Permanent Court of Arbitration

Multiple Party Actions in International Arbitration
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. 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.

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 rise to significant mass claims.

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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.
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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. 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?

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. TRETY NEWS, 14 Feb. 2007, available at <http://www.iisd.org/investment/trn>. 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. TRETY NEWS, 14 Feb. 2007, available at <http://www.iisd.org/investment/trn> (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. 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. 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. 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. In a comprehensive survey, A.M. Stuyt has catalogued around 380 international arbitrations that were conducted during the period 1776–1925.

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 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.


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 Majorie Whiteman, DAMAGES IN INTERNATIONAL LAW I–III (1943).

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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.).
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.\textsuperscript{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?

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.\textsuperscript{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.\textsuperscript{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), \textit{ex officio} collection of evidence, ...

\textsuperscript{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>.

\textsuperscript{15} This is certainly a general sense among those who have been extensively involved in these programs. See e.g., John R. Crook, \textit{Mass Claims Processes: Lessons Learned Over Twenty-Five Years}, in \textit{REDERESSING 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.

use of evidentiary presumptions, adoption of a relaxed standard of proof, and reliance on statistical methods, have drastically enhanced the efficiency of claims adjudication.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{20} In the absence of a specific authorization in the ICSID Arbitration Rules, to what extent


\textsuperscript{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, \textit{supra} note 17, at p. 26, n.4.

\textsuperscript{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, \textit{Housing and Property Restitution in Kosovo}, in \textit{RETURNING HOME: HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS} p. 225 (Scott Leckie ed., Transnational Publishers 2003).

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.

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

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
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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, 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. 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.
establishing legal liability, 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.

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.

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.

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

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-V.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-V.S. Claims Tribunal,
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).  

Conversely, the Bosnian, Kosovo and Iraqi claims processes are essentially based on the human rights paradigm. 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. 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.

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. 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 GERMANY Y.B. INT’L L. p. 307 (2002).

31 See supra notes 18–19 and accompanying text.

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interesting questions in relation to international investment arbitration. Given that mass investor claims are typically brought by individuals, does the recent emergence of mass investor arbitration signify that a similar shift is also occurring in the field of international investment law? This does not appear to be the case, however, since the first mass investor claims that were recently filed with ICSID have apparently been brought predominantly by individual investors residing outside the host state. Thus, these claims, like the field of international investment arbitration as a whole, appear to fall squarely under the state responsibility paradigm.

IV. Mass Claims Processing Methods and Techniques

A. General Observations

12.23 Modern mass claims processes differ from their classic predecessors mainly in terms of the methods and techniques they use. As noted above, these include methods and techniques 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, use of cover decisions, ex officio collection of evidence, evidentiary presumptions, application of a relaxed standard of proof, and reliance on statistical methods.

12.24 The rules of procedure of many, if not most, modern mass claims processes specifically authorize the use of at least some of these mass claims processing techniques. To give a prominent example, Article 37 of the UNCC Provisional Rules for Claims Procedure (the “UNCC Rules”), which governs the processing of “urgent” (i.e. claims with an asserted value below US$100,000) individual claims, provides as follows:

With respect to claims received under the Criteria for Expedited Processing of Urgent Claims (S/AC.26/1991/1), the following expedited procedures may be used:

a) The Secretariat will proceed to check individual claims by matching them, insofar as possible, against the information in its computerized database. The results of the database analysis may be cross checked by the panel.

b) With respect to claims that cannot be completely verified through the computerized database, if the volume of claims is large, the panel may check individual claims on the basis of a sampling with further verification only as circumstances warrant.

c) Each panel will make its recommendations on the basis of the documents submitted, taking into account the preliminary assessment conducted in accordance with Article 14, any other information and views submitted in accordance with Article 32 and any information submitted in accordance with Article 34. Each panel will normally make its recommendations without holding

32 See supra note 3.
an oral proceeding. The panel may determine that special circumstances warrant
holding an oral proceeding concerning a particular claim or claims.

d) Each panel will complete its review of the claims assigned to it and issue its report
as soon as possible but not later than 120 days from the date the claims in ques-
tion are submitted to the panel.

e) Each panel will report in writing through the Executive Secretary to the Governing
Council on the claims received and the amount recommended to each Government
or other entity for each consolidated claim. Each report will briefly explain the
reasons for the recommendations and, to the extent practicable within the time-
limit, contain a breakdown of the recommendations in respect of individual
claims within each consolidated claim.33

Thus, the UNCC Rules specifically authorize the creation of an electronic
claims database and its use for purposes of claims resolution (Article 37(a)); statis-
tical methods, specifically sampling (Article 27(b)); delegation of claims review
functions to the UNCC secretariat (Article 37(c)); and use of cover decisions
(Article 37(d) and (e)).

Article 38 of the UNCC Rules provides for the use of similar procedures for the
larger claims (i.e. individual claims with an asserted value of US$100,000, as well
as corporate and government claims):

With respect to claims received under the Criteria for Processing of Claims of
Individuals not Otherwise Covered; Claims of Corporations and Other Entities,
and Claims of Governments and International Organizations (S/AC.26/1991/7/
Rev. 1), the following procedures will be used:

a) In so far as possible, claims with significant common legal and factual issues will
be processed together;

b) Panels may adopt special procedures appropriate to the character, amount and
subject-matter of the particular types of claims under consideration;

c) Each panel will complete its review of any claim or group of claims and report in
writing through the Executive Secretary to the Governing Council within 180
days of the date the claims in question are submitted to the panel, except for any
unusually large or complex claims referred to for detailed review, as described
below. Each panel will make its recommendations on the basis of the documents
submitted, taking into account the preliminary assessment conducted in accord-
ance with Article 14, any other information and views submitted in accordance
with Article 32 and any information submitted in accordance with Article 34.

d) Unusually large or complex claims may receive detailed review, as appropriate. If so,
the panel considering such a claim may, in its discretion, ask for additional written
submissions and hold oral proceedings. In such a case, the individual, corporation,
Government, international organization or other entity making the claim may
present the case directly to the panel, and may be assisted by an attorney or other
representative of choice. The panel will complete its review of the case and report
in writing through the Executive Secretary its recommendations to the Governing
Council within twelve months of the date the claim was submitted to the panel.

33 UNCC Rules, supra note 22, art. 37.
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e) Each panel will report in writing through the Executive Secretary to the Governing Council on the claims received and the amount recommended to be awarded for each claimant. Each report will briefly explain the reasons for the recommendations. 34

12.27 Article 38 thus permits, more or less explicitly, the grouping of claims (Article 38(a)); common issue determination, except for certain unusually large or complex claims (Article 38(c) and (d)); and use of cover decisions (Article 38(e)). 35 All of these methods and techniques were in fact used by the panels of commissioner. 36

12.28 Similarly, Section 11.3 of Regulation 2006/50 of the United Nations Interim Administration Mission in Kosovo ("UNMIK/REG/2006/50"), which governs the activities of the recently-established Kosovo Property Claims Commission (KPCC), provides:

The Commission may:
(a) Join or consolidate claims for the purpose of their consideration and reaching decisions thereon where there are common legal and evidentiary issues to be considered;
(b) Delegate to the staff members of the Executive Secretariat, assigned by the Director of the Executive Secretariat to service the Commission, certain claims review and evidentiary review functions, subject to the supervision and final approval of the Commission;
(c) Use computer databases, programs and other electronic tools in order to expedite its decision-making; and
(d) Take any other procedural measures it considers appropriate to expedite its decision-making. 37

34 Id., art. 38.
35 The only decision reported individually by a UNCC panel was the panel report concerning the Well-Blowout Control Claim, which dealt with the costs incurred by the state of Kuwait in extinguishing the oil-well fires. See Report and Recommendations Made by the Panel of Commissioners Concerning the Well-Blowout Control Claim (the "WBC Claim"), S/AC.26/19965/Annex (18 Dec. 1996). For discussion see e.g. Roger P. Alford, International Decisions: Well Blowout Control Claim, 92 AM. J. INT'L L. p. 287 (1998).
36 See Heiskanen, supra note 22, at pp. 288–305.

See also the Supplemental Principles and Rules of Procedure of the Property Claims Commission of the German Foundation "Remembrance, Responsibility and Future," which authorize and indeed mandate the Commission to group the claims (Section 20.2: "IOM [International Organization for Migration] shall submit the claims received by IOM to the Commission in installments. To the extent possible, claims raising similar factual and legal issues shall be processed together") and to apply a relaxed standard of proof:

22.1: The Commission's decisions on compensability shall be based on relaxed standards of proof taking into account the lapse of time between the date the loss occurred and the date the claim was made; the circumstances in which the specific loss or types of losses occurred; the information available from other cases; and the background information available to the Commission regarding the circumstances prevailing during the National Socialist era and the Second World War and the participation of German enterprises in the commission of National Socialist wrongs.
Mass Claims Processing Methods and Techniques

The rules of many other modern claims commissions contain similar, although often less elaborate, provisions. Depending on the circumstances in which the claims arose, and the overall process design, some of the processing methods may be more relevant than others. Thus, for example, in claims programs that deal with claims that arose a long time ago (which is the case in all of the Holocaust and other World War II related claims programs), or in war-like circumstances where documentary evidence is often destroyed or otherwise lost, evidentiary presumptions and a relaxed standard of proof have often been specifically incorporated into the rules.38

The inter-state agreement establishing the Eritrea-Ethiopia Claims Commission also authorizes the Commission to employ mass claims processing techniques.39 However, while the inter-state agreement itself and the Commission's early decisions envisaged that claims would be filed not only by one government against the other, but also "by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party,"40 in practice the Commission, apparently with the agreement of the parties, has limited its function to resolving claims at the state-to-state level.41 It remains unclear whether, as a result of this limitation, individual claimants will receive any compensation or indeed, whether the individual claims will in fact be off-set at the state-to-state level. Thus, the Commission's practice marks an unusual retreat to the diplomatic protection philosophy of 19th century inter-state arbitration.42

22.2: A fact shall be considered established if it has been credibly demonstrated. A claim cannot be rejected on the sole ground that it is not supported by documentary evidence.


In order to facilitate the expeditious resolution of these disputes the Commission shall be authorized to adopt such methods of efficient management and mass claims processing as it deems appropriate, such as expedited procedures for processing claims and checking claims on a sample basis for further verification only if circumstances warrant.

The language of the provision echoes that of the UNCC Rules.

40 Art. 5(1) of the Agreement, id. See also Decision No. 2 of the Commission, available at <http://www.pca-cpa.org>.


42 This philosophy was most authoritatively spelled out by the Permanent Court of International Justice in the Panevezys-Saldutiskis Railway Case (Est. v. Lith.), 1939 P.C.I.J. (Ser. A/B) No. 76 (Judgment of Feb. 28) p. 16:

In the opinion of the Court, the rule of international law on which the first Lithuanian objection is based is that in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting
Since neither the ICSID Convention nor the ICSID Arbitration Rules make any mention of mass claims processing methods and techniques, the question arises as to what extent, if any, such methods and techniques may in fact be used in the absence of a specific authorization. As noted above, this arguably depends, to a large extent, on whether the possible employment of these methods and techniques in ICSID arbitration would raise justifiable due process concerns. The issue is particularly important in the ICSID context, since unlike modern international claims commissions, the jurisdiction of ICSID tribunals in a mass claims context is likely to be based almost exclusively on bilateral or (less frequently) multilateral investment treaties, and not on a compromis or another legal instrument authoritatively settling the issue of liability or quantum. In these circumstances, and in case the respondent state raises an objection to the use of mass claims processing methods and techniques, may the arbitral tribunal nonetheless use them?

The most frequently employed mass claims processing methods and techniques, and the issues their use may raise in the context of investment arbitration, are described briefly below in turn.

B. Computerization

Computerization of claims data is a fundamental component of mass claims processing. Without computer support, most of the other mass claims processing methods and techniques may be used only with considerable difficulty, if at all. Thus, computerization, together with other facilities such as sufficient office and storage space and adequately trained staff, constitutes the very infrastructure of mass claims processing and, as such, a necessary (but not necessarily sufficient) pre-condition of a successful mass claims process.

The scale of computerization is a function of several factors, including the number of claims filed, the degree to which the claims data has been structured during the claims intake (which is largely dependent on the design of a claim form), and the volume of claims documentation. Generally speaking, the simpler the claims, the more straightforward the computerization process. From a management information perspective, at least key claim form data such as the identity and address of the claimant, the type of claim or claims being made, the relief sought, and the type of supporting documents submitted, should be computerized. Ideally, the supporting documents themselves should be cataloged and scanned, to allow their electronic viewing and searching.

its own right, the right to ensure in the person of its nationals, respect for the rules of international law.

43 For discussion of use of computers in claims processing see e.g. Chris Gibson, Using Computers to Evaluate Claims at the United Nations Compensation Commission, 13 ARB. INT’L p. 167 (1997); Heiskanen, supra note 17.
Apart from the creation of a claims database, modern mass claims processes also often develop customized claims processing programs such as claims processing status tracking and payment tracking systems. In certain circumstances, in particular in case of simple claims for fixed amounts of compensation or other simple forms of relief, electronic resolution of claims may also be feasible. In practice, one of the most common forms of computerized claims resolution has been computer-aided “matching” of claims included in an electronic claims database against evidence contained in another “verification” database. If a “match” is found in the computerized process, the claim may be granted or selected for further review to determine its merits. As noted above, in the case of the UNCC, this method was specifically envisaged in Article 37(a) of the UNCC Rules.45

Computerization of key claims data, including the supporting evidence, is a merely technical tool which, as such, should not raise any due process issues in the ICSID context. However, to the extent that computers are used not only for the purpose of processing information but also for the purpose of claims resolution, questions may arise. Thus, it might be argued that, to the extent that computers are used to actually resolve claims, this would be inconsistent with the ICSID Convention and the ICSID Arbitration Rules, which require that decisions be made by panels of arbitrators. Whether or not such an argument has merit largely depends on how the process is organized, in particular on the effect to be given by the arbitral tribunal to the computer-generated outcome. If computer-aided claims processing takes place under the supervision, control, and approval of the arbitral tribunal, it seems that there can be, as a matter of principle, no serious objections to the process. The principal challenge appears to be a practical one: creating a claims database and developing the necessary software, which often must be at least to a certain extent customized, requires time and resources. It is unclear whether the ICSID secretariat currently possesses such resources, and indeed whether it sees as its proper role to provide such resources. If this is not the case, an alternative approach would be for the arbitral tribunal to procure the necessary computing services on ad hoc basis, for example by way of outsourcing, and at the expense of the parties.

44 See generally Heiskanen, supra note 17, at pp. 30–32. For more detailed discussion of use of computers in decision-making by the UNCC see Gibson, supra note 43.

45 According to art. 37(a), “[t]he Secretariat will proceed to check individual claims by matching them, insofar as possible, against the information in its computerized database.” The matching technique was used by the UNCC in particular in the processing of the category “A” (departure) claims. Similar methods have also been employed in the Bosnian claims process and by CRT-II, which used the computer-generated match as a basis for further, manual review of the claims. See art. 20 of the CRT-II Rules Governing the Claims Resolution Process, available at <http://www.crt-ii.org>.

46 See e.g. art. 42 (“Powers and Functions of the Tribunal”) of the ICSID Convention and Rule 16 (“Decisions of the Tribunal”) of the ICSID Arbitration Rules.

47 In practice this requires that, for the members of the tribunal to be able to perform their function effectively, they have to be familiar with computerized claims processing and must have at least a basic understanding of the computer system that is being used to process the claims.
C. Delegation of Claims Review

12.37 This particular mass claims processing technique involves the delegation of review of individual claims and the supporting evidence to the secretariat servicing the claims commission. Upon completion of review, the secretariat reports back to the commission on the results of the review, including identifying the common legal and factual issues raised by the claims, and making recommendations as to how those issues should be resolved.\(^48\) Delegation of claims review is often used as a preparatory tool for other mass claims processing techniques such as grouping of claims and common issue determination.

12.38 Like computer-aided claims processing, possible delegation of the claims review function to the ICSID secretariat (or expert staff retained by the arbitral tribunal on an ad hoc basis) raises the question of whether this amounts to impermissible delegation of the tribunal's decision-making function. Again, this is not necessarily the case so long as what is in fact delegated is the review of claims and not the decision-making function itself, i.e. to the extent that the delegation is limited to the review of evidence, the identification of common legal and factual issues, their reporting to the arbitral tribunal, and making of recommendations to the tribunal as to how these issues should be resolved. Since the tribunal remains free to decide whether or not to adopt the recommended solution, the method does not seem objectionable.

12.39 The procedural rules of mass claims programs which specifically authorize the delegation of the claims review function make clear that their purpose is not to delegate the decision-making function. Thus, Section 11.3 of UNMIK/REG/2006/50, which governs the operations of the KPCC, specifically provides:

> The Commission may:

\[\ldots\]

(b) Delegate to the staff members of the Executive Secretariat, assigned by the Director of the Executive Secretariat to service the Commission, certain claims review and evidentiary review functions, subject to the supervision and final approval of the Commission; \ldots\] \(^49\) (Emphasis added.)

12.40 Similarly, in order to remain compatible with the ICSID Convention and the ICSID Arbitration Rules, any claims review functions that may be delegated to

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\(^48\) The rules of some claims commissions specifically provide that the secretariat will provide "administrative, technical and legal support" to the claims commission. See e.g. art. 34(1) of the UNCC Rules.

\(^49\) Section 11.3(b) of UNMIK/REG/2006/50, available at <http://www.unmikonline.org>. See Section 19.5 of UNMIK/REG/2000/60, containing the rules of procedure of HPCC, KPCC's predecessor organization, which contains an otherwise identical provision, except that the emphasized section was missing.
the ICSID secretariat or other supporting staff must be exercised under the guidance and supervision of the arbitral tribunal. In any event, for the tribunal to be able to exercise its supervisory function effectively, it must itself review at least a representative sample of the claims and fully familiarize itself with the legal and evidentiary issues raised by the claims. Under these conditions, the delegation of the review function, or at least certain aspects thereof, is probably not inconsistent with the ICSID Convention and the ICSID Arbitration Rules. The principal hurdle is likely to be a psychological one, as the delegation technique necessarily involves reliance on an analysis performed by supporting staff.

D. Grouping of Claims and Common Issue Determination

Grouping of claims based on similarity of legal and factual issues is one of the most commonly employed mass claims processing techniques. Its use is greatly facilitated and indeed enabled by computerization, which allows the viewing, processing, and reporting of the claims data, and by delegation of the claims review function to the secretariat.

As a result of grouping, the claims population may be approached in terms of issues rather than in terms of claims, which reduces the number of decisions to be taken while increasing the efficiency of decision-making by allowing common issue determination, or “common issue extrapolation.” This is a method of decision-making where the commission or the tribunal resolves the legal and factual issues raised by a pre-defined group of claims rather than each claim individually. Once the issue is resolved, the decision is then applied to all the claims in the group which raise this particular issue. As a result, one decision, taken on the issue level, may resolve a high number of claims in their entirety, or at least in part, depending on whether they raise additional legal or evidentiary issues. The actual application of the decision to the underlying claims is often performed by the secretariat, under the supervision and control of the claims commission. This allows the decision-making body to focus on high-level decision-making and issuance of claims processing guidelines that are meant to ensure both the proper identification of issues and an accurate application of the commission’s decisions to all claims which raise the issue in question. Common issue determination has been widely used by mass claims programs such as the UNCC and the Kosovo claims programs.

50 For the sample to be truly representative of the claims population, statistical expertise will be required. IfICSID indeed chooses to enhance its mass claims processing capability, it is well advised to ensure that such expertise will be available to the tribunals, either through the secretariat or by way of experts retained by the arbitral tribunal.
52 See supra notes 33–37 and accompanying text.
If the grouping technique were to be applied in ICSID arbitration, would it raise any due process concerns? This does not appear to be the case. So long as both parties are given full access to the claims which raise the issue in question and the underlying evidence, and are provided with an adequate opportunity to brief the issue, there seems nothing inappropriate, from a due process point of view, about this particular method. The principal concern would appear to be to ensure that, to the extent that the application of the arbitral tribunal's decision is delegated to the secretariat staff, this exercise is appropriately supervised and controlled by the tribunal. If this is the case, such delegation arguably would not be considered an impermissible delegation or abdication of the tribunal's decision-making function. Moreover, where the number of claims remains manageable and does not exceed more than a few hundred or a few thousand, such delegation may not even be necessary.

E. Cover Decisions

The use of cover decisions governing a number of claimants, instead of an individual decision for each of the claimants, is a concomitant of common issue determination and, as noted above, is often expressly endorsed in the procedural rules of modern claims commissions. Thus, the “reports and recommendations” of the UNCC panels of commissioners contained anything between one and several hundreds of thousands of claims. Cover decisions have also been used extensively by the two Kosovo claims commissions.

In the absence of any authorization in the ICSID Arbitration Rules, would the use of cover decisions be considered permissible in the ICSID context? One might argue that this would contradict relevant ICSID rules, specifically Article 48 of the ICSID Convention and Article 47 of the ICSID Arbitration Rules. According to Article 48(3) of the ICSID Convention, “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.” Article 47(1)(i) of the ICSID Arbitration Rules similarly requires that “[t]he award shall be in writing and shall contain . . . the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based.”

Whether or not these provisions could be considered as precluding the use of cover decisions in the ICSID context appears to depend on the level of detail in drafting. To the extent that such decisions indeed deal with “every question submitted to the Tribunal” and “state the reasons upon which [they are] based,”

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53 As noted above, supra note 35, only one claim—the Well-Blowout Control Claim—was processed and resolved individually. In contrast, the reports and recommendations of the category "A" and "C" commissioner panels covered typically tens or even hundreds of thousands of claims. All of these reports are available at the UNCC website at <http://www.uncc.org>.

54 See Dodson & Heiskanen, supra note 19, at p. 240.
there seems nothing inappropriate about the method as such. Moreover, if a particular claim requires a more detailed or separate discussion because it raises unique issues not raised by the other claims in the group, nothing prevents the arbitral tribunal from addressing such issues specifically in a particular section of the cover decision; this is indeed entirely consistent with the cover decision format.  

F. Discovery of Evidence ex officio

Many international claims programs, in particular those based on the human rights model, do not rely in their decision-making solely on the evidence produced by the parties, but also collect evidence ex officio, or on their own motion. This often involves a search, usually conducted by the secretariat, for appropriate archives and other repositories of documents, both public and private. In theory, such a discovery process may serve to assist the claimant or the respondent, depending on the type of evidence obtained; however, in practice, if any additional evidence is found, this often tends to support the claimant’s position.

Ex officio discovery of evidence is specifically allowed and indeed mandated in the rules of procedure of a number of modern mass claims programs. Thus, Article 17 of the “Rules Governing the Claims Resolution Process” of CRT-II (the “CRT-II Rules”) provides:

[T]he CRT shall use, to the maximum extent possible, the records and files available under Article 3-6, the information submitted by the Claimant, and, to the extent that the CRT deems relevant, other sources of information. Other sources of information may include, but are not limited to, records of the Austrian State Archives and archives of other governments, records of the New York State Holocaust Claims Processing Office, the reports of the Independent Commission of Experts Switzerland-Second World War (the “Bergier Commission”), and any other historical and factual material available to the CRT.

Similarly, Section 10.2 of the UNMIK/REG/2000/60, which governed the work of the Housing and Property Claims Commission in Kosovo (“HPCC”), confirms:

The Directorate [i.e., the Secretariat of the Commission] may investigate a claim, and obtain evidence relevant to a claim from any record held by a public body, corporate or natural person. The Directorate is entitled to free access without charge to any records in Kosovo relevant to the settlement of a claim for any other verification purposes.

Ex officio discovery of evidence certainly involves a significant regulatory intervention in the conventional principles concerning the allocation of the burden of proof. It is arguable that such an intervention can only be considered justified in human

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55 Thus, the UNCC panels of commissioners tended to customize their reasoning based on the number and types of issues raised by the claims and combined issue-based approaches to individualized reasoning.

56 UNMIK/REG/2000/60, Section 10.2, supra note 37.
Arbitrating Mass Investor Claims

rights-oriented claims programs where claimants have significant difficulties with access to evidence, as a result of displacement or otherwise, or where much of the relevant evidence has been destroyed or lost. Most of the Holocaust-related claims programs and the claims programs in the Balkans fit this model, and it is indeed in these programs where *ex officio* discovery has been most frequently used. These programs are driven by a strong public policy rationale to provide material rather than purely procedural justice, the accuracy of outcome being considered more important than procedural neutrality.57

12.51 The use of interventionist techniques such as *ex officio* discovery in the ICSID context would likely be considered highly questionable. The collection of evidence by the ICSID secretariat on its own motion, even in the context of a mass investor claim, would likely be considered inconsistent with the secretariat’s role under the ICSID Convention and the ICSID Arbitration Rules. Nor would there seem to be any compelling legal policy basis for such an intervention, by way of an amendment to the ICSID Arbitration Rules or otherwise. While the right to private property is generally considered as an international human right, it is probably far-fetched to argue that the purpose of ICSID arbitration, even in the context of a mass investor claim, is the enforcement of international human rights. Indeed, the ICSID Convention itself identifies as its principal purpose “international cooperation for economic development,”58 and most bilateral investment treaties are similarly designed to promote “greater economic cooperation” and to “stimulate the flow of private capital.”59

G. Evidentiary Presumptions

12.52 Many recent international claims programs have adopted certain evidentiary presumptions concerning the circumstances in which the loss or the damage occurred, or the quantum of the claim. Thus, for example, Articles 28 and 29 of the CRT-II Rules establish specific presumptions concerning certain closed Swiss bank accounts and the value of accounts with low or unknown value, for use in these processes. Similarly, the UNCC developed standardized verification and valuation programs to deal with claims that involved losses occurring under very similar circumstances but supported by varying levels of evidence.60


60 For further discussion see Ramanand Mundkur, Michael J. Mucchetti & D. Craig Christensen, *The Intersection of International Accounting Practices and International Law: The Review of Kuwaiti
Like the *ex officio* discovery of evidence, evidentiary presumptions are usually applied in circumstances where the claimants have systematic difficulties in accessing evidence, either because of displacement or because the evidence has been lost or destroyed. Evidentiary presumptions are often developed on the basis of information available in the public domain about the circumstances of the loss, and where the fact of loss or its value may be derived by using appropriate "proxies." Thus, it is hardly surprising that evidentiary presumptions have been used, in particular, in the context of the Holocaust claims programs and other claims programs arising out of World War II. In such circumstances, evidentiary presumptions may indeed be considered an institutionalized form of "judicial notice."  

In the ICSID context, the use of evidentiary presumptions raises issues similar to those raised by the *ex officio* discovery of evidence. Thus, their use likely would be considered inappropriate. Moreover, unlike the war-like circumstances which have given rise to most modern international mass claims programs, the financial and economic crises out of which most mass investor claims are likely to emanate, will only rarely, if ever, result in systematic destruction and loss of evidence. In addition, in most instances the claimants likely will be individual foreign investors residing in a country other than the host state, which presumably means that the relevant evidence is also located outside the host state. In these circumstances there is likely to be neither justification nor need for evidentiary presumptions in ICSID arbitration.

H. Relaxed Standard of Proof

A relaxed standard of proof has been specifically adopted in certain modern mass claims programs, in particular those dealing with the Holocaust. Thus, Section 22 of the "Supplemental Principles and Rules of Procedure" of the Property Claims Commission of the German Foundation "Remembrance, Responsibility and Future" (the "GFPCC Rules") provides:

> 22.1 The Commission’s decisions on compensability shall be based on relaxed standards of proof taking into account the lapse of time between the date the loss occurred and the date the claim was made; the circumstances in which the specific loss or types of losses occurred; the information available from other cases; and the background information available to the Commission regarding the circumstances

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61 For judicial notice as a form of discovery see e.g. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. p. 13, at p. 40 (Judgment on Merits of 27 June) ("[A]lthough it is perfectly proper that press information should not be treated in itself as evidence for judicial purposes, public knowledge of a fact may nevertheless be established by means of these sources if information, and the Court can attach a certain amount of weight to such public knowledge.")
prevailing during the National Socialist era and the Second World War and the participation of German enterprises in the commitment of National Socialist wrongs.

22.2 A fact shall be considered established if it has been credibly demonstrated. A claim cannot be rejected on the sole ground that it is not supported by documentary evidence.62

12.56 Similarly, Article 17 ("Relaxed Standard of Proof") of the CRT-II Rules provides:

1. Standard of Plausibility. Each Claimant shall demonstrate that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the claimed Amount.

2. Sources of Information for Determinations. In making the determinations on Admissibility and Awards, the CRT shall use, to the maximum extent possible, the records and files available under Article 3-6, the information submitted by the Claimant, and, to the extent that the CRT deems relevant, other sources of information. Other sources of information may include, but are not limited to, records of the Austrian State Archives and archives of other governments, records of the New York State Holocaust Claims Processing Office, the reports of the Independent Commission of Experts Switzerland-Second World War (the "Bergier Commission"), and any other historical and factual material available to the CRT. The CRT shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long period of time that has elapsed since the opening of the Accounts.63

12.57 In modern international claims programs the relaxed standard of proof has often been employed in addition, or as an alternative, to ex officio discovery of evidence and evidentiary presumptions. Thus, the relaxed standard of proof is usually applied in situations where the two alternative methods would be ineffective because there are no sufficiently detailed public or private records available, even for the purpose of developing presumptions. This was the challenge faced by most of the recent Holocaust claims programs, and indeed it is in the context of these programs that the relaxed standard of proof has been most frequently applied.

12.58 In legal terms a systemic relaxation of the applicable standard of proof in such circumstances is arguably justified under the principle of probatio diabolica: a party cannot be required to prove what is in fact impossible.64 This would often be the case if there has been a significant lapse of time between the date the loss occurred and the date the decision is taken, and if the evidence is no longer available, or if there has been systemic and widespread loss or destruction of evidence because of the circumstances in which the loss occurred. Given the systemic nature of the lack of proof, the burden of proof arguably must be adjusted accordingly.

62 See supra note 37.
63 See also art. 22 of the CRT-I Rules, supra note 38.
64 For an in-depth analysis of the application of the probatio diabolica doctrine in the context of mass claims processing see Das, supra note 57.
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The ICSID Arbitration Rules evidently make no allowance for the application of a relaxed standard of proof, and given the extraordinary nature of the probatio diabolica doctrine, it can hardly be considered to be implicitly included in the Rules. Moreover, as noted above, since financial and economic crises usually do not result in systematic loss or destruction of evidence, there seems to be neither justification nor need for the use of this particular method in the context of mass investor claims.

I. Statistics

Statistical methods may be considered an alternative to the relaxed standard of proof. Like the relaxed standard of proof, statistical methods seek to fill in gaps in the evidence resulting from the extraordinary circumstances in which the claims arose. However, unlike the relaxed standard of proof, which operates on the level of individual claims, statistical methods operate on a global level, or on the level of the claims population as a whole. Thus, statistical methods are particularly appropriate in cases where the number of claims is very high and exceeds tens or even hundreds of thousands, and where therefore the cost of case-by-case review would be prohibitive.

Along with the relaxed standard of proof, statistical methods represent perhaps the most radical departure from standard arbitral decision-making. This is, in particular, the case to the extent that such methods allow the resolution of claims without an effective review of all of the claims covered by the decision (which is the situation, for example, when decisions are taken on the basis of sampling), or to the extent that they allow approval of claims not supported by any or very little evidence, based on evidence available in other claims (regression analysis and statistical modeling). In practice, the use of statistical methods is heavily dependent on computer support, which enables more effective manipulation of data.\footnote{See Gibson, supra note 43, at pp. 184–190.}

Statistical methods have been used in certain recent mass claims programs where the evidence produced by claimants is systematically uneven or poor, and where neither ex officio collection of evidence nor evidentiary presumptions would allow a principled resolution of the claims. In such extreme circumstances statistical methods are used to “predict” outcomes and to construct effectively evidence based on information available in the overall claims population but not necessarily present in all of the claims granted on the basis of the statistical analysis. At the UNCC, statistical expertise was used, in particular, in order to resolve the approximately 900,000 category “A” (departure) claims and the more than 160,000 category “C” claims (individual claims below US$100,000). The use of statistical methods in other recent claims programs has been more limited.\footnote{However, they have been used extensively in mass torts litigation in the United States. For discussion see e.g. McGovern, supra note 16.}
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Apart from cost-effectiveness, the principal justification for the use of statistical methods is that, in circumstances where there are significant gaps in evidence because much of it has been lost, destroyed, or because many claimants have otherwise been unable to document their claims, they operate so as to protect the equal treatment of claimants. By definition, in a mass claims context all of the claims, or at least all valid claims, arise out of the same event or incident, usually a man-made disaster, and during a relatively short period of time. Thus, the claimants are similarly situated and should be treated accordingly. Indeed, on a global (rather than case-by-case) level, statistical methods generally produce more accurate outcomes than case-by-case determination, minimizing as they do the scope for human error in decision-making.

In the ICSID context the use of statistical methods raises significant due process issues. While it is not excluded that in certain circumstances, in particular if the respondent raises no objection, they may be considered acceptable, statistical methods are likely to be considered generally incompatible with the fundamental principles of arbitral decision-making. This is primarily because they allow the arbitral tribunal to resolve claims without either the secretariat or the tribunal having actually reviewed all of them (sampling), or to grant claims on the basis of evidence present in the overall claims population rather than in the claim itself (statistical modeling). This may be considered an excess of powers or "a serious departure from a fundamental rule of procedure," thus creating a risk of annulment of the award under Article 52 of the ICSID Convention.

The recent emergence of mass investor arbitration poses substantial procedural and institutional challenges to ICSID. Chief among these is the authority of ICSID tribunals to employ mass claims processing methods and techniques—tools without which they are unlikely to be able to resolve the claims within a

See HPCC Resolution No. 7 of April 11, 2003, which contains perhaps the first juridical or quasi-judicial definition of a mass claims process, quoted in Heiskanen, supra note 17, at pp. 28–29:

[A] mass claims process can be broadly understood as a process designed to deal with a high number of claims that arise out of the same extraordinary situation or event and are filed with the decision-making body within a limited period of time; thus, claimants in a mass claims process are generally in the same situation, having suffered the same or similar losses within the same period of time; . . . the HPD/HPCC process undoubtedly qualifies as a mass claims process, as it deals with over 25,000 claims arising out of the crisis that prevailed in Kosovo preceding, during and following the NATO air campaign in 1999; . . .

It should be noted, however, that reliance on statistical methods is not necessarily adverse to the legitimate interests of the respondent state, since they significantly expedite decision-making and thus reduce arbitration costs.
Conclusion

reasonable period of time. While there appear to be no serious legal impedi-
ments for ICSID tribunals to employ at least some, if not all, of these tools, the
psychological threshold for actually doing so may be high. However, so are the
stakes for ICSID as an institution, and it seems difficult to see how mass investor
arbitration—if it continues to grow—can be successful in the long term without
recourse to these methods and techniques.

Mass investor claims also pose significant administrative challenges for ICSID as
an institution. Efficient mass claims processing requires adequate computer sup-
port facilities, including the creation of an electronic claims database and the
development of other computer support systems, as well as appropriately trained
staff that has expertise in mass claims processing. The author is not aware whether
the ICSID secretariat has already taken steps to address these challenges, and what
these measures might have been, or whether it intends to leave it for the arbitral
tribunals to develop _ad hoc_ solutions based on the circumstances of each individ-
ual case. The latter approach could include solutions such as the use of outside
experts and outsourcing of computer support, and less reliance on the services
provided by the ICSID secretariat. In any event, the experience that ICSID is cur-
rently in the process of gaining from the first mass claims already filed with it, will
be useful in testing and enhancing its capacity and in developing the required
institutional solutions.

When developing these solutions, the matter certainly should be kept in a proper
perspective. It is unlikely that ICSID will ever face an avalanche of mass claims,
and that it would be required to devote a substantial portion of its resources to
mass claims processing. The challenge ICSID currently faces is one of prepared-
ness and capability rather than an existential crisis threatening the very viability of
the institution. Nonetheless, the matter seems sufficiently important to merit the
institution's full attention. The ICSID secretariat might be well advised to con-
duct further studies to assess the legal, administrative, and financial implications
of mass investor claims, the mass claims processing and methods and techniques
that may be considered to be available under the current version of the ICSID
Arbitration Rules, and any appropriate amendments that may have to be pro-
posed to these Rules.
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