Permanent Court of Arbitration

Multiple Party Actions in International Arbitration

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ARBITRATING MASS INVESTOR CLAIMS: LESSONS OF INTERNATIONAL CLAIMS COMMISSIONS

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I. Introduction

Over the last twenty years or so, international claims commissions and claims tribunals have become a standard tool to deal with international mass claims.[1] More than fifteen international claims programs have been established during this period to address the consequences of major international crises such as wars, revolutions, and other extraordinary incidents. These commissions and tribunals can appropriately be characterized as "mass claims" programs in view of the number of claims they are typically dealing with, which may range from a few thousand to hundreds of thousands, even millions.[2] **12.01**

Most, if not all, of these claims programs have arisen out of what may be characterized as "political" crises or incidents. More recently, however, there appears to have been a notable shift in that economic and financial crises have also begun to give **12.02**

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1 *See generally* INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES (Howard M. Holtzmann & Edda Kristjansdottir eds., Oxford University Press 2007) [hereinafter INTERNATIONAL MASS CLAIMS PROCESSES]; REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES (Permanent Court of Arbitration ed., Oxford University Press 2006) [hereinafter REDRESSING INJUSTICES].

2 In terms of caseload, at the opposite ends of the range are the Iran-U.S. Claims Tribunal, which faced a caseload of approximately 3,800 claims, and the United Nations Compensation Commission ("UNCC"), which processed approximately 2.6 million claims over a period of some fifteen years. For a comparative study of these and other recent programs, *see* INTERNATIONAL MASS CLAIMS PROCESSES, *supra* note 1.

rise to mass claims. The Argentine financial crisis in 2001–2002 is a case in point, and perhaps not unexpectedly, the first "mass investor claims" that were recently filed with the International Centre for Settlement of Investment Disputes ("ICSID") were against Argentina.[3] These developments are raising questions about the capability of existing institutions such as ICSID to deal with the challenge, as well as about whether the procedural rules of these institutions are suited for proceedings that may involve thousands or even tens or hundreds of thousands of claims.

12.03 The focus of this paper will be on these developments, and in particular on the applicability of certain mass claims processing methods and techniques in international investment arbitration. To what extent can mass claims processing be characterized as arbitration? Or, conversely, to what extent can international arbitral tribunals get involved in mass claims processing and yet be able to claim that they are engaged in arbitration?[4]

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[3] *See* Giovannia Beccara & ors. v. Argentine Republic, ICSID Case No. ARB/07/4, *and* Giovanni Alemanni & ors. v. Argentine Republic, ICSID Case No. ARB/07/8, both listed at <http://icsid.worldbank.org>. According to press reports, the former case has been brought by some 195,000 Italian holders of Argentine bonds and amounts to some USD 4.4 billion. The latter case, which was filed by a different legal counsel, involves some 200 Italian bondholders. *See* 7 INV. TREATY NEWS, 14 Feb. 2007, *available at* <http://www.iisd.org/investment/itn>. *See also* Bernardus Henricus Funnekotter & ors. v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, which involves claims brought by 14 Dutch farmers under the Netherlands–Zimbabwe Bilateral Investment Treaty. The claims arise out of Zimbabwe's resettlement program involving white farmers. This is effectively a test case, since apparently thousands of others are prepared to follow suit. *See* 7 INV. TREATY NEWS, 14 Feb. 2007, *available at* <http://www.iisd.org/investment/itn> (visited June 2008). The arbitral tribunal held a hearing on the merits on October 29–31, 2007, and an award on the merits may be expected in the course of 2008.

[4] The recent emergence of "class-wide" arbitration in the United States raises similar issues in the context of international commercial arbitration; *see e.g.* Eric Tuchmann, *The Administration of Class Action Arbitrations, and* Richard Chernick, *Class-wide Arbitration in California*, both in this volume at p. 325 and p. 337 respectively. Following the landmark decision of the U.S. Supreme Court in Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), all aspects of class-wide arbitration, including their management and certification of the class, have now been delegated to arbitral tribunals. Insofar as class-wide arbitrations involve parties from outside the United States, and insofar as recognition and enforcement of class-wide arbitral awards are sought outside the United States, complex legal issues are bound to arise, largely as a result of differing local regulatory frameworks, in particular between the United States and Europe. On that issue *see e.g.* Alexander Blumrosen, *The Globalization of American Class Actions: International Enforcement of Class Action Arbitral Awards*, in this volume at p. 355. In Europe, there are significant differences between various jurisdictions as to the availability of class actions (in some jurisdictions only "group actions," as opposed to "class actions," are allowed, the main difference being that in group actions plaintiffs must "opt in" or intervene in the lawsuit, in order to be bound), and there are also European-wide legal policy limitations on who can claim and regarding the subject matter of disputes that may be submitted to class actions. Thus, the 1993 European Commission Council Directive on unfair terms in consumer contracts considers arbitration clauses incorporated into contracts entered into between consumers and manufacturers or providers of goods and services as abusive. *See* Council Directive 93/13/EEC of April 5, 1993, Annex (q). Such policies are likely to complicate substantially the recognition of

II. The "Glorious Past" of International Claims Commissions and Claims Tribunals

12.04 International claims commissions and claims tribunals have a "glorious past," as aptly noted by David Bederman.[5] It is not far-fetched to say that international claims commissions served as the cradle of public international law as a professional practice; indeed, until the Jay Treaty arbitrations in the 1790s, public international law was largely an academic discipline, hardly distinguishable from political philosophy or diplomacy.[6] The Jay Treaty arbitrations marked the beginning of a long line of development, which reached its "high noon" around the year 1900 and continued until well after World War I.[7] During this period, *ad hoc* inter-state arbitration became the dominant method of resolving international claims, and *ad hoc* arbitrations such as the *Alabama* arbitration and the many awards of international claims commissions such as the United States-Mexican Claims Commissions, the various claims commissions involving South American countries such as Venezuela, Peru, Chile, and Brazil, and the "Boxer Commission" in China, became to be known as the early leading cases in international law.[8] In a comprehensive survey, A.M. Stuyt has catalogued around 380 international arbitrations that were conducted during the period 1776–1925.[9]

12.05 The decline of *ad hoc* inter-state arbitration began after the establishment of the Permanent Court of Arbitration ("PCA") in the first Hague Peace Conference in 1899 and of the Permanent Court of International Justice ("PCIJ") in 1922; however, it did not vanish entirely from the scene. On the contrary, as the settlement of inter-state disputes became more institutionalized, international claims commissions and tribunals found a new function, or specialization, in the settlement

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class-wide international arbitration in Europe, since class-wide arbitrations in the United States generally involve what would be considered in Europe as consumer disputes.

For discussion of class-wide arbitration in the United States during the pre-*Bazzle* era *see e.g.* D.F. Donovan, *Arbitrating Mass Claims: The Life Insurance Class Actions in the United States*, 16 ICSID Rev. p. 25 (2001).

[5] David J. Bederman, *The Glorious Past and Uncertain Future of International Claims Tribunals*, *in* International Courts for the Twenty-first Century p. 161 (M. Janis ed., Kluwer 1992).

[6] For further discussion *see* Veijo Heiskanen, International Legal Topics pp. 83–95 (Finnish Lawyers' Publishing Co. 1992). The Jay Treaty of November 19, 1794, which concluded the Revolutionary Wars between the United States and the United Kingdom, established two claims commissions, one of which was terminated by way of settlement in 1802. The other rendered awards in 536 claims over a period of five years. Bederman, *supra* note 5, at p. 164.

[7] Clive Parry, *Some Considerations Upon the Protection of Individuals in International Law*, 90 Recueil ADI p. 653, at p. 660 (1956 II).

[8] The case-law of these commissions is reported in detail *in* Marjorie Whiteman, Damages in International Law I-III (1943).

[9] Alexander M. Stuyt, Survey of International Arbitration 1794–1970 (1976).

of international mass claims—although "mass claims" was not used, or even known, as a term of art at the time. After World War I, more than sixty claims commissions and mixed claims tribunals were established to resolve the mass of claims arising out of the war.[10] The claims filed with these commissions and tribunals numbered thousands and even tens of thousands, and it was this new function of mass claims processing that became not only the new lifeline of international claims commissions, but also the cause of their eventual demise. As it happened, the many claims commissions and tribunals established after World War I proved incapable of efficiently handling their workload, and by the 1930s, they came to be seen as one of the many symbols of the institutional failure of international law.[11] As wryly noted by Manley O. Hudson, despite the many differences between the different commissions, they all appeared to share one thing in common—delay.[12]

12.06 After World War II, the international community remembered the lesson, and international claims commissions and tribunals became effectively extinct as they were replaced by diplomatic inter-governmental negotiations and lump-sum settlement agreements. The lump-sum amount, which was fixed on a global basis between the government parties, was then distributed on a claim-by-claim basis in a domestic claims process.[13] It was during this era that institutions such as the Foreign Claims Commission in the United States and the Foreign Compensation Commission of the United Kingdom became the leading institutions in the field of "international" claims. As a result of these developments, international claims programs were effectively nationalized, as were the proceedings employed by them.

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[10] *See* Norbert Wühler, *Mixed Arbitral Tribunals*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW p. 143 (I.R. Bernhardt ed.).

[11] David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Commissions*, 27 N.Y.U. J. INT'L L. & POL. p. 1, at p. 18 (1994) (noting that "[t]he phenomenon of delay was undoubtedly the primary cause of disaffection with the institution of claims settlement by international tribunals").

[12] MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS p. 197 (1944). Perhaps the most extreme example is the *Pious Find of California* award rendered by the United States-Mexican Claims Commission in 1868. After Mexico challenged the enforcement of the award in 1902, the matter was referred to arbitration by the PCA (and became the first case resolved by the new institution). The PCA rendered an award in favor of the United States in 1902, but the matter remained pending until 1967, when it was finally settled by way of an exchange of notes. *See* Bederman, *supra* note 5, at p. 168.

[13] For discussion of lump-sum agreements, *see* BURNS H. WESTON, RICHARD B. LILLICH & DAVID J. BEDERMAN, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975–1996 (Transnational Publishers 1999). Lillich and Weston have counted that between 1945 and 1975 no less than 139 lump-sum settlement agreements were concluded. Between 1975 and 1988 an additional 29 agreements were reached. *See* Bederman, *supra* note 5, at p. 170 (citing BURNS H. WESTON & RICHARD B. LILLICH, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS (1974)).

12.07 Against this background, the recent re-emergence of international claims commissions and claims tribunals—which started with the creation of the Iran-United States Claims Tribunal in 1981 and continued throughout the 1990s—is somewhat perplexing.[14] After a hiatus of some fifty years, why were international claims commissions again seen as a viable option, despite their troubled past, in particular when dealing with mass claims? What had changed?

12.08 There are likely to be many answers to these questions, including, in particular, the surge in the popularity of, and the newly-found faith in, international law and institutions following the end of the Cold War. But while these developments may explain the increased willingness to "internationalize" international claims programs again, the newly-established programs could hardly have been able to sustain their popularity had they proved, in practice, as inefficient as their predecessor programs in the 1920s and 1930s. But they did not. It turned out that the third-generation international claims commissions and tribunals were substantially more effective than their pre-war predecessors and, indeed, most of the many programs established during the 1990s are generally considered "successful" in handling and disposing of their caseload.[15] The enhanced efficiency is largely attributable to increasing reliance by the new programs on mass claims processing methods and techniques developed at the domestic level, in particular in the United States, and the innovative adaptation of such methods and techniques in the circumstances of international claims.[16] These methods and techniques, which include tools such as large-scale computerization, delegation of certain claims review functions to the secretariat servicing the commission, grouping of claims based on similarity of legal and factual issues, common issue determination (i.e. the resolution of legal and evidentiary issues on a "wholesale" basis, or for a group of claims as a whole rather than for each claim individually), use of cover decisions covering claims of several claimants (instead of an individualized decision for each claimant), *ex officio* collection of evidence,

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[14] For a list of these programs *see* the website of the PCA, which contains a comprehensive list of links and key documentation for completed programs. *See* <http://www.pca-cpa.org>.

[15] This is certainly a general sense among those who have been extensively involved in these programs. *See e.g.*, John R. Crook, *Mass Claims Processes: Lessons Learned Over Twenty-Five Years*, *in* REDRESSING INJUSTICES, *supra* note 1, p. 41, at p. 55:

> The nearly quarter-century of modern experience with international mass claims processing since the Iran-United States Claims Tribunal was launched in 1981 demonstrates several things. First and foremost, it shows that the job can be done. It is possible to design and implement international mass claims processes that provide a measure of justice to large numbers of people, based on the consistent and transparent application of legal principles, and within time periods relevant to the lives of the claimants. It can be done.

[16] For discussion *see e.g.* Francis McGovern, *The Intellectual Heritage of Claims Processing at the United Nations Compensation Commission*, *in* THE UNITED NATIONS COMPENSATION COMMISSION: THE THIRTEENTH SOKOL COLLOQUIUM p. 187 (Richard B. Lillich ed., Transnational Publishers 1995).

use of evidentiary presumptions, adoption of a relaxed standard of proof, and reliance on statistical methods, have drastically enhanced the efficiency of claims adjudication.[17]

12.09 More recently, however, it appears that, despite their enhanced efficiency, the third-generation claims commissions have also reached, if not passed, their own high noon. Over the last few years, since around the year 2000, there again appears to have been a turn towards the "nationalization" of international claims commissions. Claims programs that only a few years ago likely would have been created under an international umbrella, are now being established, at least in part if not fully, as domestic bodies operating under the local law and under the supervision and control of domestic courts.[18] Whether or not this trend will continue in the future, and how long it will last, remains to be seen. In any event, what appears to be reasonably clear is that this return towards the national is largely driven by the increasing reluctance on the part of the international community to carry the burden of financing international claims programs and the practical difficulties associated with ensuring the funding of compensation awards.[19]

12.10 As noted above, the sole exception to this new trend appears to be the emergence of "mass investment arbitration"—mass claims arising out of economic and financial crises such as that experienced in Argentina. This development poses a particular challenge to institutions such as ICSID since, unlike the third-generation claims commissions, ICSID is not designed to operate as a mass claims processing facility, and its Arbitration Rules remain silent on the authority of ICSID tribunals to employ the mass claims processing methods and techniques that arguably explain the relative success of modern international claims commissions.[20] In the absence of a specific authorization in the ICSID Arbitration Rules, to what extent

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[17] For discussion *see e.g.* Jacomijn van Haersolte-van Hof, *Innovations to Speed Mass Claims: New Standards of Proof, in* REDRESSING INJUSTICES, *supra* note 1, at p. 13; Veijo Heiskanen, *Virtue out of Necessity: International Mass Claims and New Uses of Information Technology, in* REDRESSING INJUSTICES, *supra* note 1, at p. 25.

[18] This trend is visible in the most recent claims commissions—those operating in Bosnia, Kosovo, and Iraq, the last one being an entirely domestic claims process, the sole international input apparently being in the form of technical advice provided by certain international organizations. *See* Heiskanen, *supra* note 17, at p. 26, n.4.

[19] Thus, two of the most prominent programs—the Iran-U.S. Claims Tribunal and the UNCC—were funded by arrangements that are somewhat unusual and not always available. In the case of the Iran-U.S. Claims Tribunal, the security account that was used to satisfy awards made in favor of U.S. claimants was established from frozen Iranian funds; in the case of the UNCC, the awards were paid out of revenue generated from UN-sanctioned Iraqi oil sales. The most recent programs have operated under much tighter budgets. For discussion *see e.g.* Alan Dodson & Veijo Heiskanen, *Housing and Property Restitution in Kosovo, in* RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS p. 225 (Scott Leckie ed., Transnational Publishers 2003).

[20] *See* the International Centre for Settlement of Investment Disputes: Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"), *available at* <http://icsid.worldbank.org>.

can such methods and techniques still be used? More specifically, to what extent can they be considered consistent with the consensual nature of arbitration and, more specifically, the requirements of due process?

III. Classification of International Claims Commissions and Claims Tribunals

A. Claims Commissions v. Claims Tribunals

Before addressing the possible use of mass claim processing methods and techniques in international investment arbitration, it is worthwhile to recall that modern international claims commissions are diverse. There is not one basic design that fits the size of all of them. From a procedural point of view, one may distinguish between two kinds of international claims programs: those that are based on a more or less elaborate settlement agreement in which one of the parties agrees to pay compensation, or to provide another form of remedy such as restitution, to a specified class of claimants; and those in which the parties agree to establish a mechanism for processing a particular group of claims, but without prejudice to either party's liability. **12.11**

International claims programs that are based on the former model are essentially quasi-judicial (or perhaps "quasi-arbitral") rather than arbitral processes. In the absence of a live dispute regarding the basis of liability, which has been settled by the settlement agreement, there is necessarily no need for the decision-making body to employ fully-fledged adversary proceedings to process and verify the claims. Since the liability issue has been settled, there is effectively no respondent on the level of legal principle; the sole task for the claims commission is to receive the claims, assess whether they meet the applicable eligibility requirements, verify the evidence and, if necessary, quantify the claim.[21] While the respondent party may wish to be heard when these decisions are taken, this is not necessarily the case, in particular if the respondent's overall financial liability has been capped in the settlement agreement, and there is no provision for the return of any excess funds.[22] **12.12**

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[21] Quantification may not be necessary if the legal framework governing the process provides for a fixed amount of compensation, or if the applicable remedy is restitution. Fixed amounts of compensation were available under category "A" (departure) and "B" (death and personal injury) claims in the UNCC, whereas the prime examples of restitution programs are the Bosnian and Kosovo claims programs. The dormant accounts processes (CRT-I and CRT-II) are also, technically speaking, restitution programs in the sense that they involve claims for restitution of assets deposited in Swiss banks.

[22] It is apparently for this reason that Swiss banks did not participate in the second phase of the dormant accounts claims process. For discussion *see e.g.* Veijo Heiskanen, *CRT-II: The Second*

12.13 However, claims programs based on the latter model—without prejudice referral of claims to a claims resolution process—are, in terms of the issues to be resolved, hardly distinguishable from arbitration and, indeed, these programs often employ arbitral methods of dispute settlement, with both written briefing of issues and hearing of both parties on both liability and quantum. While the factual circumstances out of which the claims arise are often very similar, if not identical, and while briefing and hearings can therefore be more limited in scope than in a full-fledged arbitration,[23] the underlying constituting presumptions remain the same: both liability and quantum are disputed and need to be established.

12.14 Perhaps the best example of an international claims program based on the latter model is the Iran-U.S. Claims Tribunal; another one would be the first phase of the Claims Resolution Tribunal for Dormant Accounts in Switzerland ("CRT-I"). Practically all of the other important international claims programs established over the last twenty years or so fall under the former category—the United Nations Compensation Commission ("UNCC"), the second phase of the Claims Resolution Tribunal for Dormant Accounts in Switzerland ("CRT-II"), German Foundation "Remembrance, Responsibility and Future," and the claims programs in Kosovo and Bosnia—although the latter programs, being essentially restitution programs and inspired by the protection of human rights rather than the execution of state responsibility, are somewhat unusual in their design and involve a substantial element of due process.[24] Indeed, from a conceptual perspective, it is on this basis that one could justifiably draw a distinction between claims *tribunals* and claims *commissions*—claims tribunals arbitrate claims that are disputed in terms of both liability and quantum, whereas claims commissions are quasi-judicial bodies operating on the basis of a settlement agreement, or another legal instrument

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Phase of the Swiss Banks Claims Process, in LAURENCE BOISSON DE CHAZOURNES, JEAN-FRANCOIS QUÉGUINER & SANTIAGO VILLALPANDO, *CRIMES DE L'HISTOIRE ET RÉPARATIONS: LES RÉPONSES DU DROIT ET DE LA JUSTICE* p. 147 (Bruylant 2004). Similarly, since Iraq's legal liability for the losses, damage and injury caused by its invasion and occupation of Kuwait was established in Security Council Resolution 687 (1991), its ability to participate in the UNCC claims process was curtailed; however, since there was no cap on its overall financial liability, it was invited to participate in proceedings relating in particular to the unusually large and complex claims. *See* UNCC's Provisional Rules for Claims Procedure, S/AC.26/1992/10, June 26, 1992 ("UNCC Rules"), art. 38(d). For further discussion *see e.g.* Veijo Heiskanen, *The United Nations Compensation Commission*, Recueil ADI p. 296, at pp. 300–302 (2002).

[23] Thus, hearings at the Iran-U.S. Claims Tribunal were, with a few exceptions, generally much shorter than in cases of a similar level of complexity in international commercial arbitration. *See* DAVID D. CARON, LEE M. CAPLAN, & MATTI PELLONPÄÄ, THE UNCITRAL ARBITRATION RULES: A COMMENTARY p. 608 (Oxford University Press 2006).

[24] Thus, neither Serbia nor any other entity allegedly responsible for the mass displacement of population underlying these two claims programs appear as respondents in the proceedings. Instead, the claims are brought by property right holders against current illegal occupants. For further discussion *see* Section III.B., *infra*.

establishing legal liability,[25] that has conclusively settled at least the legal basis of liability, if not both liability and quantum.

Thus, from a procedural perspective the suitability for arbitration of mass claims is a function of the scope of the disputed issues: the broader the scope of disputed issues (i.e. if not only quantum but also liability is disputed), the more likely it is that arbitration is the most appropriate method to process the claims. Conversely, the broader the scope of agreement between the parties (i.e. if both liability and quantum, or at least liability, are uncontested), the more appropriate it is to process the claims in a quasi-judicial or administrative distribution process where claims are resolved largely on the basis of an application of the claimant, without a full-fledged, or indeed any, hearing of the other side. **12.15**

If these are the options, the question arises as to what extent mass claims processing methods and techniques are dependent on the nature of the process. In other words, is the applicability of mass claims processing methods and techniques limited to quasi-judicial claims processing, or can they also be employed in arbitration? Is there anything in the nature of these methods and techniques that renders them unsuited to the arbitral method of dispute settlement or, more generally, inconsistent with the minimum requirements of due process? This is the key issue since it is precisely the absence of an effective respondent (owing to the settlement of principal liability and quantification issues) that has allowed many international claims commissions to shortcut their procedures and substantially increase their efficiency. **12.16**

B. State Responsibility Paradigm v. Human Rights Paradigm

The distinction between claims commissions and claims tribunals often coincides with another important distinction—claims programs based on what may be called the "state responsibility" paradigm, and those based on what may be termed the "human rights" paradigm. Under the former, an international claims process is viewed primarily as a mechanism to enforce the property rights of nationals of one state against another state, whereas under the latter it is essentially seen as a method for protecting, and enforcing, certain human rights of individuals against their own home state, or state of residence. **12.17**

While claims processes based on both of these paradigms can be characterized as "international" in the sense that both involve the enforcement of international law—in the former case, the enforcement of state responsibility (and the relevant primary rules of international law relating to foreign property and investment); in the latter, the enforcement of international human rights (and the relevant rules **12.18**

[25] In the case of the UNCC, Iraq's liability was established in Security Council Resolution 687 (1991). *See supra* note 22.

of international law justifying intervention in the domestic jurisdiction of the state in question)—the underlying legal rationale of the two processes is substantially different. A claims process based on the state responsibility model is, in effect, an alternative to the exercise of diplomatic protection by one state against another state on behalf of its nationals: instead of agreeing to refer the claims to a claims process, the claimant state could try to negotiate a lump-sum settlement. Thus, the state responsibility model operates, as a matter of principle, on a state-to-state level. By contrast, in a claims process based on the human rights model, diplomatic protection is not available as an alternative since the process deals, by definition, with claims by individuals arising out of events taking place in their own state of residence. Thus, unlike the state responsibility model, the human rights model operates essentially on the intra-state level.[26]

12.19 These differences in the underlying rationale of the two models are reflected in their function: in a claims process based on the state responsibility paradigm, claims may be brought not only by the state itself (inter-state arbitration) but also by corporations and individuals having its nationality, whereas in a claims process based on the human rights paradigm, claims are typically, if not exclusively, made by individuals.

12.20 Of the modern mass claims processes, the Iran-U.S. Claims Tribunal and the UNCC are prime examples of claims programs based on the state responsibility paradigm. Both programs dealt with claims brought by nationals of one state or states (in the case of the UNCC, which was a multilateral program, claims were made by nationals of a number of states) against another state. In both programs claims were also brought not only by states but also by individuals and corporations; before the UNCC, even international organizations were eligible to claim. Finally, both programs involved the enforcement of state responsibility in the sense that, for a claimant to be able to prevail on the claim, the liability of the respondent state had to be established. In the case of the Iran-U.S. Claims Tribunal,

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[26] The validity of the model *qua* model is not affected by the fact that some of the individuals residing in the state in question may have the nationality of another state. Similarly, in claims programs based on the state responsibility model some claimants may be dual nationals and thus, at least formally, may be claiming against their "own" state. For discussion of the Bosnian claims process ("Commission for Real Property Claims of Displaced Persons and Refugees," or "CRPC") *see e.g.* Hans van Houtte, *Mass Property Claims Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina*, 48 INT'L & COMP. L.Q. p. 625 (1999). For discussion of the first Kosovo process ("Housing and Property Claims Commission," or "HPCC") *see* Dodson & Heiskanen, *supra* note 19. The second Kosovo claims process ("Kosovo Property Claims Commission," or "KPCC") was established by United Nations Interim Administration Mission ("UNMIK") Regulation 2006/10, as suspended and amended by Regulation 2006/50, both *available at* <http://www.unmikonline.org>. For the Iraqi claims process ("Iraq Property Claims Commission") *see* "Coalition Provisional Authority Regulation 8: Delegation of Authority Regarding an Iraq Property Claims Commission" and "Coalition Provisional Authority Regulation 12: Iraq Property Claims Commission," *available at* <http://www.iraqcoalition.org>.

this was determined on a case-by-case basis; in the case of the UNCC, Iraq's liability was established on a global basis by Security Council Resolution 687 (1991).[27]

12.21 Conversely, the Bosnian, Kosovo and Iraqi claims processes are essentially based on the human rights paradigm.[28] In all of these programs the claims arise out of events that took place in the claimants' own state of residence, and the claims are made almost exclusively by individuals.[29] The available remedies also reflect the predominantly human rights nature of these programs, the emphasis being on various types of property restitution, including the right to housing and repossession of private property. The many recent Holocaust claims programs are arguably also based on the human rights paradigm in the sense that these claims are being made by Holocaust victims, or their heirs, against the government of their former country of residence, or other entities such as private banks and companies that either actively participated in property spoliation or otherwise took advantage of the circumstances.[30]

12.22 The distinction between the state responsibility and human rights paradigms suggests that the recent tendency to "re-nationalize" international claims programs appears to coincide with a shift from processes based on the state responsibility paradigm towards those based on the human rights paradigm.[31] It remains to be seen whether this is only a temporary phenomenon, or whether it reflects a more long-term, systemic shift in the law of international claims. In any event, it also raises

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[27] Security Council Resolution 687 (1991), para. 16, provided that Iraq was "liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

[28] The September 11th Compensation Fund also falls largely under this paradigm, although in this case the government providing compensation—the United States government—is obviously not liable for the events out of which the claims arise. For discussion of the September 11th Compensation Fund, *see* Kenneth R. Feinberg, *Compensating the Families and Victims of September 11th: An Alternative to the American Tort System*, *in* REDRESSING INJUSTICES, *supra* note 1, at p. 235.

[29] Before the Kosovo Property Claims Commission, legal entities are also eligible to bring commercial property restitution claims. UNMIK/REG/2006/50, Section 9.1.

[30] Thus, the Swiss banks' claims programs (CRT-I and CRT-II) and the Property Claims Commission of the German Foundation are based on a comprehensive settlement of claims against private Swiss banks and German companies, respectively, brought before U.S. courts. The litigation against Swiss banks was settled as between the parties, whereas the Property Claims Commission of the German Foundation is based on an inter-state agreement between the United States and Germany and the subsequent German legislation. For discussion of the U.S. litigation against Swiss banks *see* Heiskanen, *supra* note 22. The U.S.-German inter-state agreement and other relevant background documentation (including the German Foundation Act) relating to the German Property Claims Commission are *available at* <http://germany.usembassy.gov/holocaust.html>. For further discussion *see e.g.* Roland Bank, *The New Programs for the Payment to Victims of National Socialist Injustice*, 44 GERMAN Y.B. INT'L L. p. 307 (2002).

[31] See *supra* notes 18–19 and accompanying text.