Spring 1964

International Claims: A Comparative Study of American and British Postwar Practice

Richard B. Lillich
Syracuse University College of Law

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Comparative and Foreign Law Commons, and the International Law Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol39/iss3/4
INTERNATIONAL CLAIMS:
A COMPARATIVE STUDY OF
AMERICAN AND BRITISH POSTWAR PRACTICE*

RICHARD B. LILICH†

The law of international claims, sometimes called "the diplomatic protection of citizens abroad" or "the responsibility of states for injuries to aliens," is a subject of vast importance today. Spurred on by the postwar nationalizations in Eastern Europe, and more recently by numerous expropriations in the Near East, the Far East and Latin America, various groups in recent years have attempted to formulate the rules under which the international responsibility of a state is engaged, with particular reference to a state's liability for the taking of foreign property. Notable among these efforts are the revised draft of the International Law Commission's Special Rapporteur,¹ the draft convention prepared by the Harvard Law School,² the proposed official draft of the American Law Institute's Restatement of the Foreign Relations Law of the United States,³ and the draft multinational convention of the O.E.C.D.⁴

Helpful as these drafts may be in clarifying the substantive law of international claims, they largely overlook or ignore the procedural problems of applying this body of law. Indeed, the drafters of the Harvard Convention state that "the procedural law relating to international claims . . . is in one sense of secondary importance, since it merely provides the sanctions and the procedural devices through which compliance is sought with this important body of substantive law."⁵ This approach seems inadequate to persons who believe, in the words of Holmes, that "legal obligations that exist but cannot be enforced are ghosts that are seen in

* The writer wishes to express his gratitude to the Ford Foundation for financial assistance received under a Law Faculty Fellowship which made the research and writing of this article possible. A "Readers Digest" version appears in 17 CURRENT LEGAL PROBLEMS (1964).
† Associate Professor of Law and Director, International Legal Studies, Syracuse University College of Law.
⁵ Harvard Convention, op. cit. supra note 2, at 44. (Emphasis added.)
the law but are elusive to the grasp."\textsuperscript{6} Rights without remedies being no rights at all, equal attention must be given today to the problem of bringing law to bear on governments.\textsuperscript{7} The Committee on Nationalization of Property of the American Branch of the International Law Association indicated a more profitable approach when it observed that "any effort to strengthen the rule of law must consider procedure with substance, enforcement with prescription."\textsuperscript{8}

The procedural side of international claims, called by Feller "the Anarctica of international law,"\textsuperscript{9} assuredly needs extensive exploration today. In view of the history of international claims settlement, the logical leaders of this expedition are the lawyers of the United Kingdom and the United States. By the Jay Treaty of 1794,\textsuperscript{10} which provided for the establishment of three mixed claims commissions,\textsuperscript{11} these two countries "inaugurated the modern era of international arbitration and introduced a means of adjustment . . . of disputes arising out of the protection of citizens abroad."\textsuperscript{12} From 1794 until 1910 they submitted 1291 claims against each other to international tribunals,\textsuperscript{13} and by 1939 nearly one-half of the international arbitrations listed by Stuyt involved at least one of the two countries.\textsuperscript{14} Since the end of World War II, moreover, both countries have committed themselves almost exclusively to the lump sum settlement-national claims commission device by establishing semi-permanent commissions under municipal law for the adjudication of international claims.\textsuperscript{15}

\textsuperscript{6} The Western Maid, 257 U.S. 419, 433 (1922).
\textsuperscript{7} See Fisher, Bringing Law to Bear on Governments, 74 Harv. L. Rev. 1130 (1961).
\textsuperscript{8} Proceedings and Committee Reports of the American Branch of the International Law Association 73 (1957-1958).
\textsuperscript{9} Feller, The Mexican Claims Commissions vii (1935).
\textsuperscript{10} 8 Stat. 116, T.S. No. 105 (effective Feb. 29, 1796).
\textsuperscript{12} Dunn, The Protection of Nationals 53 (1932).
\textsuperscript{13} Jessup, A Half-Century of Efforts to Substitute Law for War, Hague Academy of International Law, 99 Recueil des Cours 3, 11 (1960-1).
\textsuperscript{14} Stuyt, Survey of International Arbitrations (1939) (198 of 408).
The purpose of this article, a comparative study of United Kingdom and United States claims practice, is twofold: (1) to provide a reasonably thorough description of the postwar experience of the two countries with the lump sum settlement-national claims commission device; and (2) to determine what advantage the respective national commissions have taken of "the opportunity afforded for the systematic and progressive development of a consistent body of law and precedent relating to international claims." If the procedural aspects of claims practice appear to receive undue stress at first, one might recall Cohen's observation


that "students of legal history know the truth of the statement that 'the substantive law is secreted in the interstices of procedure,' nor need practitioners be reminded how frequently changes in procedure affect the substantive right of parties." 17

I. UNITED STATES PRACTICE

A United States national with an international claim against a foreign country looks to the Department of State for assistance in obtaining redress. As the Department pointed out recently, it has handled such matters: "(1) by submitting individual claims through the diplomatic channel to the foreign government concerned and obtaining restitution or compensation; (2) by obtaining a lump sum in settlement of all claims, with the amount paid distributed by an agency of the United States Government; or (3) by an agreement submitting all claims to an international arbitral tribunal for adjudication." 18

The first alternative, Department of State espousal of a claim, is often the only remedy available to a claimant, especially if his claim is based upon an isolated occurrence. 19 Beginning with the Jay Treaty, however, the Department opted for international claims commissions whenever a large number of claims arose against a foreign country. While use of this alternative contributed to the development of international law by substituting a legal for a political determination, many mixed claims commissions failed to function smoothly. 20 Indeed, one of the original Jay Treaty Commissions broke down completely, 21 whereupon the United States resorted to the second alternative and paid a lump sum to the United Kingdom, 22 which in 1803 established its first national claims commission to distribute the fund. 23 Thus, the national claims commission is not an innovation of recent years, but a device dating back to the earliest days of modern international arbitration.

From 1803 until 1941 the United States concluded at least seventeen lump sum claims settlements with foreign countries, 24 ample refutation of

20. See Lillich 5-15 passim.
21. Lillich, supra note 11, at 268-76.
Rubin’s assertion that “the lump-sum compensation agreement is an unfamiliar, post-World War II phenomenon.” These settlements generally were followed by legislation establishing ad hoc national commissions, the last of which, the so-called American-Mexican Claims Commission, completed its functions in 1947.\textsuperscript{26} By this time, of course, the vast nationalization programs instituted in Eastern Europe were in full swing.\textsuperscript{27} The wholesale claims of the postwar period, coupled with the disinterest in mixed commissions shown by the nationalizing countries, brought their immediate usefulness to an end. The United States has utilized this settlement device only twice since World War II,\textsuperscript{28} validating the old War Claims Commission’s 1950 prediction that “the trend of international conditions may direct current national policy to continue to afford redress in the domestic forum and not through bilateral tribunals.”\textsuperscript{29}

This prediction came just when the United States had committed itself to the use of a semi-permanent national commission to distribute funds received under a 1948 lump sum settlement with Yugoslavia and under future settlement agreements. The $17,000,000 Yugoslav Agreement,\textsuperscript{30} by far the most successful postwar settlement concluded by the United States, was facilitated by the fortuitous fact that with Yugoslavia desperately needing foreign exchange the United States had blocked $47,000,000 of Yugoslav assets, mostly gold bullion held by the Federal Reserve Bank in New York. This fact both induced Yugoslavia to settle its American claims expeditiously and provided a fund from which they could be paid. Thereupon, Congress enacted the International Claims Settlement Act of 1949,\textsuperscript{31} which established the International Claims Commission\textsuperscript{32} and gave it jurisdiction:

\begin{itemize}
  \item \textsuperscript{25} Rubin, \textit{supra} note 15, at 473.
  \item \textsuperscript{29} WCC Report, H.R. Doc. No. 580, 81st Cong., 2d Sess. 9 (1950).
  \item \textsuperscript{30} Agreement With Yugoslavia, July 19, 1948, 62 Stat. 2658, T.I.A.S. No. 1803.
  \item \textsuperscript{32} See \textbf{ICC FIRST-EIGHTH SEMIANNS. REPS. (1950-1954)}.\end{itemize}
to receive, examine, adjudicate, and render final decisions with respect to claims of the Government of the United States and of nationals of the United States included within the terms of the Yugoslav Claims Agreement of 1948, or included within the terms of any claims agreement . . . concluded between the Government of the United States and a foreign government . . . similarly providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof.\textsuperscript{33}

Although the Commission was renamed the Foreign Claims Settlement Commission (hereinafter “FCSC”) in 1954 when it also assumed the functions of the old War Claims Commission,\textsuperscript{34} adjudication of nationalization claims under the above statute still “ constitutes the Commission’s greatest area of current and potential activity.”\textsuperscript{35}

The FCSC, while technically a federal “administrative agency,”\textsuperscript{36} is actually a “quasi-judicial body,”\textsuperscript{37} and especially in recent years it has striven mightily “to raise its prestige to the plane of dignity of a national claims commission performing judicial functions.”\textsuperscript{38} It is composed of three commissioners, appointed by the President with the advice and consent of the Senate, who now serve for staggered three year terms.\textsuperscript{39} At

\begin{itemize}
  \item 35. Id. at 104.
  \item 37. 95 Cong. Rec. 8856 (1949) (remarks of Mr. Richards.)
  \item 38. FCSC FIFTEENTH SEMIANNY. Rep. 3 (1961). Its present Chairman characterizes it as “a judicial tribunal which performs essentially, if not solely, judicial functions.” Re, The Foreign Claims Settlement Commission and International Claims, 13 Syracuse L. Rev. 516, 520 (1962). Compare LEMANS, op. cit. supra note 15, at 110, who believes that “the domestic commission more closely resembles an administrative tribunal than it does a judicial tribunal.”
INTERNATIONAL CLAIMS

last report the Commission employed a staff of 88 individuals. By its enabling act, the FCSC is instructed to decide claims by applying: (1) the provisions of the applicable claims agreement; and (2) the applicable principles of international law, justice, and equity, in that order. The statute empowers the Commission to prescribe such rules and regulations as it deems necessary to enable it to carry out its functions.

Under the FCSC's procedure, claims are filed on its official forms within a time limit set by the Commission. When a claim is received accompanied by supporting documentation it is assigned to a staff attorney for study, development and investigation. If he is satisfied that all relevant evidence available has been produced, he will recommend either that the Commission: (1) on its own initiative or upon the claimant's application direct that a conference be held on any issue involved in the claim; (2) order a hearing upon specific issues raised in the claim; or (3) issue a proposed decision in determination of the claim without benefit of conference or hearing.

When a proposed decision wholly or partly denies his claim, the claimant has a statutory right to a hearing. If he takes no action within the time specified by the Commission's rules and regulations, the proposed decision automatically becomes final. If he does request a hearing, a de novo proceeding will be conducted by the FCSC in plenary session or by one or more of the three commissioners. After this hearing, at which the claimant may call witnesses and submit other evidence, the

41. See note 33 supra.
43. A copy of an official form is reproduced in LILICH & CHRISTENSEN app. B.
44. In a recent revision of its procedures, not reflected in its published rules and regulations, the FCSC adopted the policy of assigning novel and important claims to individual members of the Commission in the first instance. FCSC Fifteenth Semiann. Rep. 3 (1961). See also Re, The Foreign Claims Settlement Commission: Its Functions and Jurisdiction, 60 Mich. L. Rev. 1079, 1091 n.57 (1962).
45. 45 C.F.R. §§ 531.5(a)–(b), 531.7 (1960).
46. 64 Stat. 15-16 (1950), 22 U.S.C. § 1623(h) (1958). According to the FSCS, recent attempts to improve the legal draftingship of staff attorneys have reduced the number of requests for hearings. "Claimants and counsel are now fully apprised of all the issues of law and fact and deficiencies in the record, and therefore know precisely the facts that must be proved in order to establish a compensable claim. One result has been the substantial reduction in the number of requests for oral hearings." FCSC Sixteenth Semiann. Rep. 3 (1962).
47. 45 C.F.R. § 531.5(g) (Supp. 1963).
48. A disappointed claimant may object to a proposed decision but not request a hearing, in which case the FCSC will examine the entire record before reaching a final decision or ordering further proceedings. 45 C.F.R. § 531.5(h) (1960).
49. 45 C.F.R. § 531.6(c) (1960).
Commission may proceed to a final decision of the claim, which may affirm, reverse or modify the proposed decision. Following this final decision, or following the time when a proposed decision automatically becomes final, the claimant may petition to reopen the claim on the ground of newly-discovered evidence. Absent such petition, the statute makes the FCSC’s final decision “a full and final disposition of the case in which the decision is rendered.”

Before considering the variety of claims programs administered by the FCSC under the above act and subsequent legislation, two points should be mentioned which affect the status of the Commission and the precedent value of its decisions: these are the character of its decisional process and its freedom from judicial review.

A. FCSC’s Decisional Process

Legislative history of the International Claims Settlement Act leaves no doubt that Congress intended the claims to be processed on an adversary basis, and a staff attorney in the early days of the Commission attested that he and his colleagues served “as adversaries to the claimants in all hearings before the Commission.” Nevertheless, within a few years the FCSC’s then Chairman enjoined it to keep “procedures as non-adversary as it can and to prevent, at all levels of processing, either the appearance or the fact of ‘opposition’ to claims.” The shift in approach as a consequence of this directive may have had its origin in the fact that Yugoslav claimants, of necessity, frequently relied upon the Commission’s help in securing needed evidence, which often meant the difference between the denial or allowance of a claim. A former commissioner estimated that at least 85 per cent of all claims would have been denied if the FCSC had not assisted claimants in that fashion and had continued to place the burden of submitting all the evidence on the claimant. Such cooperation between Commission and claimant, which fortunately

---

50. 45 C.F.R. § 531.5(i) (1960).
52. 45 C.F.R. § 531.5(e) (1960).
55. Rode, supra note 15, at 621.
57. Clay, supra note 15, at 592. “Destruction of records, books, and documents, the passage of time, the dimming of memories, and the general upheaval that followed the war in Europe have led to a liberalization by the Commission of the strict common-law rules of evidence.” Re, supra note 38, at 524 n.50.
INTERNATIONAL CLAIMS

still exists, may well have compromised the actual decision-making process. Another and stronger reason behind the shift in approach, however, would seem to be the traditional bête noire of the administrative process: the administrator's overestimation of the worth of his so-called "expertise." The former Chairman quoted above, for instance, apparently thought an adversary system unnecessary because "our staff attorneys and to some extent the members of the Commission develop a certain 'feel' for the truth which is of great assistance in estimating and appraising the likelihood or unlikelihood of the various claimed factual situations."

This writer has criticized the FCSC's rather mystic faith in its ability to "weed out bad claims" and its failure to adopt some formal defense procedure like that utilized by the Foreign Compensation Commission. Precedent for such procedure is not wanting in the United States, for the statute establishing the Spanish Treaty Claims Commission in 1901 provided for the appointment of an Assistant Attorney General of the United States who, with the necessary staff attorneys he was authorized to employ, was to defend the fund in all claims before the Commission. Granted that the FCSC's enabling act contains no such provision, there is nothing to prevent the Commission from exercising its rule-making power to establish a division within itself charged with this function. Indeed, the FCSC's predecessor, the old International Claims Commission, provided in its rules of practice for a "Solicitor of the Commission," who was to be "a necessary party in all hearings." The rules stated:

(a) The Solicitor may initiate a proceeding for approval of a claim in part or in whole which he deems entitled to approval, by submitting a written recommendation to the Commission, stating the reasons and grounds for such approval.
(b) In proceedings wherein the Solicitor is of the opinion the claims should be denied, he shall make a written recommendation to the Commission, stating the reasons and grounds for the denial.

61. LILLICH 51-52. See text at notes 137-39 infra.
63. FCSC, Settlement of Claims by the Foreign Claims Settlement Commission of the United States and Its Predecessors 266 (1955) (hereinafter cited as FCSC 1955 Rep.). Bindschedler mentioned this aspect of Commission practice and concluded that "la commission travaille comme une instance quasi-judiciaire." Bindschedler, supra note 15, at 291. Since the use of a Solicitor has been abandoned, one may only speculate whether he still maintains this characterization.
64. FCSC 1955 Rep. 268.
The rôle played by the Solicitor, whose duties were very similar to those now performed by the Legal Officer of the Foreign Compensation Commission, introduced an element of \textit{true adjudication} into the Commission's decisional process at a time well before any possible hearing.\textsuperscript{65} Unfortunately, the office no longer exists, and whatever formalized opposition to claims remains arises only at the hearing. But even the extent to which these hearings are judicial in character is subject to question.\textsuperscript{66}

\textsuperscript{65} There has been some unnecessary confusion about the meaning of the words “adjudication” and “distribution” in international legal terminology. As the title of a work by this writer indicates (see \textsc{Lillich}), he subscribes to the view that “the true function of the [Foreign Claims Settlement] Commission is to \textit{adjudicate} the claims presented. . . .” \textit{Re, The Foreign Settlement Commission and the Adjudication of International Claims}, 56 Am. J. Int'l L. 728, 732 (1962). (Italicized in original). Use of the generic term “distribution” to describe its functions, however, does not necessarily show that “the precise standing of the Commission as a judicial tribunal is not always understood.” \textit{Compare Re, supra} note 38, at 520, \textit{with Christenson, supra} note 15, at 619 n.16. “Distribution” is an old and honorable word of art embracing the adjudication of claims by national claims commissions. 3 \textsc{Whiteman}, \textsc{DAMAGES IN INTERNATIONAL LAW} 2035 (1943). See Clark, \textit{Legal Aspects Regarding the Ownership and Distribution of Awards}, 7 Am. J. Int'l L. 382 (1913). See also DeVegvar v. Gilliland, 228 F.2d 640, 642 (D.C. Cir. 1955), \textit{cert. denied}, 350 U.S. 994 (1956).


In contrast to the varying statutory wording, each of the four lump sum settlements between the United States and Communist countries speaks of “distribution.” Article III (1) of the Agreement With Bulgaria, July 2, 1963, 49 \textit{Dep't State Bull.} 139 (1963), T.I.A.S. No. 5387; Article III of the Agreement With Poland, July 16, 1960 [1960] 11 U.S.T. & O.I.A. 318, T.I.A.S. No. 4451; and Article 8 of the Agreement of Yugoslavia, July 19, 1948, 62 Stat. 2658, T.I.A.S. No. 1803 (term “adjudicate” also used.) \textit{But see} Article IV of the Convention With Panama, Jan. 26, 1950 [1950] 1 U.S.T. & O.I.A. 685, T.I.A.S. No. 2129. Since these settlements were intended to be handled by the FCSC, it may be assumed that the Department of State construes the traditional term “distribution” to include FCSC adjudication, thus casting no aspersions upon the Commission's quasi-judicial status.

In any event, semantics aside, one may recognize “the intrinsic judicial character of the task with which the Commission was charged,” Wiener v. United States, 357 U.S. 349, 355-56 (1958), and still question whether the FCSC is using a truly adjudicatory process to fulfill that duty. See text at notes 66-71 infra.

\textsuperscript{66} \textsc{Lillich} 51. Litmans, critical of what he considers the FCSC's nonadjudicatory approach and aware of “the possible abuses of the judicial process caused by ex parte
The Commission's present Chairman, "without attempting to evaluate the merits of the defender of the fund technique," sees no reason to adopt such a procedure, since the staff attorneys perform the duty of presenting all the facts which favor or undermine the claim prior to the Commission's determination. He points out that "one cannot ignore the clear language of the Commission's regulations, which declare that 'the claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his claim.'" Graciously, he suggests that the present writer "has unduly relied upon a remark of a former Chairman of the Commission, and has perhaps been misled as to the actual Commission procedure and the function of the staff attorney."

If certain staff attorneys now are assigned the duty of defending the fund, this development is indeed a step in the direction of a true adjudicatory process. However, no new section has appeared in the FCSC's regulations that would indicate such a change, and the present Chairman himself has acknowledged that the proceedings are essentially non-adversary. With all due respect, the fact that claimants have the burden of proof, as indeed they must, does not make the proceedings any less ex

---

67. Re, supra note 65, at 732. Compare text at and accompanying note 71 infra.
68. Ibid. See Lillich & Christenson 109.
69. Re, supra note 65, at 732. Less gracious is Schein, Book Review, 31 Geo. Wash. L. Rev. 673, 676 (1963), who quotes Re's remark in connection with his review of Lillich & Christenson (1962), which he believes relies "too much upon unstable precedents and earlier techniques of the various divisions of the agency," making the book "an unfortunate dilution of interesting and excellent historical and informational content with imperfect and incomplete technical material." The present writer has no intention of replying piecemeal to the above broad-brush criticism, which the reviewer fails to document for the rather odd reason that he was "painfully limited in time and space..." Ibid. The writer's reasons for such abstention are akin to those of C.P. Snow, who recently stated "that engaging in immediate debate on each specific point closed one's own mind for good and all. Debating gives most of us much more psychological satisfaction than thinking does: but it deprives us of whatever chance there is of getting closer to the truth." Snow, The Two Cultures: A Second Look, The Times Literary Supplement, Oct. 25, 1963, p. 839, col. 3. See Chase, The Tyranny of Words 12-13 (5th ed. 1943).

Nevertheless, he is compelled to question the credentials of a reviewer who, attempting for some undisclosed reason to consign the work to the ashcan, would raise the spectre of a "treatise [which] appeared after the Lillich and Christenson book and, with respect to the functions and operations of the Foreign Claims Settlement Commission, appears to be much more timely." Schein, supra, at 676. (Emphasis added.) The reviewer, of course, gives no citation to this phantom "treatise." Nor could he be expected to do so, there being none. His reference, as he himself later lets drop, is to a law review article, also uncited, which devoted three and one-half pages to FCSC procedure. See Re, supra note 44, at 1090-93. Compare Lillich & Christenson 104-15, which of necessity treats just one aspect of the subject in far greater detail than the survey article. Furthermore, it should be noted that contrary to the reviewer's assertion this article did not appear "after" the book, and therefore, with respect to the subject matter under review, is no more "timely." For the general evaluation of the book by the profession, see Laylin, Book Review, 57 Am. J. Int'l L. 452 (1963).
70. Re, supra note 38, at 523.
parte. Only by providing for a formal and continuous opposition to claims, from the day they are filed until the day of final decision, can a true process of adjudication in the common-law sense of the term be achieved. There has been some indication of late that the Commission may be willing to consider the merits of the defender of the fund technique, a practice which would produce increased respect for the FCSC's decisions among international lawyers throughout the world.\[71.]

**B. Judicial Review**

The Commission's original enabling act provided, *inter alia*, that "the action of the Commission in allowing or denying any claim under this act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise."\[72.\] Legislative history shows that Congress meant this provision to preclude any review of the amount and validity of Commission decisions,\[73.\] and subsequent statutes under which claims have been adjudicated vouch in this specific no-review provision.\[74.\]

Despite this finality clause, judicial review has been sought in seven reported cases,\[75.\] underscoring an early Senator's lament that "there was never a Commission from which disappointed claimants did not appeal."\[76.\] Since the Supreme Court has rejected the trust fund theory and held repeatedly that a lump sum is a national fund to be distributed by Congress.

---

71. The present Chairman recently noted that under its existing rules and regulations the FCSC may use this technique when the claim reaches the hearing stage. Re, supra note 44, at 1091 n.55. See 45 C.F.R. § 531.6(c) (1960), which provides that testimony and evidence "may be offered in evidence . . . by counsel for the Commission designated by it to represent the public interest opposed to the allowance of any unjust or unfounded claim. . . ." (Emphasis added.) The principal weaknesses of the regulation are the fact that it is permissive rather than mandatory, and that it does not provide for a formal defense procedure to commence upon the filing of a claim.

72. See note 51 supra and accompanying text.

73. LILICH 55-58. The act's sponsor explained that "those provisions mean precisely what they say. The actions of the Commission insofar as they refer to the merits of claims will be final. They will not be subject to review by the courts of our judicial system." 95 cong. rec. 8840 (1949) (remarks of Mr. Ribicoff).


76. 3 Cong. Deb. 305 (1829).
as it sees fit, the Government has taken the position that claimants have no right to judicial review absent clear congressional intent to the contrary. This intent being expressly negated by a no-review provision, all seven cases have denied review. As one judge wrote, "errors in the result reached or errors in the admission of evidence or in the making of a legal ruling . . . are not grounds for judicial intervention in the face of the congressional fiat that the Commission's determinations shall be free of judicial review." Although some opinions have implied that judicial intervention would be proper should a claimant's constitutional rights be denied, e.g., if an award was refused by reason of a claimant's race, creed or color, none has involved such a situation. As long as the FCSC accords claimants procedural due process, it is likely that its decisions will continue to be held nonreviewable, a factor adding great weight to the Commission's jurisprudence.

C. Administration of Claims Programs

After fourteen years of claims adjudication, the reasoned decisions of the FCSC and its predecessors form an impressive body of literature. The Commission's jurisprudence comprises not only its decisions under the 1948 Yugoslav Agreement, where awards were made in 876 of 1,556 claims in the amount of $18,817,904.89, exclusive of interest, against a

77. See, e.g., Williams v. Heard, 140 U.S. 529, 537 (1891). See generally LILICH 23-40. See also text accompanying note 134 infra.
79. Ibid.
81. Selected opinions of the FCSC are found in its FIRST-SEVENTEENTH SEMIANNUAL REPORTS (1954-1962), especially the TENTH SEMIANNUAL REPORT (1959), the FOURTEENTH SEMIANNUAL REPORT (1961), and the SEVENTEENTH SEMIANNUAL REPORT (1962). See FCSC 1955 REPORT. See also the semiannual reports of the War Claims and International Claims Commissions, notes 32 & 34 supra.

Under its enabling act, the Commission in approving or denying a claim "shall state the reason for such decision . . . ." See note 53 supra. These reasoned decisions, formerly brief and conclusory, were given only limited circulation, and this writer once urged that the Commission "could do much more to make well-reasoned decisions available to the general public." LILICH 54. Therefore, it is especially gratifying to learn from the FCSC's Sixteenth Semiannual Report that, under a recent innovation, "Commission decisions now comply with the statutory requirement of stating the precise reason for Commission action," and that "the Commission has attempted to assure the wider availability and distribution of its decisions." In this fashion the FCSC's opinions will be subject to wider scrutiny and possible assimilation into customary international law. FCSC, SIXTEENTH SEMIANNUAL REPORT 3, 4 (1962).

Facilities for the reproduction and distribution of decisions have been increased, as have research facilities in the Commission's library. Furthermore, work has been started "on a comprehensive legal index and digest of all Commission decisions which should prove to be an invaluable aid to the legal researcher or counsel seeking legal precedents in earlier Commission decisions." Id. at 4.
fund of $17,000,000,\textsuperscript{82} but also those following lump sum settlements with Panama in 1950,\textsuperscript{83} with Rumania and Poland in 1960,\textsuperscript{84} and with Bulgaria in 1963.\textsuperscript{85} The Rumanian and Bulgarian Agreements constitute a unique development in postwar international claims practice in that they follow rather than precede the FCSC's unilateral adjudication of the claims pursuant to domestic claims legislation.\textsuperscript{86} This 1955 statute amended the International Claims Settlement Act and authorized the vesting and liquidation of the assets in the United States of Bulgaria, Hungary and Rumania, and the adjudication by the FCSC of Peace Treaty, nationalization and certain contractual claims of United States nationals against the three countries.\textsuperscript{87} At the same time, the adjudication of certain claims against Italy and the Soviet Union was authorized, awards to be paid from funds received under the Lombardo Agreement and the Litvinov Assignment.\textsuperscript{88} Under these five claims programs established in 1955, awards were rendered in 4,275 of 10,565 claims in the amount of $304,295,367, including interest, against funds totalling about $40,000,000.\textsuperscript{89}

In the absence of a settlement with Czechoslovakia, Congress again amended the International Claims Settlement Act in 1958 to provide for the adjudication of Czech nationalization claims by the FCSC and their partial payment for vested Czech assets.\textsuperscript{90} Final official figures on Czech claims show that the Commission made awards in 2,630 of 3,976 claims in the amount of $113,645,205.41 in principal and interest.\textsuperscript{91} Now that this claims program has terminated, the FCSC is concentrating on Polish claims\textsuperscript{92} and readying itself for the thousands of claims against

\textsuperscript{82} FCSC 1955 REP. 4.
\textsuperscript{85} Agreement With Bulgaria, July 2, 1963, 49 DEP'T STATE BULL. 139 (1963), T.I.A.S. No. 5387.
\textsuperscript{86} For an analysis of the practical problem of the preadjudication of claims, see Lillich, The United States-Bulgarian Claims Agreement of 1963, 58 AM. J. INT'L L. (1964).
\textsuperscript{89} FCSC, THIRTEENTH SEMIANN. REP. 7 (1960). Interest amounted to approximately $108,231,119. FCSC, ELEVENTH SEMIANN. REP. 1 (1959). Since the precise funds have not been published, the estimate in the text is based upon figures contained in Re, The Foreign Claims Settlement Commission: Completed Claims Programs, 3 VA. J. INT'L L. 101, 108-13 passim (1963).
\textsuperscript{91} FCSC, SEVENTEENTH SEMIANN. REP. 143 (1962).
\textsuperscript{92} FCSC, SIXTEENTH SEMIANN. REP. 6-7 (1962).
Germany and Japan that will be filed under the War Claims Act of 1962. 93

To sum up, in the past dozen years or so the FCSC and its predecessors have processed a total of more than 600,000 claims, issuing nearly 400,000 awards in an amount exceeding 500 million dollars. 94 Although these awards have not always been paid in full, in excess of one-third of a billion dollars has been awarded to American claimants. 95 The volume and magnitude of international claims make it imperative that the substantive standards and procedural processes be continually scrutinized and refined. 96

II. UNITED KINGDOM PRACTICE

A British national with an international claim against a foreign country looks initially to the Foreign Office for aid in securing redress. The Foreign Office, whose experience closely parallels that of the Department of State, also has handled claims in the same three ways. According to one member of Parliament:

One was by setting up a Mixed Claims Commission which adjudicated on each claim between the claimants and the foreign government concerned. In a formal sense that was quite a suitable arrangement, but it has proved very slow in operation.

. . . .

The second way in which this has been dealt with in the past has been an agreement between His Majesty's Government and what I might call the debtor government as a result of which the lump sum for all the British claims is agreed. That leaves the Government here to deal with the splitting up of the lump sum among the individual claimants.

. . . . There is a third way, which has not, I think now very much practical relevance . . . and that is the possibility of direct negotiation with the government concerned on each separate claim; but as the House will realise, at any rate where

---

93. See note 74 supra. The Commission also will preadjudicate certain claims against Canada for property damage caused by the Gut Dam under the Gut Dam Claims Act, 76 Stat. 387 (1962). Furthermore, a few additional nationalization claims under the 1960 Rumanian and 1963 Bulgarian Agreements remain to be decided. Lillich, supra note 86, at n.65.

94. Re, supra note 44, at 1089.

95. LILICH & CHRISTENSON 1.

96. Comprehensive study of the FCSC's jurisprudence is the subject of an extensive study under the new research program on Procedural Aspects of International Law to be conducted under the auspices of the International Legal Studies Program of the Syracuse University College of Law.
the claims are numerous, that is very rarely a practical procedure.\textsuperscript{97} Like the Department of State, the Foreign Office forsook the espousal remedy long ago whenever a large number of claims were involved. As far back as the Jay Treaty it looked to the mixed claims commission device in such situations,\textsuperscript{98} and it has used this method of settling claims frequently through the years.\textsuperscript{99} However, as the above member of Parliament related in 1950, “it has become more and more difficult to get foreign governments to agree to the use of the Mixed Claims Commission procedure. In fact, the countries with whom we have had to deal in this matter since the end of the war have in all cases, I think, refused to accept the procedure.”\textsuperscript{100}

Faced with this attitude, the Foreign Office attempted to conclude lump sum settlements with the foreign countries concerned. While the United Kingdom had received lump sums in the past, unlike the United States it had not utilized national claims commissions to determine claims thereafter.\textsuperscript{101} Generally the Secretary of State for Foreign Affairs had made the distribution to individual claimants, assisted by “either an individual legal expert to advise him on the distribution of the money, or in some cases a committee, usually under a qualified legal chairman. . . .”\textsuperscript{102} Thus, when confronted with the problem of how to distribute the L 4,500,000 received under the British-Yugoslav Agreement of 1948,\textsuperscript{103} as well as the L 8,000,000 from the British-Czech Agreement of 1949,\textsuperscript{104} the Foreign Office had to cut from whole cloth. The pattern of a semi-permanent national claims commission, in many ways like the FCSC, emerged from the Foreign Compensation Act, 1950.\textsuperscript{105}

This act established the Foreign Compensation Commission (hereinafter “FCC”) and authorized the Government by Order in Council to provide for the “distribution” by the Commission of the sums received from Yugoslavia and Czechoslovakia.\textsuperscript{106} Furthermore, since it was en-

\textsuperscript{97} 475 H.C. Deb. (5th ser.) 40-41 (1950) (Mr. Younger).

\textsuperscript{98} See text at notes 20-23 supra.

\textsuperscript{99} See text at notes 13-14 supra.

\textsuperscript{100} Id. at 40.

\textsuperscript{101} Indeed, the only three British national commissions now known to have existed functioned over 100 years ago. See Lillich, \textit{International Claims: Their Adjudication by British National Commissions in the First Half of the Nineteenth Century}, to be published in 1965.

\textsuperscript{102} 475 H.C. Deb. (5th ser.) 41 (1950) (Mr. Younger).


\textsuperscript{105} 14 Geo. 6, ch. 12, §§ 1-9 (1950) (hereinafter cited as FCA).

\textsuperscript{106} FCA §§ 1, 2. See text accompanying note 65 supra.
visaged that the Commission should be available if similar agreements were made with other countries, section 3 of the act permitted the Government to authorize the FCC to register and determine claims if the United Kingdom contemplated or entered into lump sum settlements with "any foreign country . . . . " The reasons cited for the establishment of the commission were the large number of claims involved, the difficult and complicated issues needing decision, and the belief "that what is essentially a judicial function of assessing claims and the shares of each different claimant should be performed now by a standing body, a judicial body, which should not merely advise the Secretary of State but actually make the decision and actually distribute the money."

The FCC, also characterized as a "quasi-judicial body," has functioned as a judicial tribunal from its inception. It consists of a Chairman and such number of other commissioners as the Secretary of State, with the approval of the Treasury, may determine is necessary. All are appointed by the Lord Chancellor and hold office in accordance with the terms of their appointments. A Chairman and three other commissioners comprised the FCC until 1955, when one commissioner resigned, but by 1959 it was back to its original strength. In both 1960 and 1961 two additional commissioners were appointed to handle the influx of Egyptian claims, and since then its composition has remained at a Chairman and seven commissioners. The Commission employs a staff of 75 individuals at present.

Unlike its American counterpart, the FCC is not instructed to apply either the provisions of the relevant claims agreement or the principles of customary international law. Instead, the act requires it to apply the detailed instructions laid down by the applicable Orders in Council.

107. 475 H.C. DEB. (5th ser.) 39 (1950) (Mr. Younger).
108. Id. at 41. In addition, the point was made that "it is quite obviously preferable that a Commission of this sort should be set up instead of the rather ad hoc procedure used previously by the Secretary of State for Foreign Affairs." Id. at 48. See also Brooks, Registration of International Claims Under the Foreign Compensation Act, 1950, 4 TRANSACT. GROF. SOC'Y 187 (1959).
110. FCA § 1(1).
111. FCA § 1(1) (3).
117. FCA § 2(2). See 475 H.C. DEB. (5th ser.) 42 (1950) (Mr. Younger).
According to the Commission’s late Vice-Chairman it is “not at liberty to resort to the terms of the particular compensation agreement, unless perhaps there is such ambiguity in the wording of the Order in Council that the difficulty of interpretation cannot be resolved from within the Order. In that event alone perhaps, can the terms of the agreement be consulted for clarification.”  Thus it can be said that the FCC does not apply international law directly. Insofar as practice before the Commission is concerned, it is governed by rules of procedure which the FCC adopts subject to the Lord Chancellor’s approval.

Under the FCC’s procedure, claims are filed on its official forms within a time limit set by the Order in Council. Claims generally are screened and developed by the Examiners Department of the Commission before they are turned over to the Legal Officer or one of six staff attorneys. Once the Legal Officer has examined the claim, he may take one of two steps. In the first place, he may file with the Commission’s Secretary a statement recommending that the FCC admit the claim. Secondly, if he is not prepared to make such a recommendation, or if he has and the FCC has not accepted it, he must file an answer to the claim setting out those matters affecting the claim which he believes the Commission should consider, a copy of which must be served on the claimant. While the answer is a pleading, having as its main purpose the narrowing of the issues in dispute, it serves other functions as well. It is the only document before the Commission which relates the entire history of the claim, considers all issues involved and identifies all relevant papers. Also, it satisfies the Legal Officer’s need for a brief should the claim come up for oral hearing. Some indication of the importance of answers in the FCC’s decisional process may be gleaned from the fact that, out of 2,325 Hungarian claims, 2,069 were answered and only 256 received recommendations.

120. FCA § 4(2). Its current rules are found in [1956] 1 STAT. INSTR. 1021 (No. 962) (hereinafter cited as Rule).
121. The FCC’s enabling act permits it to make rules prescribing the time limits for filing claims. FCA § 4(2). The Commission by rule 7 has required claims to be filed “on or before the date fixed in the relevant Order in Council. . . .” But see [1959] 1 STAT. INSTR. 1368 (No. 640), where in rule 7(1) of the rules governing Egyptian claims the FCC sets a specific date. The British-Egyptian Agreement, Feb. 28, 1959, CMND. No. 723 (T.S. No. 35 of 1959) is a very special case and the adjudication of claims thereunder is beyond the scope of this article.
122. Rule 11(1).
123. Rule 12.
When a claimant is served an answer, he has 21 days in which to deliver a reply to the Secretary. With his reply, or within 28 days after service of the answer, whichever is later, he may make a written demand to the Commission for the determination of his claim by oral hearing. If the claimant does not demand a hearing he may submit a written argument, whereupon the FCC, without further reference to him, may make a determination after considering any submissions made by the Legal Officer. When a hearing is held, it is conducted in ordinary judicial fashion. The claimant makes an opening statement, calls witnesses and introduces other evidence, and after the Legal Officer has replied the claimant concludes with any additional remarks he desires to make. The Commission usually reserves its decision, which when rendered is conveyed to the claimant and the Legal Officer.

Before mentioning the half-dozen claims programs administered by the FCC since its establishment in 1950, several points which affect the status of the Commission and the precedent value of its decisions merit consideration. They are its freedom from judicial review, the character of its decisional process and its failure to develop and make known a body of jurisprudence.

**A. Judicial Review**

The FCC's rules provide that its decisions shall be provisional and subject to review by the Commission itself. This review generally is limited to the introduction of additional evidence and to oral argument on key legal points. The Commission's decision following its review of a provisional determination is final; the Foreign Compensation Act expressly provides that "the determination by the Commission of any application made to them under this Act shall not be called in question in any court of law." In an unreported case in 1956, the Divisional Court held that this provision "precluded the court from going into the merits of an application for certiorari to quash such a determination, even though in the case in question the application to quash was founded on alleged excess of jurisdiction as well as patent error of law."

The finality of Commission decisions is not weakened by Section II of the Tribunals and Inquiries Act, 1958, which states that prior statutes

---

126. Rule 17.
127. Rule 35.
128. Rule 38(1), (3).
129. Rule 38(2).
130. FCA § 4(4).
making administrative action final shall not preclude courts from issuing orders of certiorari or mandamus, because that section expressly excludes FCC decisions from its purview.132 Since the Franks Committee recommended that all administrative decisions should be subject to judicial review on points of law,133 the special status accorded the FCC is apparent.

The reasons given for the special exception, similar to the ones advanced in the United States, "were that the payments awarded to claimants were made ex gratio and that it would be undesirable for the calculations made by the Commission in relation to distribution of the limited sums at their disposal to be upset by successful applications to the courts.134 The justification of this exception has been questioned repeatedly,135 and de Smith has suggested that the aggrieved claimant may be able to attack the determination of the Commission on jurisdictional grounds in the Court of Appeals.136 To date no claimant has attempted to secure judicial review on this ground.

B. FCC's Decisional Process

Reference already has been made to the quasi-judicial status of the FCC and the adversary procedure which it has adopted. As one member of Parliament explained, replying to a charge that the Commission moved slowly in determining claims, "there is a judicial procedure to be gone through, and it is not in consonance with British practice for this judicial procedure not to be thorough and absolutely complete."137 With all the administrative work relating to claims handled by the Commission's Secretary, thus freeing the commissioners for purely judicial duties, the single most important factor contributing to the judicial nature of its operations is the existence of "a Legal Officer whose duty it is to represent the interests of the Funds established by the various Orders in Council or, in other words, the general body of claimants and therefore to submit to the Commission, when necessary, arguments showing in what way an individual claimant has failed fully to prove his claim."138

134. de Smith, op. cit. supra note 131, at 239. Under English law, claimants also have no right to share in lump sum settlements. See, e.g., Civilian War Claimants Ass'n, Ltd. v. The King, [1932] A.C. 14 (1931). See text at notes 77-78 supra.
135. The latest criticism is found in Griffith, Constitutional Law and Administrative Law, in Law Reform Now 51, n.1 (Gardiner & Martin ed. 1963).
136. de Smith, op. cit. supra note 131, at 240.
137. 239 H.L. Deb. (5th ser.) 835 (1962) (Lord Lansdowne).
138. Moller, supra note 118, at 233.
One must, of course, avoid exalting form over substance. It is true that in a great many claims the inquisitorial procedure used by the FCSC's staff attorneys would achieve the same result as the FCC's adversary procedure. Indeed, in most cases both commissions would reach the same result insofar as fact-finding is concerned. But the same cannot be said of claims involving complicated legal issues where surely the Legal Officer's arguments, often accepted but sometimes rejected, inject a wholly independent line of thought into the proceedings. Completely free from Commission influence and responsible for weighing the legal and factual merits of all claims from the time they are filed, the Legal Officer, in his role as a personable "advocatus diaboli," provides a constant and consistent factor in the FCC's decision-making process. Here one may say that form has had a beneficial effect on substance.

C. Development of a Jurisprudence

With respect to the development of a jurisprudence, the Commission fares less well. Unlike the International Claims Settlement Act, the Foreign Compensation Act does not specifically require the FCC to state the reasons for its decisions, and although it records them in minutes of adjudication the Commission never has issued them for publication. Instead of a reasoned decision, the claimant receives a letter from the Registrar stating the FCC's determination and identifying those elements of the claim allowed and denied. This procedure is quite inadequate for both practical and jurisprudential reasons.

From the practical standpoint, the Commission's silence as to its reasons for denying a claim in whole or in part may work hardship on a claimant attempting to substantiate his claim on review. Take, for example, the case of a claimant who, uncertain whether his claim was denied on legal grounds or for failure to substantiate it sufficiently, does not know which defect he must attempt to cure. Assistance from the Legal Officer or information from the bench may help him upon review, but only at the risk that he may have spent considerable time and money on a point already won or, as may be the case, on a point lost for good. Not without reason, the Franks Committee concluded that "a reasoned decision is essential in order that, where there is a right of appeal, the applicant can assess whether he has good grounds of appeal and know the case he will have to meet if he decides to appeal."

139. 167 H.L. Deb. (5th ser.) 1116 (1950) (Lord Chancellor).
Turning to the jurisprudential aspect of the problem, the reasons for publishing written decisions scarcely need stating. Not only did the Franks Committee believe that the claimant had a right to be appraised of the bases for the decision, but it considered written opinions more likely to be better reasoned and resolved. While the FCC does record the reasons for its decisions in minutes of adjudication form, surely the high quality of these minutes would not be lessened if they were prepared with publication in mind. Furthermore, with national claims commissions being the normal method of adjudicating claims today, the failure to make known the bases of claims adjudications forfeits to a great extent the chance to develop the law of international claims. Hence, one can only reiterate Martin's suggestion, made five years ago, "that appropriate arrangements should be made, as soon as possible, for the regular publication at least of those determinations of the Commission in which points of legal principle are involved."

D. Administration of Claims Programs

Some indication of the contribution that the FCC could make to the progressive development of the law of international claims by the publication of its decisions may be seen from a brief survey of the settlement agreements which it has administered. Under the Yugoslav and Czech Agreements, which provided the raison d'être for the Commission, only nationalization claims were compensable. Awards were made in 307 of 623 Yugoslav claims, in the amount of L 25,120,582, against a fund of L 4,500,000. In the case of Czechoslovakia, from a fund of L 8,000,000 awards totalling L 89,768,175 were allowed in 1,511 of 2,302 claims. Thus a Yugoslav claimant received 17.9 per cent and a Czech claimant only 8.9 per cent of his award. The next lump sum settlement, with Poland in 1954, provided for the payment of L 5,465,000 in settlement not only of nationalization claims, but also of Polish government guaranteed debts and other prewar banking and commercial debts. Furthermore, two direct payments to corporations amounting to L 535,000 were made under the agreement, an innovation in the lump sum settlement technique. By expanding the categories of claims settled, the Polish Agreement also opened the way to more broadly based settlements, often

141. Ibid.
144. Ibid.
providing for the compensation of claims not thought allowable under traditional international law.\textsuperscript{146}

In the same year as the Polish Agreement, the device of registering claims prior to the negotiation of a settlement first was used. Under Section 3(a) of the Foreign Compensation Act the Government, when it contemplates a compensation agreement with a foreign country, may by Order in Council require the FCC to register claims to participate in such a settlement and to make a report thereon. In an effort to provide British negotiators with a better estimate of the number and amount of claims against Bulgaria, Hungary and Rumania, Orders in Council were made in 1954 authorizing the registration of claims against these countries.\textsuperscript{147} The belief that this technique will help secure better settlements than were paid under the Yugoslav and Czech Agreements finds support in figures showing that awardees under the Bulgarian Agreement of 1955, the only settlement concluded after the institution of registration for which statistics now are complete, received payments amounting to 32.6 per cent of their awards.\textsuperscript{148} The Bulgarian experience cannot be considered conclusive evidence of the usefulness of registration, for as Martin has observed, “the size of a compensation fund obtainable from an expropriating Government is determined neither exclusively nor pre-dominantly by the particulars which can be presented of the claims put forward.”\textsuperscript{149} Nevertheless, it establishes a prima facie case for the effectiveness of the registration device, which is being used again to register additional claims against Czechoslovakia and the Soviet Union.\textsuperscript{150}

The 1955 Agreement with Bulgaria in the amount of L 400,000 covered those classes of claims mentioned in the Polish settlement and added some new categories as well.\textsuperscript{151} Claims arising out of insurance contracts, Peace Treaty claims and “personal prejudice” claims all made their appearance for the first time. The Hungarian lump sum settlement in 1956 repeated the broad categories of the Bulgarian Agreement and added a claim for payments made by the Treasury under its guarantee

\textsuperscript{146} See Brooks, \textit{supra} note 108, at 191-92.
\textsuperscript{149} Martin, \textit{supra} note 142, at 249-50.
for one Hungarian prewar issue of debenture stock.\footnote{152} Hungary agreed to pay L 4,050,000 in settlement of these claims, plus L 450,000 direct to Rothschilds in favor of certain creditor committees claiming for prewar short-term credits and unpaid Hungarian Treasury bills. Finally, the Rumanian Agreement of 1960, under which L 1,250,000 was paid in settlement of nationalization and Peace Treaty claims against that country, represents a much simpler agreement than its two immediate predecessors.\footnote{153}

From this description of the United Kingdom's postwar lump sum settlements with Eastern European countries\footnote{154} it can be seen that the FCC, even more than its American counterpart, has evolved from a specialized commission adjudicating nationalization claims to one handling a wide variety of claims. Whether some of the new classes of claims covered, \textit{e.g.}, creditor claims, can be classified as international claims at present is an open question. In any event, they represent areas where the lump sum settlement-national claims commission device, by gradually expanding the scope of national protection to keep abreast of the actualities of current international life, is contributing to the development of the law of international claims by filling the role formerly assumed by mixed claims commissions. Since the United Kingdom is in the forefront of this process of juridical germination, a detailed study of the FCC's jurisprudence is perhaps even more important than the needed study of the FCSC.\footnote{155}

\textbf{III. ASPECTS OF FCSC AND FCC JURISPRUDENCE}

While the decisions of the FCSC and the FCC constitute a considerable body of claims law, their value as precedents depends to a great extent upon the applicable legal standards. Although the FCSC applies international agreements and customary international law in most instances, its decisions cannot be accorded the weight given opinions of international claims commissions since its application of the rules, even if recognized by the foreign country in the settlement agreement, is a unilateral one. Decisions of the FCC, on the other hand, might seem to have even less international value, being based upon Orders in Council

\footnote{152. British-Hungarian Agreement, June 27, 1956, Cmnd. No. 9820 (T.S. No. 30 of 1956), 249 U.N.T.S. 19.}
\footnote{154. The Egyptian settlement has not been considered. See text accompanying note 121 supra.}
\footnote{155. See text accompanying note 96 supra. See also Lillich, \textit{The Jurisprudence of the Foreign Compensation Commission: Eligible Claimants}, 13 \textit{Int'l & Comp. L.Q.} (1964).}
INTERNATIONAL CLAIMS

usually restating the terms of the lump sum settlements. The distinction, however, is more theoretical than real, for in most instances the Order accurately reflects the standards previously agreed upon by the two countries, enabling the FCC to apply international law by reference. In any event, decisions of either commission must be examined carefully in terms of the legal standards which the commission is applying before an estimate can be made of their international value.

Another factor which must be kept in mind when evaluating the jurisprudence of these commissions is the extent of judicial freedom enjoyed by each. When the FCSC applies the terms of an agreement providing compensation for the "nationalization or other taking" of property, for instance, it has considerable freedom in determining just what action of a foreign country constitutes a "taking." The FCC, on the other hand, may be limited to compensating claimants whose property has been taken under certain scheduled measures. Obviously, the FCC in such a case has no power to deal with the important problem of "creeping nationalization." Thus, while the various Orders which the FCC construes spell out the terms of the settlement agreements, supposedly easing the Commission's task by doing for it what the FCSC must do for itself, at the same time they greatly restrict, for better or worse, the Commission's freedom of decision.

A final point which should not be overlooked when comparing the judicial function of the two commissions is their relative independence of their respective executives. The FCSC, initially housed in the Department of State, is now a completely independent agency. In several instances, once again for better or worse, it has reached decisions on questions of international law which conflict with the position taken by the Department of State. Indeed, in one noted case under the Yugoslav Agreement, the Commission expressly rejected the Department's contention that the settlement agreement embraced a certain claim, despite evidence to that effect submitted by the agreement's negotiator. The FCC, also an independent body, has less freedom of maneuver under its Orders which are drafted in the Foreign Office. Furthermore, in the past its decisions on both general legal questions and specific claims have been reversed

156. See LILLICH & CHRISTENSON 62 n.245.
159. See, e.g., Section 1 of the Czech Amendment Order, [1952] 1 STAT. INSTR. 1092 (No. 1413).
160. See Section 1 of the Polish Nationalisation Amendment Order, [1961] 2 STAT. INSTR. 2336 (No. 1196).
by amendatory Orders in Council, something unknown to United States practice.\textsuperscript{161} The tentative conclusion may be reached, therefore, that the FCC's decisions generally are a more accurate reflection of its Government's position than are the decisions of the FCSC. The decisions of the two commissions on aspects of the eligibility of claimants, one of the most important areas of the law of international claims, will be considered with these preliminary points in mind.

Under customary international law a government will espouse the claim of an individual against a foreign country only if the claim has been owned by one of its nationals from the date of its accrual to the date of its settlement.\textsuperscript{162} This continuity-of-nationality rule is found in the settlement agreements of both countries and in their Orders in Council and domestic claims legislation as well.\textsuperscript{163} In only two instances, one involving Czech claims in the United Kingdom and the other Italian claims in the United States, have the legal standards been modified to allow the claims of nationals who acquired such status after the date of the international wrong.\textsuperscript{164} In both countries, however, the traditional rule has been relaxed somewhat by requiring continuous nationality only to the date of the lump sum settlement.\textsuperscript{165} This departure from the traditional rule permits the payment of awards to non-national heirs and legatees when elderly claimants have died during the long course of claims adjudication.\textsuperscript{166} Another departure from the traditional rule may be found in the decisions of both commissions allowing the claims of dual nationals.\textsuperscript{167}

In the case of business associations, however, a divergence of opinion between the two commissions is apparent. Insofar as partnership claims are concerned, the traditional British practice held "that a firm is not an

\textsuperscript{161} Twice Congress has liberalized the statutory standards under which the FCSC was adjudicating claims, once to permit awards to certain so-called "late nationals" claiming against Italy, and once to allow additional awards based upon direct stock ownership in nationalized Balkan corporations. 72 Stat. 531 (1958), 22 U.S.C. §§ 1641c, 1641j(c) (1958).

\textsuperscript{162} 1 Oppenheim, International Law § 155b (8th ed. H. Lauterpacht 1955).


\textsuperscript{166} See, e.g., FCSC 1955 Rep. 21-22.

\textsuperscript{167} Cf. Application of Janos Ivan and Vilma Vago (BY 344 undated), and FCSC 1955 Rep. 213-14.
entity in English law, and that intervention and protection can only extend to individual British interests in a firm, not the firm itself." While this view still may be the position of the Foreign Office, and certainly reflects current Department of State and FCSC practice, the British agreements and Orders permit an award to a firm regardless of the nationality of its partners. In one case the FCC rendered an award to a firm despite the fact that all the individual partners were Dutch citizens. Only in the case of Hungarian claims, where the Order gave the FCC some flexibility in the matter, was the Commission able to look to the nationality of the partners. This return to traditional practice which prevents non-nationals from getting a slice of what should be exclusively British cake seems sound indeed.

With respect to corporate claims, both the United States and the United Kingdom formerly took the position that the claim of a corporation established under their laws was espousable without regard to the nationality of its stockholders. Gradually this view evolved to the point where both countries also insist "upon the presence of a substantial national-owned beneficial interest in the corporation. Where such an interest is lacking, mere nominal nationality based on the law of incorporation does not suffice for the exercise of protection." This conclusion is accurate with regard to American practice, which generally requires that 50 per cent of the corporation's outstanding stock or other beneficial interest be owned by United States nationals, but a caveat is necessary insofar as FCC practice is concerned, since settlement agreements and Orders in Council allow the claim of "companies" or "corporations" irrespective of the nationality of the stockholders. As with partnership claims, it is thus appropriate to ask whether, in view of the

173. Unfortunately, the recent Roumanian Order rejects this approach and, following the pattern of other claims programs, once again permits such claims regardless of the nationality of the partners. Section 1(2)(d) of the Roumanian Order, [1961] 3 Stat. Instr. 3476 (No. 1832).
174. See Beckett, Diplomatic Claims in Respect of Injuries to Companies, 17 Transact. Grot. Soc'y 175, 185 (1932); Lillich & Christenson 15.
177. The FCC's form of Rumanian claims does not require a corporate claimant to state the British interest in the corporation.
limited funds available for distribution, it is wise to throw the mantle of British protection around what may be non-British interests. One also may speculate about the eligibility of such claimants under customary international law.

This approach to the claims of business associations which emphasizes legal formalism and administrative convenience to the detriment of real British interests concerned, also is manifest in the FCC's decisions on stockholder claims. Here, ironically, it is not the over-protection accorded some claimants that injures the real British interests, but the converse; the same reasons that lead to the allowance of all partnership and corporate claims of British business associations operate to cause the disallowance of meritorious stockholder claims.

The rule has long since developed in international law that stockholders in non-national corporations may seek protection to the extent of their proportionate interest in the injured or nationalized corporation. Although strictly speaking all such claims are "indirect" in that the initial international wrong is to the corporation, a useful distinction was developed in the United States between "direct" and "indirect" stockholder claims. Under this approach a direct claim arises when the claimant owns stock in the wronged corporation, while an indirect claim occurs when the claimant owns stock in another corporation which, in turn, owns stock in the wronged corporation. American practice, reflected in the legal standards applied by the FCSC, permits the claims of direct stockholders without regard to the total American interest in the corporation concerned. British practice, as FCC decisions show, is in accord on this point. In the case of indirect stockholder claims, however, the United States generally allows such claims if there is a 25 per cent American interest in the wronged corporation. The FCC does not allow such claims at all, with three exceptions mentioned below. Since the lump sum settlements concluded by the United Kingdom appear broad enough to encompass such claims, only the British Orders having precluded their allowance, presumably there exists a fundamental difference of opinion on the question of the extent to which international law protects such stockholders.

The refusal to sanction these claims is in accord with the formalistic


approach to stockholder claims advocated by certain Scandinavian writers. Under this approach which stresses domestic corporation law to an extreme, the prime claim for compensation resides in the corporation, and any settlement by the country of incorporation puts an end to the matter. Only when there is no possibility of the corporation's claim being satisfied is a stockholder claim possible, and even then the claim "should not be receivable unless an effective cooperation between the States intending to put forward claims of this nature has been arranged." This approach is fine in theory, but it does not accord with the realities of present day claims settlement. First, it presupposes a degree of cooperation between claimant countries which is simply nonexistent and probably impossible. As long as the conclusion of lump sum settlements turns on political and economic factors, such countries will be more interested in securing the maximum compensation for their nationals than in coordinating their efforts with other claimant countries for what in large measure would benefit only the taking states. Second, it completely overlooks the fact that most postwar lump sum settlements not only are with Communist countries, but also involve ownership interests through corporations in other Communist countries which are unlikely to join in any such cooperative effort.

The Yugoslav and Czech Orders in Council are the least unfavorable to this class of stockholders. These Orders allowed such claims if (1) the country in which the corporation was established had concluded a settlement with the nationalizing country, and (2) this settlement agreement expressly excluded the stock interest of the claimant from compensation under its terms. While a few claimants were able to satisfy these requirements, presumably through interest in Swiss corporations, many saw their claims denied on the ground that the country of incorporation had not concluded the necessary settlement with Yugoslavia or Czechoslovakia. Thus, where the claimants were the majority stockholders in an Austrian corporation, which in turn held the majority of shares in a Czech corporation, the FCC denied the claim in the absence of a Czech-Austrian settlement. The effect of this approach is to delegate to a third state, perhaps even a Communist one, the power to control the

---

182. Baage, Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders, 34 BENT. YR. INT'L L. 162, 175 (1958). See also FORCHHEL, NATIONALIZATION 112-14 passim (1957).
184. Section 14(a) (ii) of the Czech Order, [1950] 1 STAT. INSTR. 775 (No. 1191), and Section 15(a) (ii) of the Yugoslav Order, [1950] 1 STAT. INSTR. 784 (No. 1192).
185. Application of Julius Herman Meinl (BC 1762 undated).
claims of British nationals for their property losses. At the very least the presumption contained in these Orders should be reversed and an indirect stockholder claim allowed, unless a prior settlement has been concluded by the third state expressly covering the British interest involved. 186

Unfortunately for indirect stockholder claimants, the Czech and Yugoslav Orders represent the apex of liberality in the allowance of such claims in the United Kingdom. While a limited number were permitted under the Polish Nationalization Order, 187 none was allowed under subsequent Orders, each of which conclusively ruled out indirect stockholder claims. 188 Since the FCC is bound by these Orders, it has had to take an attitude toward these claims far stricter than that of its American counterpart. The American approach may permit some such claimants to receive double compensation since the corporation in the third state may receive an award under a settlement agreement concluded by that state, but the low percentage of payments on awards everywhere precludes them from ever receiving anything near just compensation. Moreover, "the possibility of a double intervention does not seem to involve any serious inconveniences, anyway not so great as the lack of diplomatic support of interests which are, as clearly shown by experience, in great need of protection." 189 The present British approach to indirect stockholder claims sacrifices them on the altar of formal corporation law, an ironic result in view of the unnecessarily liberal protection accorded nonnational interests through the formal approach to partnership and corporate claims. It seems highly desirable to reconsider British policy in this whole area, with the aim of fully protecting only British interests.

A final problem involves the standing of trustees to claim when one or more of the beneficiaries of the trust is a nonnational. The FCSC in applying customary international law has held that the portion of a trustee's claim representing the nonnational's beneficial interest should be denied. 190 Under the Yugoslav and Czech Orders, the FCC also held that it was the nationality of the beneficiary and not that of the trustee

186. Annex A(g) of the Agreement With Poland, July 16, 1960 [1960] 11 U.S.T. & O.I.A. 1957, T.I.A.S. No. 4545, adopts this presumption and allows all such claims except those "which are compensable through any other international agreement to which Poland is a party."
188. See, e.g., Section 32 of the Bulgarian Order, [1958] 1 STAT. INSTR. 1210 (No. 261).
that determined whether British property was involved, but this decision was reversed by a subsequent amendatory Order. Nevertheless, Orders following the four subsequent settlements reverted to the Commission's original position, bringing it into line with American practice. While one might not characterize this result as a "discrimination against trustees," it is fair to contrast it with the British position on the claims of business associations. Unnecessary inconsistency on trustee claims could have been avoided if the goal of protecting only British interests had been kept in mind.

IV. Conclusion

The first purpose of this article was to describe the lump sum settlement—national claims commission device in the United Kingdom and the United States since World War II. Keeping in mind the semi-permanent character of these quasi-judicial tribunals, it is hoped that the article has shed enough light on the operation of the FCSC and the FCC, so that others can see their way clear to criticize in constructive fashion this procedural device for the settlement of international claims.

The second purpose of the article was to determine, by an examination of one aspect of their jurisprudence, the extent to which the two commissions were contributing to the development of the law of international claims. Here it can be seen that the FCSC, less hamstrung than the FCC by detailed legal rules and publishing reasoned decisions which it is required by law to write, has been able to develop and make known a fairly consistent body of law. The FCC, faced with the application of a variety of Orders, which often include overly-rigid provisions, has done less well on this score. In view of the high esteem in which Parliament holds the Commission, it is somewhat surprising that the FCC is not entrusted with the direct application of settlement agreements, preferably agreements with eligibility provisions having as their guideline the full protection of only British interests. Even without this change, the FCC's publication of written opinions would enable it, especially with respect to the new classes of claims which it has handled, to make a greater contribution to the development of international law.

Finally, this comparative study of national claims commissions supports the general conclusion that, while they may sometimes be thought of primarily as expedient devices for settling international claims and only

---

192. See note 159 supra.
193. See, e.g., Section 19(2) of the Roumanian Order, [1961] 3 STAT. INSTR. 3481 (No. 1832).
194. See Martin, supra note 142, at 260-61.
secondarily as expositors of international law, national commissions if afforded sufficient freedom may contribute greatly to the maintenance and development of international law. A critical evaluation of their contribution is long overdue. Only when it is complete will the time be ripe for ambitious formulations of the substantive law of international claims.