of the

⁶⁴ M.R. No. 0017-69-FO PE, Feb. 6, 1969, preamble.

⁶⁵ *Id.*, appendix, in 2 *CONTROVERSIA*, Doc. No. 79; 8 *INT'L LEGAL MATERIALS* 300-04 (1969). The prices utilized may be arbitrary; the East Texas price used for crude oil is one of the highest in the world and relatively little of the *La Brea y Parinas* crude was sold in the United States during IPC's administration. Further, the United States price has increased recently with respect to the international market.

⁶⁶ See, e.g., *Cabanellas*, 3 *DICCIONARIO DE DERECHO USUAL* 527 (Buenos Aires, 1954). Replevin was a similar action at Common Law.

The Peruvian Civil Code does not include a lengthy provision for *reivindicación* as, for example, the Chilean Code does. Compare Peruvian Code, art. 850, with Chilean Code, arts. 889-915. Nonetheless, the institution is well known and, in any case, the *reivindicación* applied in the instant case is probably and ad hoc action.

⁶⁷ S.R. No. 0095-69-EM, Aug. 6, 1969, preamble.

possessor is no defense to the obligation to make restitution where depletion of the property has occurred. *Reivindicación* involves no question of use by the possessor; it simply forces him to surrender all of the property to the owner, making reparation for whatever part of the original property cannot be returned. Other adjustments between owner and possessor are necessary, but the essence of the action of *reivindicación* is the recuperation by the owner of his original property.

A. *The Procedure*

International Petroleum Co. was not notified of the \$690.5 million debt until February 6, 1969, almost four months after the Revolutionary Government forcefully occupied *La Brea y Pariñas*. Computation of the debt and official notification was by the Ministry of Development and Public Works, which was instructed by Decree-Law No. 17066 to "commence and carry out the process of expropriation" of the surface and installations of IPC's *La Brea y Pariñas* property, taking into account "for the purposes of compensation, the amount of IPC's debts to the State, whose collection will be effected." Coincidentally with the notification to IPC of the \$690.5 million claim against it, a "preventive embargo in the form of intervention" was placed on all the remaining assets in Peru.⁶⁸ In effect, the government took over IPC's total operation, under a procedure for the "coactive" collection of public debts established by Decree-Law No. 17355 of December 31, 1968.

As before, IPC was quick to attack the government's action. Within two weeks the company filed an administrative appeal against the ministerial resolution fixing the debt.⁶⁹ Unsuccessful in the Ministry of Development and Public Works,⁷⁰ where the resolution originated, IPC renewed its appeal to the highest administrative level, the President of the Republic, where it was also rejected.⁷¹ Due to the restrictions on public debtors created by Decree-Law No. 17355, IPC had no other means of attacking

⁶⁸ *Notice of Preventive Embargo*, 2 CONTROVERSY, Doc. No. 80; 8 INT'L LEGAL MATERIALS 305 (1969).

⁶⁹ IPC Appeal of Feb. 21, 1969, in 2 CONTROVERSY, Doc. No. 81; 8 INT'L LEGAL MATERIALS 316 (1969).

⁷⁰ M.R. No. 144-EM AT, July 8, 1969.

⁷¹ S.R. No. 095-EM, Aug. 6, 1969.

the debt; all judicial recourse was blocked until the entire claim was paid to the Peruvian State.⁷²

B. IPC's Allegations

In essential part, IPC's petition before the Ministry of Development and Public Works states:

[We] have no debt whatever to the State for the value of the products which we have extracted from *La Brea y Pariñas* from 1924 to October 9, 1968, inasmuch as such extraction was done on the basis of our title as owners of said oilfield. . . . [A]ssuming that our status of our title as owners of the *La Brea y Pariñas* oilfields should not be recognized, it would still be impossible to doubt our good faith possession . . . Moreover, we point out that in the period of more than forty years in which we have been possessors of the *La Brea y Pariñas* oilfields, such possession has been public, peaceful, consented to by several governments . . . and has never been judicially questioned.⁷³

In its brief and unembellished allegations, IPC tacitly presumes that the *La Brea y Pariñas* controversy is controlled by the provisions of the Peruvian Civil Code. If this is true, the case is a simple one under the normal rules of Peruvian real property law and IPC's legal position is remarkably strong.⁷⁴ However, since long before the founding of the Peruvian Republic, mineral resources have been subject to a regime of special obligations and

⁷² IPC's appeal was under S.D. No. 006-SC, Nov. 11, 1957. The Regulations of the General Norms of Administrative Procedures, Law No. 17355, Dec. 31, 1968, art. 6, leave it to the discretion of the administrative agency involved whether to suspend the administrative process and allow a judicial presentation of issues. Such a restriction is in contravention of the general rule, which would allow a court to take an issue from the Executive branch whenever a "litigious question" is involved. ORGANIC OF JUDICIAL POWER, D.L. 14605, July 23, 1963, art. 10.

IPC petitioned the "coactive judge," the magistrate especially appointed to handle the coercive collection procedures under law No. 17355, to permit a judicial determination of various legal points involved in its debt to EPF for delivery of retail oil products. IPC was unsuccessful both before the coactive judge and on appeal to the Supreme Court. See IPC Petition of Feb. 25, 1969; Denial by Coactive Judge, Feb. 27, 1969, in 2 CONTROVERSY, Docs. No. 83 and No. 84; 8 INT'L LEGAL MATERIALS 322, 326 (1969); IPC Appeal March 18, 1969; Denial by Supreme Court, March 28, 1969, in 3 CONTROVERSY, Docs. No. 86 and 87.

⁷³ IPC Appeal of April 22, 1969, against M.R. No. 0017-69-FO/PE, in 3 CONTROVERSY, Doc. No. 93.

⁷⁴ See, e.g., CIVIL CODE, arts. 818, 834, 871, 1052.

limitations which form an autonomous legal system, exclusive of the Civil Code. Fundamental to this special system is the classification of mineral resources as part of the public domain of the Peruvian State, a type of property outside the private law system established by the Civil Code and other statutes.

The fact that public, and not private, law is primarily involved does not foreclose all possibility of applying Civil Code provisions to actions involving petroleum resources or to IPC's specific case; in case of lagunae in the special laws, recourse is to the general principles of law and equity, to the common law expressed in the Civil Code and other general laws.⁷⁵ Thus, there are several crucial threshold issues to be resolved. First, given that a special legal regime does exist for petroleum deposits, what are its rules and how do they apply in the *La Brea y Pariñas* case? Are there lagunae in the special regime which must be filled by recourse to the general sources of law? Second, are there facts and law which might create an exception and thrust the *La Brea y Pariñas* subsoil petroleum deposits outside the purview of the special legal regime and back into the general?

C. *The Administrative Decision and IPC's Title Claim*

The Ministry of Development and Public Works rejected IPC's appeal without discussion of the substantive issues. However, on the presidential level denial was handed down in an extensive opinion which represents the first definitive official declaration of the Peruvian government's legal position in the case.

The Executive flatly denied the possibility of a private title to the subsoil of *La Brea y Pariñas*, stating that petroleum deposits may be exploited only under concessions formally awarded by the State, regardless of whatever facts and/or law a private party might argue as an exception.⁷⁶ Normally, an enterprise should not care whether it has absolute title to mineral resources. Title to a depleting asset is ultimately no more valuable than a simple concession, provided that the exploiter plans to exhaust the minerals in question and taxes are not a factor. However, in the *La Brea y Pariñas* case, IPC enjoyed a special tax regime at

⁷⁵ ALZAMORA VALDEZ, INTRODUCCION A LA CIENCIA DEL DERECHO, 267 Lima, 1964).

⁷⁶ S.R. 095-EM, Aug. 6, 1969, in 3 CONTROVERSY, Doc. No. 109.

least in part because of the claim that it and its predecessors made to absolute title rights in the subsoil. IPC was not willing to abandon that claim until its special tax regime became more onerous than that available under a common concession.⁷⁷ In addition, IPC's title claim currently represents the only justification outside of equity for its presence as exploiter of the field for forty-four years. No specific concession was ever granted for petroleum operations in *La Brea y Pariñas*. The Arbitration Award of 1922, which created the unique arrangement under which IPC operated there, was annulled by Law No. 14696 in 1963 and, while jurists may debate the validity of that unilateral action academically,⁷⁸ the Award is almost certainly *void ab initio* before the Peruvian courts, since the Supreme Court recognized Law No. 14696 as one of the bases for rejecting IPC's habeas corpus.⁷⁹

Peruvian commentators support the Executive's categorical rejection of even the possibility of absolute private title to subsoil petroleum. They contend that the eminent domain of the State over petroleum and other mineral resources creates a special status for such property within the "public domain," inherent (*inmanente*) in the State and inalienable.⁸⁰ They cite earlier cases

⁷⁷ See Petition of IPC to Director of Petroleum, Aug. 8, 1957; S.R. of Nov. 18, 1957 (rejecting petition).

⁷⁸ Two distinguished Brazilian jurists have dealt with the problem, on IPC's side. See CARNEIRO, DICTAMEN JURIDICO SOBRE EL LAUDO ARBITRAL DE LA BREA Y PARINAS, both in OSORES, *et. al.*, LA BREA Y PARINAS 57, 67 (1963).

On the other side see, Castañeda, "Análisis del Laudo que Pretendió Poner Fin a la Controversia 'La Brea y Pariñas'", 28 REV. DE DERECHO Y CIENCIAS POLITICAS 5, (1964). In 1960 a commission including such Peruvians as Víctor Andrés Belaúnde (once President of the United Nations General Assembly), José Luis Bustamante y Rivero (President of International Court of Justice), and Alberto Ulloa (author of a much-heralded text on Public International Law) found that "the 1922 agreements are essentially defective (*viciados en su esencia*), but what cannot be ignored is that they have created a status that has been in effect for 38 years, and a unilateral decision on points which might have been subject to international decision . . . would be undesirable."

⁷⁹ See Exp. 939/68, S.R., Jan. 3, 1969 (Corte Suprema, Ia. Sala).

⁸⁰ Properties of the State are divided by most treaties into three classes: *public use* (roads, parks, rivers); *public benefit* (mines, other concessions); and *private use of the State* (offices, vehicles, furnishings). The most problematical classification is that of public benefit, which may involve elements of both the others. However, in the *La Brea y Pariñas* case it is essential that the minerals in question fall into the public domain, for private use property of the State is probably subject to all the rules governing treaties between private individuals, *i.e.*, the CIVIL CODE.

The chief exponent of the Peruvian argument placing the mine in the public domain is Castañeda, in *Análisis del Derecho de Propiedad sobre 'La Brea y Pariñas'*, *supra* note 4, [hereinafter cited as Castañeda, *Propiedad*]. Zárate Polo

(Continued on next page)

of mines which were "sold" to private parties by the Crown but, on judicial review, were pronounced no more than perpetual concessions. "Owners" continued to pay all taxes and respect all obligations of the concessionaire.⁸¹ This construction is derived from a long and unvarying series of laws which provided that mineral resources are the State property and may be exploited only under express governmental authorization and payment of the proper tax (*canon*). In Spanish legislation, this rule may date from the year 1128 and the promulgation of the *Fuero Viejo de Castilla*; most colonial legislation clearly reserved title to minerals to the Crown.⁸² Curiously, the law was probably the same under the Inca, before Pizarro arrived in Peru.⁸³ It has been the rule of all the mining codes enacted by the Peruvian Republic and has been included in the country's petroleum codes since their inception in 1873.⁸⁴ Peru has never had a general law which recognized private parties' rights to more than a concession in subsoil petroleum resources.

Peru is not alone in its legal stand against private title to minerals. There is unanimity throughout those Latin American nations in which mineral wealth plays an important role in the economy.⁸⁵ Although at one time three of the countries—Mexico,⁸⁶ Colombia,⁸⁷ and Brazil,⁸⁸—permitted the owner of the surface automatic and complete title to the subsoil rights as well, all have since abolished that possibility.

Against the imposing legislative tradition to which the com-

(Footnote continued from preceding page)

might not go quite so far in his *Impugnación a la Tesis de la Internacional Petroleum Co. sobre la Propiedad Absoluta que se Atribuye, del Subsuelo y de los Yacimientos Petrolíferos de 'La Brae y Pariñas'*, 18 REV. DE JURISPRUDENCIA PERUANA 458, 482 (1960). Most of the following legislative history is from Castañeda's article, verified by the author's research. *But see* OSORES, *et. al.*, LA BREA Y PARINAS: DISCURSOS ANTE EL SENADO (LEGISLATURA EXTRAORDINARIA DE 1917) 5 (1963). An excellent source book is VELARDE, HISTORIA DEL DERECHO DE MINERIA HISPANO-AMERICANO (Buenos Aires, 1919).

⁸¹ See Zárate Polo, *supra* note 80 at 459; Castañeda, *Propiedad* at 12.

⁸² See especially, NOVISIMA RECOPIACION, LIBRO IX, TITULO XVIII, LEY 1; ORDENANZAS DE MINERIA DE NUEVA ESPANA, TITULO V, ARTS. 1-2; TITULO VI, ART. 1, INC. 22; Castañeda, *Propiedad*, at 6-9.

⁸³ Castañeda, *Propiedad*, at 13 and authority cited therein.

⁸⁴ These were the codes of April 28, 1873 and Jan. 12, 1877, the Mining Code of 1901, and Petroleum Law No. 11780 of March 12, 1952.

⁸⁵ See, *e.g.*, DIAZ *et. al.*, DOMINIO Y JURISDICCION DEL SUBSUELO, PRIMERA PARTE (1960), including three studies of the question.

⁸⁶ Law of June 4, 1892, arts. 4-5; Law of Nov. 22, 1884, art. 10, IV.

⁸⁷ Law No. 30 of Oct. 22, 1903, art. 3; Law No. 38 of 1887, Ch. I., art. 1 (3).

⁸⁸ Decree No. 4265, Jan. 15, 1921, art. 5.

mentators point, IPC raises two exceptions which it contends should have given it title to the *La Brea y Pariñas* subsoil: (1) a specific transfer of absolute title by the government in 1826 under an explicit law in derogation of the general scheme, and (2) prescriptive acquisition, through long and uninterrupted exercise of all title rights.

In 1825, following its successful fight for independence, the new Peruvian Republic found itself in debt to many of its supporters. Simón Bolívar, as acting Chief Executive, signed a law providing that "all class of properties, [including] mines, . . . which belong to the State, and which may be freely disposed of, should be applied to the extinction of the public debt."⁸⁹ Under this law and its subsequent regulations, the State discharged its 4,964 peso debt to Don José Antonio de Quintana by giving him title to "the pitch mine, at Prieto Hill in the Department of Piura, known as Amotape."⁹⁰ The official act of transfer declared that the State's authorized agents:

desist, quit, and part from the State which they represent, the action, property, and domain it has in the pitch mine referred to . . . and they cede, renounce, and sell it to the buyer or whomever he represents, so that having the title in the form in which they authorize it to him, he may dispose of it freely in the manner most convenient to him. . . .⁹¹

IPC traces the first of its claims to the *La Brea y Pariñas* subsoil petroleum principally from the language of that nineteenth century transaction.

To this observer, IPC's title claim cannot prosper on the strength of what the young Peruvian government ceded to its creditor, Quintana, almost a century and a half ago. The Peruvian commentators' argument that any transfer of absolute title would be null *ipso jure* is persuasive.⁹² But even if the State

⁸⁹ Law of March 5, 1825.

⁹⁰ Registry of Sale, Sept. 28, 1826, in Lima Registry; S.D. of Sept. 22, 1826. In the latter, the department cited is La Libertad rather than Piura, but clearly Piura is correct.

⁹¹ Auto of Sept. 30, 1826.

⁹² See Zárata Polo, *Impugnación a la Tesis de la Internacional Petroleum Co. sobre la Propiedad Absoluta que se Atribuye, del Subsuelo y de los Yacimientos Petrolíferos de 'La Brea y Pariñas'*, 18 REV. DE JURISPRUDENCIA 458, 460 (1960). Zárata argues that the 1825 law permitted the State to sell only those mines "of which it could freely dispose" and the regulations to the law, issued on Nov. 8, 1825, clearly specified (arts. 1 and 4) "caved-in, water-filled, or abandoned mines" and no others.

could have delivered a valid title giving Quintana and his successors absolute rights in subsoil petroleum, the facts and the law indicate it probably did not do so. Whatever passed in title to Quintana in 1826, it appears impossible to characterize it as absolute subsoil rights general enough to include petroleum deposits lying under a surface area of over 410,000 acres, the expanse of the present *La Brea y Pariñas* hacienda.

IPC's advocates have argued that the expansive and general right may be inferred from the history of pitch-mining operations in the area. In the colonial period, private parties renting from the Spanish Crown worked the pitch flows that occurred at several points scattered over a surface area probably even greater than that held by IPC. The operations were carried out by individuals who gained a monopoly over the entire area in return for the annual rent payment. These extensive operations were often referred to generally as the Amotape Mine, although the rental agreements also included more specific boundary descriptions.⁹³ IPC contends that since the act of transfer to Quintana simply described the property as the "Amotape Mine" located at "Prieto Hill", with no statement of bounds, it must be interpreted to conform to the extensive "Amotape Mine" described in the prior monopoly rental agreements. Support for this position may also be found in the fact that Quintana and the owners who followed him apparently interpreted the title in that way and the commercial operation apparently continued for many years, over the same territory covered by the Crown monopoly.⁹⁴ The Peruvian government never protested the pitch-mining operation.

However, the colonial rent agreements contain other facts which may bear on the 1826 transfer. They cite "Prieto Hill" as a landmark establishing a single side of the area in question.⁹⁵ Further, as early as 1775, Don Agustín de Ugarte paid 2,500 pesos a year to the Crown for the pitch-collecting monopoly. In 1802, Don Juan Cristóbal de la Cruz agreed to pay 6,000 pesos a year for the Amotape monopoly and the pitch mines of Santa Elena in Guayaquil, further to the north. Apparently, the rent was assigned

⁹³ See London & Pacific Petroleum Co. Ltd., *HISTORIA DE LA BREA Y PARINAS*, art. V (1916); 3 *CONTROVERSY*, appendix to Doc. No. 110; ECHECODAR GARCIA, *RATIFICACION DE MI INFORME JURIDICO SOBRE EL CASO DE LA BREA Y PARINAS* 21-24 (1960).

⁹⁴ See *id.* at 23.

⁹⁵ See 3 *CONTROVERSY*, appendix to Doc. No. 110.

equally to each concession, or 3,000 pesos a year for Amotape.⁹⁶ In 1825, preparatory to the title transfer, the State valued the mine it gave to Quintana at 2,695 pesos, although the latter accepted it in total payment of the debt of 4,964 pesos.⁹⁷ In the meantime, the Constitution of 1823 had abolished the Crown monopolies, so that it would not have been unnatural to sell a piece of what had always been a unitary operation.⁹⁸ As pointed out above, pitch-mining was still apparently a thoroughly viable commercial enterprise and it is doubtful that an operation over so extensive an area as IPC claims could have declined so drastically in value between 1775 and 1825.

Even if IPC were able to establish that the Quintana title was valid as an exception to the norm that private parties could never take more than a concession to mineral resources and that it covered all the surface area of the present *La Brea y Pariñas* hacienda, it would have to show that the "pitch mine" transferred in 1826 included not merely pitch, which appeared at the surface, but the liquid and gaseous hydrocarbons in the subsoil below. The point may be debatable,⁹⁹ but the Peruvian legislative tradition against alienation of the State's domain in mineral resources would seem to command a strict interpretation and presumptions which run against IPC.

The special property status created for mineral resources by the same strong legislative tradition described above is essential to the denial of IPC's other claims. Once petroleum resources are classified as part of the public domain of the State, falling within the ambit of public (instead of private) law,¹⁰⁰ it follows logically and properly that no prescriptive acquisition may run against the

⁹⁶ *Id.*

⁹⁷ See S.D., Sept. 22, 1826.

⁹⁸ CONSTITUTION OF NOV. 12, 1823, art. 155.

⁹⁹ Compare Echeopar, *supra* note 93 at 13-21 (1960) with Zárate, *supra* note 80 at 461-62.

¹⁰⁰ The public law-private law distinction, which may never concern the common lawyer, is ingrained in the civil lawyer from the time of his first exposure to legal education and continues throughout his professional career. It is a basic, and important, distinction within the civil-law traditions from which Peru draws its legal system.

The dichotomy is often drawn on the basis of civil and commercial law on the private-law side and constitutional and administrative law on the public-law side. Another general way of distinguishing the two is to say that Public Law deals with relations in which the State is involved and Private Law controls relations between private individuals.

State's title to the property,¹⁰¹ that the State's claim is not even prescribed by administrative acts such as those issued in 1887 and 1888, and that administrative (not judicial) processes will be used for many of the relevant decisions. This simple fact, so essential to the Civil Law traditions which make up Peru's legal system, represents the basic answer to most of the issues raised by IPC in its administrative appeal.

Much of IPC's difficulty throughout the administrative process and other official proceedings stems from its attempt to apply private-law concepts and norms, i.e., the provisions of the Civil Code relating to property rights between private individuals, to what are public-law issues or matters covered by special legislation. For this reason, much of the law IPC cites in support of its positions is inapposite, no matter how the rule might favor IPC if it could be applied. In the mass of petitions and pleadings it submitted to the executive and judicial powers, IPC never fully developed the threshold question of why private-law, rather than public-law, rules should control the controversy. However, despite the fact that most of the applicable laws favor the government position, they do not independently resolve the case. *La Brea y Pariñas* is a unique question in Peruvian law, which cannot be resolved satisfactorily without recourse to considerations outside the written norms.

In its treatment of IPC's administrative appeal the Supreme Resolution of the Executive most closely resembles a brief for the government position, especially on several of the minor points.¹⁰² It would be difficult to characterize it as an objective consideration of the facts and law involved. The Supreme Resolution does not consider any potential equities on IPC's side of the case. Still, in any equitable treatment of the facts, IPC may have strong arguments in its favor. For forty-four years it operated the *La Brea y Pariñas* fields in substantially the same

¹⁰¹ See CIVIL CODE, arts. 822 (4), 823; PETROLEUM CODE, Law No. 11780 of 1952, art. 1. These more recent provisions recognize a rule extant since colonial days, as authoritatively traced in Castañeda, *supra*, note 4.

¹⁰² For example, the Executive finds an admission by IPC against interest, in a clause of the August 12, 1968, Agreement IPC signed with the Belaúnde regime which exonerates the company from all debts it "may have owed the Government". In a similar vein, the Supreme Resolution finds all laws and decree-laws in question are valid because article 132 of the Constitution provides that laws take effect the day after their official publication. See S.R. 095-EM of Aug. 6, 1969.

manner as any concessionaire, paying taxes to the State and complying with most of the other substantial obligations pertaining to petroleum concessions, albeit favored by a special arrangement reducing its tax burden as set out in the Arbitration Award of 1922. Even accepting the fact that tacit concessions do not exist, it would seem that long practice and use might make some sort of equitable consideration of the *La Brea y Pariñas* question necessary to a creditable solution to the problem. *Reivindicación* itself is an ad hoc action as applied to *La Brea y Pariñas*,¹⁰³ thus an equitable balancing of interests and contributions would appear desirable. What the final result of a review in equity might be is probably beyond the capacity of anyone's conjecture at this time. It is doubtful that a simple solution exists; e.g., putting IPC in the position of a common concessionaire in 1924 and simply charging the difference in taxes actually paid and taxes which would have been paid under normal legislation since then.¹⁰⁴

It seems clear that the Peruvian Executive made its final decision on the \$690.5 million debt in the Supreme Resolution of last August, dismissing IPC's administrative appeal. However, that same resolution declared that IPC had available remedies before the Judicial Power which it had not exploited.

IV. JUDICIAL REMEDIES AVAILABLE TO IPC

There appears to be only one truly comprehensive remedy—the declaration action—available to IPC at the present time. The statute of limitations has tolled on the attack which could have been made on the limited question of the value assigned to the Talara industrial complex for purposes of expropriation.¹⁰⁵ The statute of limitations has also run on another frequently mentioned remedy, the *interdicto de recobrar*, or summary action to

¹⁰³ There is some analogy for it in the present MINING CODE OF 1950, art. 67, which provides for *reivindicación* between private concessionaires. The MINING CODE OF 1901 contained the same provision in article 112. See also note 66 *supra*. However, some authorities would argue that the State exercises a "right of sovereignty through administrative processes" instead of proper *reivindicación*. See ESCALA, *EL DOMINIO DEL ESTADO SOBRE LAS MINAS* 46-47 (Chile, 1965) and authority there cited. The substantive effect is the same.

¹⁰⁴ See note 62 *supra*, plus the multifarious claims introduced in the legislative bills before Congress in 1960. See ELEJALDE, *et. al.*, *LA BREA Y PARINAS: EXAMEN JURIDICO DE LOS PROYECTOS DE LEY PRESENTADOS EN EL PARLAMENTO* (1963).

¹⁰⁵ See Law No. 1925, June 4, 1940, art. 13; Law No. 12063, art. 9.

recover possession.¹⁰⁶ Apparently IPC considered the latter barred to it by the nature of the property in question¹⁰⁷ and the fact that laws and decree-laws were the direct authority for the possession of the *La Brea y Pariñas* fields by the Revolutionary Government.¹⁰⁸ In addition, the *interdicto de recobrar* does not determine a party's right, but merely returns to him possession of property from which he can show he was removed without due process.

One means of quick access to the courts on the larger issues would be for the Executive to consent to a judicial appeal from its Supreme Resolution dismissing IPC's administrative appeal. Under present circumstances, IPC has an absolute right to judicial process only if it first pays the full amount outstanding on its \$690.5 million debt.¹⁰⁹ The Executive has not indicated a willingness to waive IPC's obligation to pay the debt and IPC has never specifically asked for such a waiver.¹¹⁰ IPC perhaps could achieve the same substantial consideration of its case through institution of a declarative action in the Peruvian courts, if it wishes to exhaust the domestic remedies available to it.

Virtually all issues in the *La Brea y Pariñas* controversy could be considered in a declarative action suit, including equitable circumstances.¹¹¹ If at all complicated—and it should almost certainly be painfully complicated—the suit could drag on for years. Such delay might not be all to IPC's disadvantage, providing that at some point a decision is actually made. IPC has lost possession of all its Peruvian investment and holdings. It seems unthinkable that the company entertains any hope of establishing an enterprise in Peru in the relevant future, either by way of resuming a part of its former operation or initiating new ventures. At this point in time and the political context, IPC can have realistic concern for little more than compensation for its loss. An extended judicial consideration of all the equities built up since 1924 may be IPC's best hope for an objective treat-

¹⁰⁶ CODE OF CIVIL PROCEDURE, arts. 1010-1017.

¹⁰⁷ *Id.* art. 992.

¹⁰⁸ Interview with IPC lawyers in Lima, Peru, in late September, 1969.

¹⁰⁹ D.L. No. 17355, Dec. 31, 1968, art. 8.

¹¹⁰ IPC did ask unsuccessfully for a waiver on another debt. See note 72 *supra*.

¹¹¹ The declarative action is not specifically provided for in the Peruvian Code of Civil Procedure, but is normally permitted as a valid ordinary (as opposed to summary) suit. See ALZAMORA VALDES, DERECHO PROCESAL CIVIL 63-65 (Lima, 1959).

ment of its case. Anything short of the comprehensive treatment available in a declarative action makes little sense, for the Peruvian government has a number of potential debts it could press against IPC were any single debt dismissed.¹¹² In fact, IPC seems indisposed to press for this sort of hearing, perhaps because it feels the political climate makes any further appeals futile and sterile exercises, perhaps because it does not wish to submit to the sort of review of all its *La Brea y Pariñas* operation that the process would entail. On the Peruvian side, at least as reflected by the Petro-Peru lawyers the author talked to, the prevailing view is that the controversy is closed and a declarative action would be useless.

V. CONCLUSION

For the reasons outlined above, the *La Brea y Pariñas* controversy represents a case unique in Peruvian petroleum law. Although the Revolutionary Government moved immediately to take the action it did once it assumed power, circumstances had moved in that direction for years. The *La Brea y Pariñas* case probably generated more legal commentary and writing (wholly leaving aside political treatments) than any other single case in Peruvian history. Most of the issues were well-defined and fully-developed at least a decade ago.

Whatever other observations may be made, it seems indisputable that *La Brea y Pariñas* is an extremely complex legal controversy. No isolated or clearcut legal rules control the case; rather it involves some of the most basic and far-reaching questions in the Peruvian legal system. The dichotomy between public and private law is at the heart of the matter. IPC, to a surprising degree, has relied on private-law doctrine and norms. But, even more surprising, it has never fully discussed *why* it should be private rather than public law rules which govern the controversy. Still, IPC's advocacy throughout many years of difficult procedures has been on the whole extremely complete and painstaking. IPC has made an exceptional public record of the case in all its legal aspects. The Peruvian Executive and

¹¹² See notes 15-17, 62 *supra*. More of the possible debt claims are detailed in the projects of law discussed in *ELEJALDE et. al., supra* note 4.

Judiciary have accorded IPC full hearing and ample responses on most issues in the case. However, no comprehensive judicial consideration of the equities has been granted, and the governmental action may at times have seemed—especially to the North American lawyer—abrupt or arbitrary in denying what other countries might consider ordinary due process safeguards. Peru, however, is a country in which the State is not yet treated as an equal before justice with private citizens.

Ultimately, *La Brea y Pariñas* is much more a political question than a legal question, of course. It is, unfortunately, the political rather than the legal aspects which appear to have the greatest impact on other countries and the treatment of foreign investment. Although deeper study demonstrates the case is unique, it is all too easy to look at the result—a large foreign investment in a key extraction industry nationalized without compensation.¹¹³ The recent Gulf Oil case in Bolivia represents such a striking parallel in the political pronouncements that accompanied it, that, though the basic legal issues appear totally different it seems copied directly from the more publicized aspects of the Peruvian example. Latin-American experts who should know better have failed to distinguish between the cases, perpetrating an erroneous and ignorant view of the case.¹¹⁴

Even within Peru, the whole set of circumstances must be set in political perspective to be fully understood. One should not underestimate the intense public feeling, built up over years by the journalism of *El Comercio* and other influential Lima newspapers and magazines, that *La Brea y Pariñas* represented an old injustice perpetrated against the Peruvian nation, a score which had to be settled. When IPC's *La Brea y Pariñas* operation is viewed in the light of Peruvian popular opinion, as the shameful

¹¹³ Despite the inevitable effect its action in the IPC case had on foreign investment, Peru's Revolutionary Government has from the first emphasized that it was a unique case and that foreign capital is welcome in Peru. See the government pamphlets *PETROLEUM IN PERU* (No., 1969); *LA POLITICA DEL GOBIERNO REVOLUCIONARIO* (Jan., May, Oct., 1969); *LINEAMIENTOS DE LA POLITICA ECONOMICA-SOCIAL DEL GOBIERNO REVOLUCIONARIO* (1969). It appears that more recently foreign capital may be venturing back into Peru, after a waiting period.

¹¹⁴ Chief offender is George Jackson Eder, in his *Expropriation: Hickenlooper and Hereafter*, 4 *INT'L LAWYER* 611, 619-23 (1970). Eder is not alone, however. None of the relatively heavy comment engendered by *The La Brea y Pariñas* case has shown much comprehension of what really went on in Peru; most have simply assumed the Peruvians were arbitrary and capricious and proceeded from there.

and irritating vestige of another era in foreign investment in that country, harsh treatment of the oil company becomes more understandable, if no easier to justify.

In fact, IPC under Standard Oil ownership was at least ostensibly a model corporate citizen, but IPC in 1971 is paying not for its own sins, so much as for those of all its predecessors and the Peruvian governments with which they worked. The delay in taking definitive action during the first five years of the Belaúnde regime, at a time when public attention was continually focused on the issue, almost unquestionably increased the minimum conditions acceptable to the Peruvian populace. Thus, if the \$690.5 million debt appears blown out of all equitable proportion as applied to a company which apparently relied, in good faith, throughout forty-four years, on an arbitration award which lacked only four years of expiring, its dogmatic expression—based as it is on substantial legal foundations—may be most comprehensible as justification for Peru's total takeover of IPC's going enterprise. Whether Peru will bargain down from that figure at some future date is impossible to predict, but under the legal theory invoked any reduction in IPC's debt would be a clear concession.

If this brief article has any final message, it is simply that Peru and the Revolutionary Government have been more responsible throughout the *La Brea y Pariñas* controversy than many casual observers may realize. Although the credibility of the government may have been jeopardized by more recent arbitrary acts, legal procedures were followed throughout the *La Brea y Pariñas* affair, if not always with total equanimity. There is a solid basis in law for all that Peru has done. If Peru has been less than equitable in applying the full force of its law to divest an oil company (which on the author's limited experiences was one of its best corporate citizens in recent years) of its whole operation, one might objectively balance this against the fact that the ultimate confrontation took place on legal grounds the company chose not to move off of gracefully and graciously (albeit at a high cost) when it might have had the chance.

Quite apart from the fact that official negotiations continue between the Peruvian and the United States governments, perhaps the Hickenlooper Amendment's sanctions against governments' expropriating American properties without adequate compensation

have not been applied on the grounds that Peru did not confiscate IPC's property but merely followed a valid legal process against the company, which has not yet terminated. The other foreign petroleum and other mineral concessions in Peru have not been touched and the *Conchan-Chevron* habeas corpus¹¹⁵ is still good law.

Whether, at some time during the last fifteen years, negotiation could have resolved the complexities of the *La Brea y Pariñas* case and left IPC a place among the existing concessionaires, is a moot point. Whether at some time in the future, the controversy may be opened through arbitration, negotiation, or a declaratory action, and what the outcome of any such procedure might be, are questions of sheerest conjecture. Matters are now frozen by political considerations that leave little flexibility for compromise.

¹¹⁵ Note 44 *supra* and accompanying text.