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International Claims: Postwar French Practice, by Burns H. Weston

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BOOK REVIEWS

INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE. By Burns H. Weston. Syracuse, N.Y.: Syracuse University Press. 1971. Pp. xv, 237. \$10.75.

When Richard Lillich's *International Claims: Their Adjudication by National Commissions*¹ was published, one reviewer noted the need for comparative studies of the structure and case law of national claims commissions and the need for serious analysis of the lump-sum agreements on which their operation is based.² It turned out that these two areas of study were a major part of the agenda of the Procedural Aspects of International Law Institute, created and directed by Professor Lillich.³ Several studies of foreign practice have by now been published⁴ or are approaching publication;⁵ a comparative study of lump-sum agreements⁶ has been completed, its second volume usefully reproducing the texts of well over a hundred such agreements; and, the project now turning full circle, a more elaborate study of United States practice is being prepared.⁷ The individual studies and especially the entire series are of inestimable value to everybody concerned with the development of international law.

Foreign claims settlement commissions were established after the Second World War by many Western nations, to distribute to claimants the "global" amounts ("lump-sums") paid by Eastern European (and later other) countries as compensation for the taking of alien-owned

1. (1962). Despite its broad title, the book deals solely with United States experience.

2. Fatouros, Book Review, 41 CAN. B. REV. 306, 309, 310 (1963).

3. For a detailed description of its activities, see Lillich, *The Procedural Aspects of International Law Institute*, 4 INTL. LAW 741 (1970).

4. R. LILlich, INTERNATIONAL CLAIMS: POSTWAR BRITISH PRACTICE (1967) [hereinafter cited as LILlich]; B. WESTON, INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE (1971) [hereinafter cited as WESTON].

5. FOIGHEL, INTERNATIONAL CLAIMS: POSTWAR DANISH PRACTICE (forthcoming).

6. R. LILlich & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP-SUM AGREEMENT (forthcoming).

7. R. LILlich, THE JURISPRUDENCE OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES (forthcoming). I still would object to the use of the "imposing quadrisyllable" to refer to the Commission's caselaw; cf. Fatouros, Book Review, 41 CAN. B. REV. 306, 308 (1963). An earlier study of the same topic, less ambitious in scope and direction, was R. LILlich & G. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION (1962), reviewed in 42 CAN. B. REV. 174 (1964).

properties in their territories. Although the lump-sum method of international claim settlement is not novel, its near-exclusive use in recent years has changed its role in, and enhanced its importance for, the international legal order. Accordingly—and this is, of course, the fundamental assumption of the PAIL Institute series—the provisions of inter-governmental lump-sum agreements and the decisions of national claims commissions are of evident relevance to modern international law. The book under review offers a good opportunity for considering anew the whole topic.

The study begins most appropriately with a description of the historical background. Along with other Western countries, France tried at first various patterns of claims settlement. Lump-sum agreements proved the most convenient method and were therefore widely used. From 1948 to 1967 France concluded a total of fifteen agreements,⁸ ten (two each with Hungary and Yugoslavia and one each with Bulgaria, Cuba, Czechoslovakia, Egypt, Poland, and Romania) of which led to the establishment of claims commissions.⁹ Their texts are conveniently reproduced in an appendix to Weston's book.¹⁰ Instead of a single claims commission, France established one for each country; these operated concurrently with a minimum of formal connection but apparently with considerable informal contact through regular administrative channels.

The author then reviews in detail the provisions of the statutory instruments, issued in implementation of the lump-sum agreements and establishing the various commissions, and the contents and effects of the rules of procedure issued by each commission.¹¹ Here, as in the subsequent exhaustive analysis of the French claims commissions' caselaw, Professor Weston adopts the language and classification of the "New Haven School" of international law.¹² The important point to note is that his analysis of the caselaw follows a thematic sequence, it is ordered according to substantive legal issues and not on the basis of such accidental features as chronology or the work of a particular commission.¹³ This

8. WESTON, *supra* note 4, at 22-24.

9. Of the others, most were implemented through direct administrative (as distinct from quasi-judicial) action. *Id.* at 24-25.

10. *Id.* at 191-224.

11. *Id.* at 39-69.

12. *Id.* at 71-75. For an exposition of the specific analytical framework the author applies here, see Weston, *International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry*, 2 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 36-182 (Falk & Black eds. 1970). [Hereinafter cited as Weston, *International Law*.]

13. *But cf.* Lillich's study of the British Foreign Compensation Commission case law. LILLICH, *supra* note 4, criticized on this point in Weston, Book Review, 19 SYRACUSE L. REV. 196, 198 (1967).

approach is certainly appropriate, not only because it makes for more interesting reading, but also because it makes possible, or at least much easier, later comparisons and generalizations.

A proper summary of Weston's analysis would require too lengthy and elaborate an exposition since the particulars of his "framework of inquiry" would have to be explained. It is only possible to list, in traditional, approximative, language, the several topics and sub-topics of his inquiry which form a consistent, if sometimes overly elaborate, whole. After discussing the problems of eligibility of claimants (ownership, nationality, etc.), he covers all possible features of claims presented before the commissions: private or public character of the "deprivor" authority; presence and character of a "public purpose"; territorial effect of the governmental action involved; contractual claims; significance of the government's ability or inability to pay compensation; varieties of "creeping expropriation"; the requirement that the claimant must prove an actual loss caused by host government action; compensability of particular kinds of loss; and finally the actual measure of compensation.¹⁴ He concludes with a critique of some (mostly procedural) defects of the process of claims distribution by the French commissions (secrecy and refusal to publish their decisions, delays, undue emphasis on the adjudicatory stage of the proceedings). At the same time, Weston finds that "the commissions have performed most of their basic missions generally with distinction."¹⁵ They have not been unduly rigid or legalistic; their caselaw, although based on decisions by eight discrete commissions, has been remarkably uniform and consistent; and they have exhibited an "unparochial" attitude, a "global outlook," rendering decisions which are in the main "consistent with what is said to be customary international law as well as with comparative American and British practice."¹⁶

Professor Weston is most persuasive in his argument that national claims commissions "can be regarded as decision-making agents of the international legal order."¹⁷ To the extent that it is constituted of nation-states, the international legal order is lacking a hierarchical, "vertical" structure; it is, in the now popular expression, a "horizontal" legal order.¹⁸ National officials, not limited to the diplomats and soldiers

14. WESTON, *supra* note 4, at 71-182. This is Part II of the book, which forms the core of the study.

15. *Id.* at 187.

16. *Id.* at 188-89.

17. *Id.* at 183.

18. However, this horizontal character is not as pervasive a trait as is sometimes assumed. In a way, insistence on it is fully justified only when traditional assumptions as to the impermeability of national legal orders are accepted. When they are discarded, and the fact of interpenetration, formal and informal, is acknowledged, the picture

among them as the traditional conception would have it, make decisions and engage in activities which are of international character and effect; they participate, in various manners and degrees, in international law-making. The case of national claims commissions is relatively evident, since such organs are established by law to implement international agreements and routinely refer to international law in formulating rules and principles for the resolution of the disputes before them.

Professor Weston's study is in this respect conclusive as well as fully consistent with studies of the caselaw of claim commissions in other nations. The French commissions' decisions ordinarily are in accord with traditional principles of international law; as to the requirement of continuity of nationality,¹⁹ for instance, or as to state responsibility for fiscal and financial measures.²⁰ Such decisions, consistently followed, undoubtedly strengthen existing international law prescriptions by expressing, and thereby also inducing, official expectations on these matters.

While the international relevance of the French claims commissions' decisions cannot be denied, their importance is doubtful, primarily because of the presence of the lump-sum agreements themselves. The commissions' decisions deal on occasion with questions left open, ambiguous, or obscure by the lump-sum agreements and the implementing statutes. It appears, on reading Professor Weston's remarkably clear and thorough exposition, that on most policy issues the commissions' holdings were "diplomatically predetermined." There is nothing reprehensible in this, nor is it an argument against undertaking the study of the commissions' work. This may help to explain, however, one particular trait in their overall attitude (which Weston criticizes, quite cogently, from a scholar's point of view²¹). Since most policy issues were already decided by diplomatic or

changes. First of all, within nation states there are complex and extensive hierarchical relations between authorities and officials of various kinds; since many of these officials currently act in the international arena, the hierarchical differences among them possess considerable international significance. Witness the French claims commissions' occasional dealing with acts of minor officials (cf. WESTON, *supra* note 4, at 100-01) or prior judicial decisions in the host ("deprivor") state (*Id.* at 139). Second, and more important (although by and large not relevant to the developments in the book under review), it is becoming increasingly accepted that not only nations but also international organizations, private and public corporations, individuals, and voluntary associations, participate in varying degrees in international legal activities and are therefore, in the traditional terminology, "subjects of international law" (in a variety of forms, extent and manner). When this disparate collection of "actors" is taken into account, the image of horizontality loses much of its attraction. To describe the relative positions of all these various entities, in law and in fact, much more elaborate geometrical metaphors are needed.

19. Cf. WESTON, *supra* note 4, at 89.

20. Cf. WESTON, *supra* note 4, at 130-31 (exchange controls), 132-34 (taxation).

21. *Id.* at 190.

legislative authorities, the commissions may have been justified to a degree in their refusal to fashion and apply prescriptions founded on broad considerations of international legal policy when occasionally policy issues were left for them to decide.

The record of national claims commissions in the past twenty years is an indispensable guide for understanding the conditions which influence policies in this area. Nevertheless, it is quite likely that many of the issues to which the commissions addressed themselves are by now mainly of historical significance. The patterns of transnational economic activity and of national political-economic crisis which underlay the situations the commissions confronted have changed considerably. The events which gave rise to most postwar claims have by now shaped new expectations among investors and national officials. Therefore, many of the arguments and solutions properly applied to the postwar "foreign wealth deprivations" may no longer be appropriate.

The application of the "New Haven approach," most commonly associated with the names of Professors Myres S. McDougal and Harold D. Lasswell, in the book under review raises several questions of its own. This is not the place to examine the validity, advantages and disadvantages of the whole approach. It is only fair to stress that Professor Weston is not a blind adherent of any school.²² He uses the method as an instrument of research and analysis, not as a badge of intellectual respectability or a symbol of scientific achievement. The sole question to be considered is whether use of this method, more particularly of its language and classification, ultimately adds to or detracts from the study.

One feature of the New Haven method, often stressed in denigration, is of special significance here. The approach is comprehensive, detailed and well-ordered, providing in its own oft-repeated term, a "framework for inquiry"—an orderly checklist if you will. However proper, desirable or adequate in other contexts, this feature is particularly appropriate for an exhaustive study of an essentially disorganized and diverse body of caselaw. It provides ordered points of reference, sets of headings and sub-headings, which help to organize otherwise formless materials. This is a signal advantage of Burns Weston's study; it compares favorably in terms of exhaustiveness with the other published studies in the series. The qualities of the analytical approach can be best seen in Weston's treatment of the so-called "creeping expropriation" phenomenon, the modalities and discrete aspects of which he has analyzed elsewhere in some detail.²³ His discussion of French caselaw on this

22. His occasional critique is all the more cogent for coming from the inside. See, Weston, Book Review, 117 U. PA. L. REV. 647 (1969).

23. Weston, *International Law*, *supra* note 12, at 75-80.

topic²⁴ manages to shed light and to import a modicum of sense in a highly confused and obscure area.

If a number of serious problems remain, they are due to the language, not the ordering, of the discussion. In its grand lines, the book's sequence does not depart significantly from tradition: *i.e.*, commission constitution and procedure, claimant eligibility, substantive bases for claims, defenses and exceptions, proof of loss and measure of damages. In matters of detail, less familiar results are reached, but traditional learning has been rather haphazard in this respect and the difference is not apparant. A principal feature of the New Haven approach, however, is the use of a special language, intended to be precise, neutral and unambiguous—in contradistinction to traditional legal language, accused of being vague, normative, and ambiguous. It is here that the difficulties inherent in the differences of approach become obvious.

The need for or usefulness of terminological innovation is itself debatable. Lack of ambiguity is not an absolute value. In the history of law and jurisprudence, multiplicity of meanings and equivocation have been powerful devices for assuring the flexibility and growth of the law, although every obscurity cannot be defended on such grounds, and ambiguity is not the only available way to import flexibility. The old terms moreover are not as misleading or unclear as is alleged, nor are the new terms entirely free of ambiguity and fuzziness. For instance, a linguistic philosopher might argue that using the same term, "claims," to refer both to demands and to excuses is not conducive to analytic clarity. Finally, as long as legal consequences are perceived as depending on the legal qualification of an event or an act, as long as the parties see advantage in adopting or rejecting particular terms, legal terms will not remain neutral, regardless of the intentions of their creators. A state which chooses to act by refusing to recognize an investor's title over mineral resources would argue that its action constitutes neither "expropriation," "taking" nor "wealth deprivation," since it is founded on a denial of the legal quality of the investor's right.

It all comes down to a counsel of prudence; too many hopes should not be pinned on the achievement of semantic clarity. Since the gains from any radical change in terminology may be ultimately rather modest, the costs of the undertaking, in terms of difficulty of communication, may possibly outweigh them.

The book's subject matter raises another special problem. In part, the terminology and the classifications of the New Haven School are

24. WESTON, *supra* note 4, at 120-41.

intended to reduce into a common descriptive language the factual and normative elements of a legal situation. Whatever the validity of the approach when dealing with problems whose factual and normative components are available for analysis, its use is problematic in a study focussed not on factual data (historical events, political or economic realities) but on juridically formulated materials. A process of multiple translation occurs. Not so much in the trivial sense of transfer from one language to another (in this respect Weston has been eminently successful; his text shows no traces of the translation problems he must have faced), but chiefly in another sense: To study the caselaw of French claims commissions, the author must translate (interpret) into New Haven language the commissions' decisions, which are themselves translations (interpretations) into traditional legal language of the basic factual data of the situation (as perceived by the commissions). Despite the author's unusual sensitivity to the limitations of his materials, one wonders how far this process of interpretation may distort whatever may have been the original events. The fact does not help that Weston has been denied access to the actual dossiers of commission cases, which might have retained a stronger flavor of reality.

Everything considered, it cannot be denied that this book is a successful application of the New Haven method, through which it achieves exhaustiveness and an orderly arrangement of diffuse materials. The handicap of the special language itself is overcome in major part by the author's style and clarity. Burns Weston is without any doubt—and this is not meant as damning by faint praise—one of the best stylists of the "New Haven School." By using special terminology in context, by referring parenthetically to traditional terminology (even if sometimes in a patronizing or disparaging manner), by providing concrete points of reference, and by other such devices, he avoids leaving the reader in suspense or uncertainty as to the meaning of his terms. He succeeds best when the book is read from cover to cover—the way a reviewer reads it. On the other hand, the obscurity inherent in the use of unfamiliar and not self-explanatory terms affects adversely the book's utilization as a reference tool. Despite a helpful attempt to provide succinct explanations in the Table of Contents, the reader who is not already wholly knowledgeable in New Haven terminology and Professor Weston's own glosses on it will have great difficulty locating specific points of detail. The index, while possibly superior to those in most recent legal monographs (but this is really faint praise), still is inadequate for overcoming the terminological barrier. Difficulties in this respect are bound to be particularly acute, and most

regrettable, for foreign readers, such as French claims lawyers, who might otherwise have used the book extensively in their practice.

In a review of Richard Lillich's companion study of British claims practice,²⁵ Professor Weston complained that the author did not state enough of his own positions on substantive issues; he insisted that Professor Lillich "owes us the benefit of his personal judgments."²⁶ In his own book, Weston has followed the advice he gave. Unfortunately, the results are mixed. On principle, his position is valid. The writing of a book, however, involves decisions based on prudential considerations as well as principle. The posture in which certain issues arrive before judicial and quasi-judicial bodies is sometimes peculiar; most frequently it is quite limited in scope. Properly argued policy discussions must fill in the missing elements at inordinate length, while the mere mention of the author's ultimate conclusions on particular points is often unpersuasive. It does not help, in the instant case, to buttress them by references to "a perspective that favors a stable, growing international economy"²⁷ or "a mutually productive flow of wealth across national boundaries."²⁸ Such expressions soon begin to sound like "code words" of uncertain meaning, which serve to express, but not to explain, the author's preferences. They do not refer to propositions acceptable by all reasonable men, since those rejecting neoliberal economics may find them most uncongenial. Reference to his recent extended discussion of the related problems²⁹ is of considerable help; ultimately one must await his promised *magnum opus* on foreign wealth deprivations for extensive and, one hopes, more persuasive elaboration of his position.

On the whole, Burns Weston has done a remarkably successful job. By what must have been immense labor, he has collected and organized a huge amount of material. Seriously handicapped by the lack of access to commission files, he has managed to draw out of this seemingly dry and barren collection of brief, often cryptic, decisions every ounce of vital juices they might have. Of course, this is not a glamorous book; its strength lies in its detail, its coverage of technical matters, its thoroughness. It cannot be expected to, and it does not, make exciting reading. Indeed, its exhaustiveness reaches on occasion the borderline of pedantry—and the author is well aware of the danger as his repeated mention of the need to avoid "pedant's footnotes" shows. He has not

25. LILlich, *supra* note 4.

26. Weston, Book Review, 19 SYRACUSE L. REV. 196, 200.

27. WESTON, *supra* note 4, at 111.

28. WESTON, *supra* note 4, at 122.

29. Weston, *International Law*, *supra* note 12.

crossed that border, however, because he is always aware of the "nice" issues behind the banal ones; he distinguishes forthrightly between the significant and the trivial, the well-established and the novel—although including in most cases both, as if, after collecting all that information so exhaustively, he is reluctant to let any of it be wasted. His pregnant footnotes often provide valuable concrete data. Where they merely refer to the unpublished, unreadable, decision of the claims commissions, they must be seen as the author's token of validity; he is thereby opening his research to all who might wish to repeat it. Moreover, Weston does not allow his material unduly to fetter him. He is willing to guess (always expressly) whenever his data are inadequate or sparse, and he is good at it: His guesses are interesting and they make sense. If on occasion, the scarcity of his data, along with the compelling comprehensiveness of his methodological framework, combine to push him into pure and not always productive speculation, he at least always makes clear how much is found in the data, what is assumed, and what is speculative.

This book is a major achievement. Within the limits of his subject-matter, Burns Weston has fulfilled the aristotelian wish to "save the phenomena." After so much painstaking labor, he has more than earned the right to greater freedom of speculation and broad policy-making for his next book.

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