

Permanent Court of Arbitration

Multiple Party Actions in International Arbitration

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

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

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 12.04

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 12.05

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.

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)).

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?

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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).

