

1972

Book Reviews

Recommended Citation

Book Reviews, 6 INT'L L. 667 (1972)

<https://scholar.smu.edu/til/vol6/iss3/19>

This Book Review is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Book Reviews

The Valuation of Nationalized Property in International Law

Richard B. Lillich, Editor and Contributor, The University Press of Virginia, 1972.

174 pp. \$15.00

Reviewed by Leonard J. Theberge

This collection of essays edited and contributed by Professor Lillich of the University of Virginia Law School, around the central theme of valuation of nationalized property is a welcome and timely addition to the literature. In underdeveloped countries Nationalism, regardless of its political stripe, will continue to approve the cosmetic cure of nationalization for as long as deep-rooted social and economic problems remain unsolved.

The issues raised by this book extend well beyond the interesting, but narrow confines of valuation, per se. There is an unsuccessful attempt to reduce the conflict to narrower grounds in order to avoid the more complex, emotional and troublesome issues of compensation and nationalization. Professor Lillich asserts in the preface that the key issue in settling disputes is agreement on methods of valuing property and not the principle of compensation. This statement is convincing only where the latter principle is not disputed.

Recent expropriations in Chile point out that methods of valuation are meaningless, where ideology comes into direct conflict with the principle of compensation. This does not mean that a settlement is impossible. It does mean, however, that where political and social theory eschew the concept of private property, there is either little room to agree about the technical and economic aspects of the problem, or those aspects will be tailored to fit the cloth of political and social theory.

The first chapter is the most theoretical one in the book and will be reviewed last in the order it was read. This arbitrary order of review is based on readability and not scholarship. On a purely academic rating, Chapter One deserves the pre-eminence it receives.

Chapters Two, Three, and Four, under the heading "Contemporary International Practice," support the thesis that reaching internationally accepted methods of valuation is the key issue where the antagonists share similar or common beliefs about how property rights of the world they live in should be organized. Chapter Two by Gillian White of the University of Manchester, deals with "The Problems of Valuation in the Barcelona Traction Case," Chapter Three by Ignaz Seidl-Hohenveldern of the University of Cologne, covers "The Valuation of Nationalized Property in Austria," and Chapter Four by Sir James Henry of the United Kingdom Compensation Commission, describes "The Valuation of Nationalized Property in Great Britain."

This Section of the book underscores the need for this first serious effort to explore in detail the process and standards of valuation. A uniform code would make the task of negotiating settlements much easier where the principle of compensation is not an issue. This Section also points out that non-technical considerations, especially in cases involving governments, play a major role in the settlement of claims. As Sir James Henry puts it:

Historical and economic accidents, as we all know, govern the processes of expropriation and its consequences; these, and the political considerations arising before and during negotiations for a settlement, are so various as to preclude any kind of uniformity, even in the method of assessment of loss.

The two Chapters that deal with "Contemporary United States Practice" describe and analyze the practice and procedure before the Foreign Claims Settlement Commission. In Chapter Five, "The Valuation of Property by the Foreign Claims Settlement Commission," Professor Lillich traces the evolution in the Commission's determination of "fair market value at the date of taking" from a presumption in favor of book value to a more flexible approach in accord with the Congressional intent outlined in Section 503(a) of The Cuban Claims Act of 1964. That section directs, "the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to, (i) fair market value, (ii) book value, (iii) going concern value, or (iv) cost of replacement."

Chapter Six, "The Measure of Damages in Claims Against Cuba," is a readable and interesting report by Sidney Freidberg, sometime member of the Foreign Claims Settlement Commission, and Bert B. Lockwood, Jr., of New York University, on the Cuban Claims Program. This in-depth ac-

count of the legal issues the Commission must resolve, provides insight into some of the more interesting aspects of valuing property rights. For example, does one value motion picture prints by reputation of the star, author or director; the number of times it has been shown; the cost of the print; anticipated revenue; or some other theory such as copyright infringement? The Commission rejected all claims based on future earnings, on the grounds that such earnings are too speculative to be compensated.

In the final chapter, Roger Smith, a corporation lawyer, proposes the adoption of a uniform method of real property valuation based on Anglo-Saxon legal theory and practice. Mr. Smith acknowledges that "there is no reason to believe that the methodology of fair market valuation as developed through domestic proceedings of Canada, Great Britain and the United States should prove the ultimate system of valuation for worldwide foreign-wealth deprivations." It is a flexible and well-defined methodology, and as such preferable to none at all.

Mr. Smith, in addition to making his case for a uniform system of real property valuation, raises the question as to whether or not compensation can be divorced from valuation. He points out that Communist countries, regardless of their ideological position, do conclude compensation agreements. They realize that there are certain benefits in the form of commercial relations and credits, freeing of blocked assets, and establishment of diplomatic relations, which outweigh adherence to a principle. Practical, and not theoretical, considerations will undoubtedly continue to dominate the issue of compensation.

The problem with establishing a universal method of valuation is that it tends to reduce flexibility. If one agrees to valuation, one cannot logically argue against the principle of compensation. Furthermore, it may be desirable to leave the question of valuation open in order to make it possible for the parties to settle their dispute on purely practical grounds. Some countries will never have the foreign exchange to pay for expropriated property. Foreign investors would be better off with one-tenth of the value of their property, than having full valuation without hope of payment.

The theoretical side of this book is found in the first chapter, which contains interesting ideas and well-reasoned arguments. Unfortunately, the blend between law and economics leads not only to enlightenment, but also to obfuscation.

The title of the first chapter, "Valuation upon the Deprivation of Foreign Enterprise: A Policy-Oriented Approach to the Problem of Compensation Under International Law," points out that valuation and compensation are part of a seamless web that can only be solved jointly. Professors Weigel and Weston of the University of Iowa, immediately take

aim at the reader's understanding of language and meaning, by informing him that the term "wealth deprivation" is preferable to the more popular terms "expropriation," "confiscation," "condemnation," "taking," or "forfeiture," for two reasons. First, wealth deprivation avoids "the simultaneous and hence, ambiguous reference to both facts and legal consequences that so often characterizes the more popular" terms. Second, it has no pejorative implication, *i.e.*, it is more neutral than the other terms.

Now, all lawyers are opposed to ambiguity except when it serves a purpose. Some, however, do not know or understand the distinction between the words ambiguous and vague, and use the word ambiguous to cover both meanings. Others prefer being vague to ambiguous. The authors seem to fall in the latter group and defined "wealth preservation" as follows:

It is therefore conceived as a neutral expression which describes the public or publicly sanctioned imposition of a wealth loss (or blocking of a wealth gain)—at whatever time, by whatever means, with whatever intensity, and for whatever claimed purpose, which, in the absence of some further act on the part of the depriving party, would involve the denial of a *quid pro quo* to the party who sustains the deprivations (the component "wealth" usually being preferred to the more popular property, because it refers to all the relevant values of goods, services, and income without sharing the latter's common emphasis upon physical attributes or the civil law's stress on "ownership").

If one is able to overcome the initial shock of being informed that international robbery is not robbery, but wealth deprivation, this chapter is worth reading in its entirety. It does offer a solution, however impractical it may be, to the dual problem of compensation and valuation.

The use of a neutral, non-value term such as "wealth deprivation" is important to the creation of a compensation standard that will satisfy not only the government but the expropriated property of the foreign investor. (It will not satisfy those who prefer to call murder, "murder" instead of "life deprivation" even though the term murder refers to both facts and legal consequences and is an emotive word.) The authors offer a compensation standard based on the value of a foreign-owned investment to a host country, which is intended to meet their policy objectives of encouraging beneficial and discouraging non-beneficial foreign investment in the host country.

If the economic realities in underdeveloped countries were static, there might be some way of determining what is and is not beneficial. This, of course, is not the only problem, and the authors recognize that "Foreign-wealth deprivations, after all, are motivated by political and other cost-benefit calculations, that have little or nothing to do with what is economically beneficial or detrimental to deprivation-prone societies, and it would be

foolish to assume that our recommended compensation standard (or any other, for that matter) has the capacity to deal adequately with all the variables that enter into the wisdom of a deprivation decision.”

Regardless of its shortcomings, this is an illuminating chapter, and deserves the reader's careful attention. If there are solutions, they will only be found by stating the problem in all its complexity. It is a commendable beginning, and together with the rest of the book, the reader will find a good balance between the normative and positive aspects of valuation.

In the end the issue of valuation may prove to be academic, as nations decide to bend the law to their own economic self-interest. The Indian parliament recently established a model that should appeal to many nations. In December, 1971, India amended Article 31 of the 1950 Constitution in order that a state or the national government may acquire property without the necessity of litigating the issues of value or payment. This 25th Amendment to the Indian Constitution may not have resolved the method of valuation but it has clearly removed it from the legal arena and the procedural and substantive safeguards the Courts could have exercised.

Manual of German Law, Volumes I and II

E. J. Cohn, Editor and Contributor, Oceana Publications, Inc., 1971.

Volume I \$15.00 324 pp., Volume II \$16.00 329 pp., both volumes—\$30.00.

Reviewed by Leonard J. Theberge.

The *Manual of German Law*, published in a two-volume set in the United States by Oceana Publications, Inc. and in the United Kingdom by The British Institute of International and Comparative Law, is an extremely useful and well-written guide to the laws of Germany for both the practicing attorney and the student of comparative law. The Manual is a revised edition of a work that has been a standard reference to German Law for more than twenty years. Its purpose, which it serves admirably, is to be a source of information on German law for those who require such information. It is highly recommended to those who have a need to refer to German law.

Volume I was published in 1968 and undoubtedly many readers are familiar with its contents. The extensive General Introduction contains an excellent description of the system of German law with its antecedents and development up to the present, a brief review of the political organization of Germany, a glimpse of the administration of justice and the legal profession, and a section on German legal publications and legal literature. German law is not only placed in perspective to Anglo-Saxon law, but its strengths and weaknesses are analyzed. The remainder of Volume I is devoted to a summary of the civil law of the Federal Republic of Germany and consists of the following five chapters: Chapter 2—General Part of the Civil Law; Chapter 3—Law of Obligations; Chapter 4—Law of Things; Chapter 5—Law of Domestic Relations; Chapter 6—Law of Succession.

The second and final volume published in October, 1971 concerns itself with Commercial Law, Civil Procedure, Conflicts of Laws, Bankruptcy, the Law of Nationality of the German Federal Republic, and a summary of East German Family Law.

Since the structure of German law is entirely different from Anglo-Saxon law, it is imperative for the uninitiated to read the General Introduction of Volume I first, in order to understand the nature and extent of the difference. It is not only the fact of codification which leads to the divergence in systems. There is a conceptual difference that extends to the uncodified parts of German law. Instead of proceeding pragmatically from case to case, German law attempts to form a coherent, systematic, general doctrine applicable to the largest possible number of cases.

It is surprising to the common-law lawyer to learn that this approach has been able, according to the author, to retain the flexibility one considers to be the hallmark of Anglo-Saxon law. Of course, today, we tend to forget that the separate system of equity grew up to counteract the rigidity of the early common-law.

The American corporate attorney who is responsible for the legal supervision of his company's German subsidiary, will find a great deal of useful information in O.C. Gile's Chapter 7 on Commercial Law. In addition to the description of the nuts and bolts of commercial transactions, the Section on Commercial Associations provides an excellent summary of the types of commercial associations, their formation, capital and management.

In view of the activist role, when compared to other European countries, that the German Federal Cartel Office has assumed, the section on unfair competition and restrictive practices should prove beneficial.

Another chapter extremely valuable to the foreign attorney is Chapter 9 by Professor E. J. Cohn on the Law of Civil Procedure. Anyone who has

had the misfortune to be involved in litigation in Germany is aware of the defects and pitfalls in this area of the German legal system. The natural instinct of the experienced attorney would be to refer to the Code of Civil Procedure (*Zivilprozessordnung*) to learn about the rules that German courts of law will apply in a civil case. A great deal of time and bewilderment can be spared by reading the Manual first. The decentralization of the administration of justice in Germany, combined with the complexity of the Code's arrangement, requires a particular type of Teutonic tenacity to fathom the procedure. The time spent in reading Chapter 9 will pay rich dividends to those faced with litigation in the German courts.

The shorter chapters, Conflict of Laws by Professor Cohn, the Laws of Bankruptcy and Nationality by M. Bohndorf, Rechtsanwalt, and Two Aspects of East German Family Law by J. Tomass, Assessor, are recommended to those who have a special interest in these areas.

Professor Cohn and his colleagues are to be commended on the lucidity of their description and analysis. While one might have a particular interest or issue that is not covered in depth, on the whole, the Manual covers its materials in a very complete and efficient manner. In particular, the Manual is commendable for the bibliography it contains. In Volume II, each chapter contains a bibliography of German and English writings on the subject matter which should be invaluable to those who must dig further.

The organization of the Manual is aided by a Systematic Index, a useful summary of the highlights of each chapter. This index makes the Manual a very handy reference guide for the busy practitioner.

If the Manual has its fault, it is in no way connected with what the Editor set out to accomplish, viz. "to assist those who in the course of their work require information on elementary aspects of German law." This goal is amply achieved, and in regard to many parts of the Manual, the claim is too modest. The primary shortcoming from the point of view of the American practitioner is that the book was written with an English approach to the legal issues. While neither the Editor nor the publishers can be faulted for this, it does detract to some extent from its usefulness to the American attorney.

When one weighs this shortcoming against the scholarship of the contributors and the usefulness of this Manual to an understanding of German law and its relation to Anglo-Saxon law, this is a small complaint.

