

Mass Claims Processes under Public International Law

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I. INTRODUCTION

The processes developed under public international law to deal with international mass claims arising from various types of crises and incidents (Mass Claims Processes) have a long history and have played an important role in shaping public international law. Indeed, the arbitrations under the Jay Treaty of 1794, which involved hundreds of claims, marked the beginning of the practical application of public international law, which had previously been largely an academic discipline.¹

Although there is no fixed definition of Mass Claims Processes under international law, the term is generally understood to encompass *ad hoc* tribunals, quasi-judicial commissions or administrative programmes established to resolve claims “when a large number of parties have suffered damages arising from the same diplomatic, historic or other event.”² These programmes “sometimes [borrow] concepts and procedures from each other, but often [invent] unique solutions in light of particular legal and practical perspectives.”³ Mass Claims Processes under international law therefore come in various forms, although they share a common purpose. The common purpose is to adjudicate large numbers of claims, whether for restitution or compensation for death, personal injury or damage to or confiscation of property resulting from extraordinary events such as armed conflicts, breaches of international humanitarian law or environmental disasters.

In recent times, mass claims arising from financial and economic crises have also been advanced in the framework of international investment treaty

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¹ V Heiskanen, ‘Arbitrating Mass Investor Claims: Lessons of International Claims Commissions’ in Permanent Court of Arbitration (ed), *Multiple Party Actions in International Arbitration* (OUP 2009) 297, 299.

² HM Holtzmann, ‘Mass Claims’ in *Max Planck Encyclopedia of Public International Law* <http://www.mpepil.com>, para 1.

³ *Ibid.*

arbitration, in particular in proceedings before the International Centre for Settlement of Investment Disputes (ICSID). Unlike past international Mass Claims Processes, the investment treaty arbitration framework was not specifically designed to handle mass claims. As a result, the use of the framework for mass claims has triggered much debate, in particular as to whether international investment tribunals have the authority to hear mass claims in the absence of the specific consent of the respondent State, and whether such tribunals can borrow from the techniques used in other Mass Claims Processes.

This paper aims to provide an overview of the evolution of Mass Claims Processes in international law and their status in today's dispute resolution landscape. It will first discuss the history of Mass Claims Processes in international law, which dates back more than two centuries, before setting out a few examples of modern processes. It will then turn to identifying the main characteristics of such processes, before discussing the emergence of mass claims in investment treaty arbitration and the future of Mass Claims Processes in international law.

II. HISTORY OF MASS CLAIMS PROCESSES

The history of Mass Claims Processes can be divided into three successive periods.⁴ Starting at the end of the eighteenth century, Mass Claims Processes took the form of claims commissions and flourished until World War II. However, the inefficiencies of such commissions, in particular those set up to address claims arising from World War I, became notorious and after World War II, they were largely replaced by agreements between governments for the payment of lump sum amounts, which were then distributed through domestic claims processes. The period approaching the end of the Cold War saw a resurgence of international Mass Claims Processes. This so-called 'third-generation' of Mass Claims Processes, of which many examples still exist today, proved to be far more effective than their predecessors due to the adaptation of methods and techniques developed in domestic mass claims procedures and the development of information technology.

⁴ V Heiskanen, 'Virtue Out of Necessity: International Mass Claims and New Uses of Information Technology' in Permanent Court of Arbitration (ed), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (OUP 2006) 25–37 (which distinguishes three main periods in the history of Mass Claims Processes). M Henzelin, V Heiskanen and A Romanetti, 'Reparations for Historical Wrongs: From ad hoc Mass Claims Programs to an International Framework Programs?' *2 Uluslararası Suçlar ve Tarih* (2006) 91, 92–101.

A. The Era of Mixed Commissions

The expression ‘mixed commissions’ was commonly used between the end of the eighteenth century and the beginning of the twentieth century to designate mainly, but not exclusively, bilateral inter-State *ad hoc* dispute settlement institutions, encompassing both arbitral commissions and mixed claims commissions.⁵ These commissions were established with the purpose of settling claims between nationals of different States, between nationals of one State and the other State, or between the States themselves in formal and final proceedings.⁶

The Treaty of Amity, Commerce and Navigation between Great Britain and the United States (US),⁷ the so-called 1794 Jay Treaty, which dealt with a number of outstanding issues after the end of the American revolutionary war, created the first mixed commission procedure which could be designated a Mass Claims Process.⁸ In addition to establishing an arbitral tribunal to determine the boundary between the US and Canada (the ‘St. Croix River Commission’), the Jay Treaty created two mixed claims commissions. The first of these rendered more than 500 awards dealing with disputes in relation to the unlawful seizure of merchant ships by British privateers, and by French privateers outfitted in US ports. The second commission was set up to hear claims by British creditors against US debtors in respect of colonial-era debts. However, its mission was unsuccessful due essentially to insurmountable disagreement between the British and American commissioners on fundamental procedural and substantial issues.⁹

Scores of claims commissions were subsequently established in the late nineteenth century and the early part of the twentieth century to address claims resulting from war, civil unrest and efforts to suppress the African slave trade.¹⁰ The peace treaties following World War I later established mixed

⁵ L Boisson de Chazournes and D Campanelli, ‘Mixed Commissions’ in *Max Planck Encyclopedia of Public International Law* <http://www.mpepil.com>, para 1. See also M Indlekofer, *International Arbitration and the Permanent Court of Arbitration* (Kluwer Law International 2013) 200.

⁶ R Dolzer, ‘Mixed Claims Commissions’ in *Max Planck Encyclopedia of Public International Law* <http://www.mpepil.com>, para 1.

⁷ Treaty of Amity, Commerce and Navigation (the Jay Treaty) (signed 19 November 1794).

⁸ DJ Bederman, ‘The Glorious Past and Uncertain Future of International Claims Tribunals’ in MW Janis (ed), *International Courts for the Twenty-First Century* (Martinus Nijhoff Publishers 1992) 161 at 161.

⁹ Holtzmann (above n 2) para 5; JR Crook, ‘International Claims Litigation I: Is Rough Justice Too Rough? Thoughts on Mass Claims Processes’ 99 *Am Soc’y Int’l L Proc* (2005) 80, 80. See generally RB Lillich, ‘The Jay Treaty Commissions’ 37 *St. John’s Law Review* (1963) 260.

¹⁰ For instance, several mixed commissions addressed the seizure of vessels suspected of trading in African slaves after the trade had been declared illegal (L Bethel, ‘The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century’, *Journal of*

claims commissions and arbitral tribunals to address claims arising out of the Great War.¹¹ At the same time, several mixed claims commissions were set up to settle disputes between Mexico and the nationals of a number of other States, including the US, France, and Germany, arising out of repeated revolutionary disturbances within the country.¹²

However, the mixed claims commissions of the early twentieth century, in particular those created after World War I, generally dealt exclusively with property and other economic rights, and not personal injury suffered by individuals,¹³ and were plagued by cumbersome administrative processes, inefficiency, and significant delays in processing claims, causing them to fall into disuse after World War II.¹⁴

B. Lump Sum Agreements

International claims commissions all but disappeared in the aftermath of World War II due to their reputation for inefficiency, as well as to the unprecedented number of international claims arising from large-scale breaches of international law during World War II.¹⁵ Instead, claims by nationals of one State against another were more commonly resolved by the two States entering into a lump sum settlement agreement. The recipient State would then establish its own domestic claims authority or national commission to decide claims and distribute the lump sum amount.¹⁶ As a result, functions previously exercised by international claims commissions became nationalized.¹⁷

The advantages of this type of Mass Claims Process were to ensure prompt payment and reduce procedural and administrative costs. For the paying

African History (1996) 79). See also Henzelin, Heiskanen and Romanetti (above n 4) 92–93; Bederman (above n 8) 161 (listing over 65 such bodies until 1991); I Bottiglieri, *Redress for Victims of Crimes Under International Law* (Springer 2004) 80.

¹¹ For instance, the Polish-German mixed commission adjudicated over 10,000 claims, while the United States-German mixed commission rendered over 7,000 awards.

¹² Holtzmann (above n 2) paras 5–6.

¹³ Henzelin, Heiskanen and Romanetti (above n 4) 92–93.

¹⁴ Heiskanen (above n 4) 28.

¹⁵ RB Lillich and BH Weston, *International Claims: Their Settlement by Lump Sum Agreements* (Procedural Aspects of International Law Series, vol 1, University Press of Virginia 1975) (originally Transnational Publishers, Inc 1999, now Martinus Nijhoff Publishers) xi (pointing to the nationalization of foreign investments in many countries, which also gave rise to numerous claims, coupled with the reluctance of the communist countries and many developing countries to have such claims submitted to third-party adjudication); see also Bottiglieri (above n 10).

¹⁶ Holtzmann (above n 2) para 7; R Bank and F Foltz, 'Lump Sum Agreements' in *Max Planck Encyclopedia of Public International Law* <http://www.mpepil.com>, para 8; SD Murphy, W Kidane and TR Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (OUP 2013) 32–35.

¹⁷ Henzelin, Heiskanen and Romanetti (above n 4) 95.

State, it also had the benefit of determining in advance the extent of its liability, allowing for the compensation of victims without an admission of responsibility, and providing for a more favourable standard of compensation – generally ‘adequate’ rather than ‘full compensation.’¹⁸

Between the end of World War II and 1995, more than 200 lump sum settlement agreements were concluded, settling claims relating to property and personal injuries, including injuries arising from persecution and detention. A recent example of such a lump sum agreement is that concluded in 1990 between the US and Iran with respect to a group of claims of less than USD 250,000 which had originally fallen under the jurisdiction of the Iran-US Claims Tribunal (Iran-US CT), but which the Tribunal had not taken any significant steps to address.¹⁹ A notable illustration of a national commission set up to oversee the domestic distribution of a lump sum is the US Foreign Claims Settlement Commission (FCSC), which administered 45 international and war-related claims programmes involving claims against eighteen countries, including Yugoslavia, Panama, the former Soviet Union, Cuba, China, Vietnam, Iran and the Federal Republic of Germany.²⁰

The prevalence of lump sum agreements has, however, declined. Since the 1980s, claims arising out of some of the most prominent conflicts have been addressed by international commissions. One reason for this development is that lump sum settlement agreements inadequately addressed victims’ compensation, which narrowed their scope of application. Considering the growing support in international literature and by domestic courts for an individual right for compensation in cases involving breaches of international human rights or humanitarian law, lump sum settlement agreements have been considered by some to be ill-adapted to handle the type of claims that the current state of international law affords to individuals.²¹ Moreover, the remedies granted by lump sum settlement institutions could consist of financial compensation only, and generally not full compensation for damage to property or other economic interests.²² By contrast, modern Mass Claims

¹⁸ *Ibid*, 96.

¹⁹ JR Crook, ‘Mass Claims Processes: Lessons Learned Over Twenty-Five Years’ in Permanent Court of Arbitration (ed) *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (OUP 2006) 41, 46. See generally MN Leich, ‘Contemporary Practice of the United States Relating to International Law’ *AJIL* (1990) 885, 890.

²⁰ See generally Foreign Claims Settlement Commission of the US <http://www.justice.gov/fcsc>.

²¹ R Bank and F Foltz, ‘Lump Sum Agreements’ in *Max Planck Encyclopedia of Public International Law* <http://www.mpepil.com>, para 27.

²² The acceptance of less than the full amount of compensation in a lump sum agreement gives rise to numerous legal problems, particularly in light of the ILC Articles on State Responsibility, which provide for full compensation: International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, GA Res 56/83 of 12 December 2001, Annex, art 34, UN Doc A/RES/56/83; Bank and Foltz (above n 21) para 26.

Processes have allowed for a wider array of remedies, such as restitution of property.²³

C. Modern Mass Claims Processes

The last thirty years have marked a return to international claims commissions and a multiplication of international claims programmes.²⁴ The establishment of these modern Mass Claims Processes has been facilitated by the increased cooperation between States following the end of the Cold War, as well as significant developments in information technology and the adaptation of methods and techniques developed in domestic mass claims procedures, which have allowed for greater efficiency in processing mass claims.²⁵ Key examples of modern Mass Claims Processes included Iran-US CT, the United Nations Compensation Commission (UNCC), and the Eritrea-Ethiopia Claims Commission (EECC).

1. Iran-United States Claims Tribunal

The first of the modern Mass Claims Processes was the Iran-US CT. The Tribunal was set up as part of the Algiers Accords of 1981, which were concluded in order to put an end to the hostage crisis at the US Embassy in Tehran.²⁶ It had the mission of adjudicating thousands of claims of individuals and entities relating to debts and contracts affected by the Iranian revolution, as well as expropriations and other measures affecting property rights.²⁷ The Algiers Accords did not address either side's liability for claims falling within the Iran-US CT's jurisdiction, and therefore left the issue of liability to be determined by the Tribunal on a case-by-case basis. The Iran-US CT also ruled that it had no jurisdiction over claims concerning personal injuries, such as physical and psychological harm suffered by victims.²⁸

²³ Henzelin, Heiskanen and Romanetti (above n 4) 96.

²⁴ HM Holtzmann and E Kristjánssdóttir, *International Mass Claims Processes: Legal and Practical Perspectives* (OUP 2007) 17–37; Crook (above n 19) 45. See also Indlekofer (above n 5) 202–205.

²⁵ Henzelin, Heiskanen and Romanetti (above n 4) 98.

²⁶ Settlement of the Hostage Crisis, US-Iran, 19 January 1981, 20 ILM 223 (Algiers Accords).

²⁷ *Ibid.*, art II.

²⁸ *Grimm v Islamic Republic of Iran* 2 Iran-US Cl Trib Rep 78 (1983) (holding that a claim for both loss of support and punitive damages due to the mental anguish resulting from the assassination of the plaintiff's husband, based on an alleged failure by Iran to provide him security and protection, did not fall within the Tribunal's jurisdiction on the basis of "other measures affecting property rights").

The Iran-US CT, which was faced with over 850 large commercial and bank claims, approximately 2,800 small claims of less than USD 250,000, and numerous large claims between the two States, “demonstrated that case-by-case arbitration of disputes in an international, multi-cultural setting was possible, but also showed that it could be expensive, slow and time-consuming.”²⁹ Indeed, the Tribunal is still operating more than thirty years after it was formed. Although the bulk of the 850 large commercial and bank claims was resolved within the first decade of its inception, a number of cases have lingered, and the Tribunal is still hearing the last claims between the two States. In addition, the Tribunal “never developed an effective strategy for dealing with the approximately 2,800 small claims on its docket.”³⁰ As mentioned above, the claims were ultimately settled by the two States by way of a lump sum agreement, after the Tribunal had decided a small number of test cases.³¹

2. United Nations Compensation Commission

A myriad of international claims commissions and claims resolution bodies followed in the footsteps of the Iran-US CT, starting with the UNCC.³²

The UNCC was set up in 1991 as a subsidiary organ of the United Nations (UN) Security Council to resolve millions of claims relating to Iraq’s invasion and subsequent occupation of Kuwait in 1990.³³ Compensation for losses resulting from Iraq’s actions was paid from a special fund (the ‘Compensation Fund’) that received a percentage of the proceeds from Iraqi oil sales. The UNCC concluded its claims-processing exercise in 2005 and made its last payments to claimants in 2007. Having resolved 2.6 million claims, it has been the largest Mass Claims Process to date.

The UNCC was the first attempt by the international community to set up a claims resolution process through a multinational facility within the UN system. Security Council Resolution 687, which was adopted under Chapter VII of the UN Charter, established Iraq’s liability under international law for any direct loss, damage – including environmental damage and depletion of natural resources – and injury to foreign governments, nationals and corporations caused by its invasion and occupation of Kuwait.³⁴ The UNCC was

²⁹ Crook (above n 19) 44.

³⁰ *Ibid.*, 45.

³¹ *Ibid.*

³² See generally V Heiskanen, *The United Nations Compensation Commission* (Hague Academy of International Law ed, Collected Courses of the Hague Academy of International Law (Martinus Nijhoff 2002).

³³ SC Res 687 UN Doc S/RES687 (3 April 1991).

³⁴ N Wühler, ‘The United Nations Compensation Commission’ in Permanent Court of Arbitration (ed), *Institutional and Procedural Aspects of Mass Claims Settlement Systems* (Kluwer Law International 2000) 17.

not therefore set up as an arbitral tribunal, as the Iran-US CT had been, but as a claims commission which mainly had a fact-finding role, “namely to establish for each claim whether or not the damage was directly linked to Iraq’s unlawful invasion and occupation of Kuwait.”³⁵

The UNCC consisted of three organs. The first, the Governing Council, was the policy-making organ. The second organ was composed of three Panels of Commissioners, which verified and evaluated claims, assessed the value of losses suffered by claimants and recommended compensation awards for approval by the Governing Council. Finally, the Secretariat provided administrative, technical and legal support to the Governing Council and the panels of Commissioners, in addition to administering the Compensation Fund. The Secretariat played an important role in streamlining the adjudication of claims by the UNCC. Indeed, the UNCC’s procedural rules provided for a delegation of claims review functions to the Secretariat for claims under USD 100,000,³⁶ as well as for the grouping of larger claims with common legal and factual issues.³⁷ Another procedure used by the UNCC to handle the numerous claims before it included the verification of claims under USD 100,000 by matching them against the information contained in a computerised database. In respect to the claims that could not be verified through the matching of database information, the UNCC was entitled to limit its review to a statistical sample, rather than having to review every claim individually, with further verification required only if the circumstances warranted it.³⁸

After twelve years of processing claims, the UNCC completed its work in June 2005. During its existence, the UNCC granted approximately 1.55 million claims, and awarded a total of approximately USD 52.4 billion in compensation, representing roughly 15 percent of the USD 352.5 billion claimed.³⁹ The resolution of such a significant number of claims with such a large asserted value over such a short time is unprecedented in the history of international claims resolution.

3. *The Eritrea-Ethiopia Claims Commission*

The EECC was established to address claims arising from the 1998-2000 war between Ethiopia and Eritrea. Unlike the UNCC, the EECC was an arbitral body established bilaterally by Eritrea and Ethiopia, as part of the 2000

³⁵ UNCC, ‘UNCC at a Glance’ (UNCC Website) <http://www.uncc.ch/uncc-glance>.

³⁶ UNCC’s Provisional Rules for Claims Procedure, S/AC.26/1992/10, 26 June 1992, art 37(c).

³⁷ *Ibid.*, art 38(a).

³⁸ *Ibid.*, art 37(a) and (b).

³⁹ UNCC at a Glance (above n 35).

Algiers Agreement.⁴⁰ The EECC was given the mandate to “decide through binding arbitration all claims for loss, damage or injury by one government against the other, and 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” arising from the war, and from “violations of international humanitarian law, including the 1949 Geneva Conventions or other violations of international law.”⁴¹ The Commission did not have jurisdiction over claims arising from the cost or preparation of military operations, or the use of force, except to the extent that they related to violations of international humanitarian law.⁴² Claims could be brought by the two States on their own behalf or on behalf of their nationals.

The EECC’s Rules of Procedure contemplated procedures for mass claims brought by individuals including prisoners of war, for unlawful expulsion, displacement, or detention, or for any other loss, damage or injury.⁴³ The Rules provided in particular for the grouping of the mass claims into sub-categories according to the alleged violation of international law, after which the Commission was to determine in respect of each sub-category whether the violation was proved. If the violation was proved, the Commission was to use “random sampling of [the] evidence to ascertain the percentage of ... claims for which the evidence is inadequate to establish the claim,” and reduce the compensation awarded for that sub-category by that percentage.⁴⁴ However, the special procedural rules for mass claims were never implemented.⁴⁵

Indeed, Ethiopia and Eritrea instead filed government-to-government claims, and the vast majority of these were:

⁴⁰ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, 40 ILM 260 (2001), http://www.pca-cpa.org/showpage.asp?pag_id=1151. See generally W Kidane, ‘Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in The Hague’ 25 *Wis Int’l L J* (2007) 23; N Klein, ‘State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far’ 47 *Germ YB Int’l L* (2005) 214.

⁴¹ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, 40 ILM 260 (2001), http://www.pca-cpa.org/showpage.asp?pag_id=1151, art 5.

⁴² *Ibid.*

⁴³ EECC Rules of Procedure, October 2011, http://www.pca-cpa.org/showpage.asp?pag_id=1151, arts 30–32.

⁴⁴ Arts 30–32, EECC Rules of Procedure, October 2011, http://www.pca-cpa.org/showpage.asp?pag_id=1151.

⁴⁵ Holtzmann and Kristjánsdóttir (above n 24) 168. See generally SD Murphy, W Kidane and TR Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (OUP 2013).

filed as claims of the governments themselves, [and] not as claims of persons that were transmitted to the [C]ommission by the governments Thus, rather than Ethiopia filing, for example, 3,000 or so claims by named individuals injured along the Central Front for harm to person or property, Ethiopia filed a signed claim on behalf of the government itself alleging harm to its unnamed nationals and property along the Central Front.⁴⁶

In this sense, the “Commission’s practice marks an unusual retreat to the diplomatic protection philosophy of 19th century inter-state arbitration.”⁴⁷

Nevertheless, the Commission addressed a wide range of claims relating to the conduct of military operations, the treatment of prisoners of war and civilians as well as their property, diplomatic immunity and the economic impact of certain government actions during the conflict.⁴⁸ Ultimately, it awarded approximately USD 161.5 million to Eritrea and USD 174 million to Ethiopia,⁴⁹ although it left open the question of how these amounts would be used to provide redress to the victims of the conflict, noting that it “would probably be impossible, and certainly inordinately expensive, to attempt to identify the specific individuals who suffered injuries as a result of the various illegal acts committed against them.”⁵⁰ Instead, it contemplated that the funds would be used for “relief programs for categories of victims,”⁵¹ although no such programmes have been implemented, as it appears that neither party has paid the awarded amounts to date.⁵² Despite this failure, commentators have pointed to successes of the EECC of another nature, namely “helping to end the war and securing the full repatriation of prisoners of war ... and broader successes in providing the two countries a forum to air their differences, giving a voice to the victims of wrongful conduct, and establishing an impartial historical record of key events that unfolded during the war.”⁵³

4. Other Modern Mass Claims Processes

Since the 1990s, Mass Claims Processes have been used in various other contexts such as the Commission for Real Property Claims of Displaced

⁴⁶ Murphy, Kidane and Snider (above n 16) 61.

⁴⁷ Heiskanen (above n 4) 311.

⁴⁸ See generally Eritrea-Ethiopia Claims Commission http://www.pca-cpa.org/showpage.asp?pag_id=1151.

⁴⁹ Murphy, Kidane and Snider (above n 16) 407.

⁵⁰ EECC, Decision No. 8, Relief to War Victims, 27 July 2007, para 2.

⁵¹ *Ibid.*, para 5.

⁵² Murphy, Kidane and Snider (above n 16) 408.

⁵³ *Ibid.*, 407.

Persons and Refugees (CRPC),⁵⁴ which dealt with the aftermath of the dissolution of the Socialist Federal Republic of Yugoslavia, in addition to claims relating to the 1992-1995 war in Bosnia and Herzegovina, and the Housing and Property Claims Commission (HPCC),⁵⁵ which dealt with claims relating to the 1999 conflict in Kosovo. More recently, Mass Claims Processes have been envisaged for other situations of armed conflicts and massive displacement of persons such as in Iraq,⁵⁶ Cyprus,⁵⁷ and Darfur.⁵⁸

A number of Mass Claims Processes were also instituted to deal with the extensive losses of assets resulting from the Holocaust, although unlike the processes mentioned above, these were not created under public international law, but rather as private arbitral tribunals or as part of domestic court proceedings.

The first of these was the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I), which was established in 1997 as an independent international arbitral tribunal under Swiss law to resolve claims relating to approximately 6,000 accounts in Swiss banks which had been dormant or inactive since the end of World War II and whose holders or their heirs were unable to recover. The CRT-I was established pursuant to the Memorandum of Understanding between the Swiss Bankers Association, the World Jewish Restitution Organization and the World Jewish Congress.⁵⁹

The CRT-I was followed by another Mass Claim Process set up in 2000, which related to additional accounts held by Swiss banks. The Second Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-II) was the result of a settlement agreement reached in the context of US class action lawsuits in 1996 and 1997 which were based on the alleged failure of banks to identify and return assets deposited by victims of Nazi

⁵⁴ General Framework Agreement for Peace in Bosnia and Herzegovina, ILM (Dayton Peace Agreement) (14 December 1995). Holtzmann and Kristjánssdóttir (above n 24) 23.

⁵⁵ UNMIK Regulation No. 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission (15 November 1993) UN Doc UNMIK/REG/1999/23 http://www.unmikonline.org/regulations/1999/re99_23.pdf. See generally See generally Holtzmann and Kristjánssdóttir (above n 24) 27.

⁵⁶ International Organization for Migration, *Property Restitution and Compensation: Practices and Experiences of Claims Programmes* (2008) 20–21, 54–57, 91, 127–130, 169–175.

⁵⁷ *Ibid.*, 39, 232–233.

⁵⁸ International Commission of Inquiry on Darfur ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General’ (25 January 2005), 149–153.

⁵⁹ Independent Committee of Eminent Persons, *Memorandum of Understanding Between The World Jewish Restitution Organization and The World Jewish Congress, representing also the Jewish Agency and Allied Organizations, and The Swiss Bankers Association* (Final Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks, 2 May 1996) http://www.crt-ii.org/icep_report.phtml.

persecution.⁶⁰ Plaintiffs also contended that the banks had accepted and laundered assets looted by the Nazis and profits generated by Nazi use of slave labour. The lawsuits were settled in January 1999, when the banks agreed to create a USD 1.25 billion settlement fund. Pursuant to a Plan of Allocation and Distribution approved in November 2000,⁶¹ the CRT-II was responsible for processing claims relating to assets deposited in accounts which were open or opened between 1933 and 1945.⁶²

Two other Mass Claims Processes, the German Forced Labour Compensation Programme (GFLCP) and the Holocaust Victim Asset Programme (HVAP), were established in 2000 to compensate victims of certain injustices committed by the Nazi regime during World War II. These mechanisms were established pursuant to settlements and private or governmental agreements following numerous Holocaust-related lawsuits brought in the US against the German and Swiss Governments, banks and corporations. Both are administered by the International Organization for Migration (IOM).⁶³ Additional Mass Claims Processes set up to deal with post-Holocaust claims include the Austrian General Settlement Fund (AGSF),⁶⁴ the French Commission for the Compensation of Victims of Spoliation (CCVS),⁶⁵ and the International Commission on Holocaust Era Insurance Claims (ICHEIC).

III. CHARACTERISTICS OF MASS CLAIMS PROCESSES

The nature of Mass Claims Processes can be difficult to define, however it is possible to identify a number of largely common and interrelated characteristics.

A. The Number and Commonality of Claims

The first characteristic of Mass Claims Processes is that they involve large

⁶⁰ See *In re Holocaust Victim Assets Litigation* F Supp 2d (EDNY, 2000). The text of the Settlement Agreement can be found at http://www.crt-ii.org/court_docs/Settleme.pdf.

⁶¹ See Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, approved by Judge Korman on 22 November 2000, see *In re Holocaust Victim Assets Litigation* and <http://www.swissbankclaims.com>.

⁶² Holtzmann and Kristjánsdóttir (above n 24) 17–37; Holtzmann (above n 2) para 12.

⁶³ Holtzmann and Kristjánsdóttir (above n 24) 29.

⁶⁴ H Lessing, R Rebernik and N Spitz, 'The Austrian General Settlement Fund: An Overview' in Permanent Court of Arbitration (ed), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (OUP 2006) 95.

⁶⁵ Decree No. 99-778 of 10 September 1999 (p 13633, Fr, 11 September 1999). See generally E Freedman, 'The French Commission for the Compensation of Victims of Spoliation: A Critique' in Permanent Court of Arbitration (ed), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (OUP 2006) 139–149.

numbers of claims. Although it is unclear how large that number has to be for a process to be characterised as a Mass Claims Process,⁶⁶ it can vary greatly, meaning that the nature of and challenges faced by different processes can be very different. For example, the Iran-US CT dealt with several thousand claims, while the number of claims addressed by the UNCC, which reached a total of 2.6 million, was on an entirely different scale. A second characteristic of Mass Claims Processes is that they involve claims which arise from common circumstances and involve common factual and legal issues, making it possible and more efficient to resolve them within a single process rather than in separate proceedings.⁶⁷ However, as with the number of claims, the level of commonality between claims varies between Mass Claims Processes, which can have an impact on the nature and complexity of the proceedings.

B. Reparative Function

Despite the different backgrounds and institutional frameworks of Mass Claims Processes,⁶⁸ their reparative function is one of their main characteristics. They share the common goal of providing effective remedies and a ‘measure of justice’⁶⁹ for the damage or injury caused to a large number of individuals or entities due to an armed conflict or similar events with widespread effects.⁷⁰ As such, they often serve to allay the societal discontent that unresolved wrongs perpetuate, and can thereby contribute to stability within a society.

Mass Claims Processes have evolved beyond the boundaries of traditional diplomatic protection to better provide relief to those who have been injured, notably by widening the scope of remedies available to affected individuals and entities.⁷¹ Indeed, the remedies are among a number of features of Mass Claims Processes that “can be tailored ... in whatever ways are required to address the ... human, political and economic dimension” of the problem being addressed.⁷² Besides providing an opportunity for compensation for injuries and losses sustained by victims of extraordinary events,⁷³ Mass

⁶⁶ It has been suggested by at least one commentator that it would have to be at least in the low thousands: Heiskanen (above n 4) 28.

⁶⁷ H Das, ‘The Concept of Mass Claims and the Specificity of Mass Claims Processes’ in Permanent Court of Arbitration (ed), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford 2006) 7.

⁶⁸ See generally PA Karrer, ‘Mass Claims Proceedings in Practice: A Few Lessons Learned’ 23 *Berkeley J Int’l L* (2005) 463.

⁶⁹ Crook (above n 19) 55.

⁷⁰ Das (above n 67) 5.

⁷¹ Crook (above n 19) 55.

⁷² *Ibid*, 55–56.

⁷³ Eg the CRT-I, the CRT-II, the GFLCP and the HVAP.

Claims Processes can provide for the restitution of property,⁷⁴ as well as serve the political and psychological function of recognising and legitimising the claims of injured groups.

C. Hybrid Nature of Mass Claims Processes

The structure and framework of modern Mass Claims Processes vary. Some Mass Claims Processes are designed essentially as arbitrations, as was the case for the Iran-US CT, the CRT-I and the EECC, even though the procedures used may differ from those in 'full-fledged arbitration' due to the commonality of the factual and legal issues to which the claims give rise.⁷⁵ For instance, "hearings at the [Iran-US CT] were, with few exceptions, generally much shorter than in cases of a similar level of complexity in international commercial arbitration."⁷⁶ Other Mass Claims Processes are structured as 'quasi-judicial' administrative procedures,⁷⁷ and others still are a hybrid of the two forms.⁷⁸ An example of such a hybrid form is the UNCC, which was an administrative body that performed essentially a fact-finding function of examining claims, verifying their validity, evaluating losses and paying out compensation.⁷⁹ Yet, for certain large cases, it operated more like an arbitral body, with adversarial proceedings which included submissions by parties.⁸⁰

The suitability of one structure or another for a Mass Claims Process is case-specific and depends on a number of factors, including the number of claims to be addressed. An arbitral method of dispute resolution may be more costly and time-consuming due to, among other things, minimum requirements of due process,⁸¹ and may not even be practicable in certain cases involving particularly high numbers of claims. Administrative procedures are less constrained by considerations of due process, and therefore afford greater flexibility in adopting an appropriate mechanism to resolve claims quickly and efficiently.

Another important factor is whether the question of liability has been settled beforehand. Most modern Mass Claims Processes were constituted on the basis of settlement agreements or other instruments which already determined that individuals or entities falling within a class or group are entitled

⁷⁴ Eg the CRPC and the HPCC.

⁷⁵ Heiskanen (above n 2) 304.

⁷⁶ *Ibid.*, note 23.

⁷⁷ Eg the CRT-II, the CRPC and the HVAP.

⁷⁸ Eg the UNCC. See generally Holtzmann and Kristjánssdóttir (above n 24) 97–103; N Wühler, 'The Different Contexts in Which International Arbitration Is Being Used: International Claims Tribunals and Commissions' (2003) 4 *J World Investment* 379.

⁷⁹ Wühler (above n 34) 17.

⁸⁰ Holtzmann and Kristjánssdóttir (above n 24) 98 & n 5.

⁸¹ Karrer (above n 68) 463–466.

to certain types of relief.⁸² Therefore, the liability of one of the parties was either recognised,⁸³ or simply left out of the process.⁸⁴ This was for example the case for the UNCC, which operated on the basis of a UN Security Council resolution which established Iraq's liability for damage caused by its invasion and occupation of Kuwait. In these kinds of circumstances, administrative, rather than arbitral procedures, are often deemed more appropriate for Mass Claims 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 adversar[ial] 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.⁸⁵

In the rare cases in which the issue of liability remains disputed, it is likely that an arbitral procedure will be more appropriate.⁸⁶ For instance, the Iran-US CT, which had to address the issue of liability on a case-by-case basis, was structured as an arbitral tribunal.

D. A Process of 'Practical' Justice

The pressure of processing and deciding very large numbers of claims, together with the desire to expedite payments of compensation and the difficulties encountered by victims in locating documentary evidence, most notably in cases involving armed conflict, have required procedural innovations and a standard of justice which often differs from that provided for in traditional international dispute resolution proceedings.

1. Guarantee of Due Process

Inherent to all Mass Claims Processes is "the tension ... between the search

⁸² Crook (above n 9) 80.

⁸³ Eg the UNCC (compensating damages arising out of the Iraqi invasion of Kuwait based on the UN's Security Council's establishment of Iraq's liability under international law). *Contra*, eg the EECC.

⁸⁴ Eg the CRPC (arising out of the Dayton Peace Agreement which, while establishing the right of return of refugees, did not confirm the legal liability of any of the parties to the conflict for damage caused during the conflict).

⁸⁵ Heiskanen (above n 2) 303.

⁸⁶ *Ibid.*, 305.

for individual justice and fairness and the requirement of an expedient process that resolves all the claims within a reasonable time period,⁸⁷ leading some to describe the outcome of Mass Claims Processes as ‘rough justice.’⁸⁸ Nevertheless, it has been suggested that such Processes do comply with the requirements of due process, although not necessarily in the same form as in court or arbitral proceedings.⁸⁹ Due process is guaranteed for the system and less for each individual case, as a traditional conception of due process would be too onerous and could lead to a denial of justice for the victims of the often tragic and extraordinary events which give rise to Mass Claims Processes. The guiding principle is therefore one of “practical justice,” in other words “justice that would be swift and efficient, yet not rough.”⁹⁰

2. Flexible Rules of Procedure

Whether Mass Claims Processes are of an arbitral or administrative nature, they are governed by procedural rules that typically are referred to in their constituting instruments.⁹¹ Some of these refer to an existing set of procedural rules, either incorporating them by reference or citing them as a basis for drafting new rules.⁹² Others provide, without incorporating a set of rules by reference, that procedures may be ‘guided by’ a set of existing rules.⁹³ Regardless of the method used, the success of Mass Claims Processes rests in the flexibility of their rules and the possibility to adjust them to the particularities of their context.

⁸⁷ Wühler (above n 34) 20.

⁸⁸ Crook (above n 9) 80; PA Karrer, ‘Mass Claims to Provide Rough Justice: The Work of the Property Claims Commission of the German Foundation “Remembrance, Responsibility and the Future”’ in B Bachmann et al (eds), *Grenzüberschreitungen: Beiträge zum internationalen Verfahrensrecht und zur Schiedsgerichtsbarkeit: Festschrift für Peter Schlosser zum 70. Geburtstag* (2005) 339; Wühler (above n 34) 22.

⁸⁹ Wühler (above n 78) 380. See generally H Houtte and I Yi, ‘Due Process in International Mass Claims’ 1 *Erasmus L Rev* (2008) 63 (analysing Mass Claims Processes in light of art 6 of the European Convention on Human Rights, and concluding that standards of due process applicable to individual justice cannot apply directly to mass claims proceedings, but that such proceedings must still meet the test of due process, albeit in a slightly different form).

⁹⁰ DD Caron and B Morris, ‘The United Nations Compensation Commission: Practical Justice, Not Retribution’ 13 *Eur J Int’l L* (2002) 183, 188.

⁹¹ See generally Holtzmann and Kristjánsson (above n 24) 205–210.

⁹² Eg Iran-US CT which used the UNCITRAL Arbitration Rules (UN Doc A/RES/31/98, 15 December 1976) <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> (UNCITRAL Rules), or the EECC, which referred to the PCA Rules.

⁹³ Eg the UNCC which took inspiration from the UNCITRAL Rules.

3. Adapted Standards of Proof and Evidentiary Rules

The sheer number of claims and the difficulty encountered in many cases in obtaining evidence in respect to events which occurred years or decades earlier, and for which the records may have been destroyed in part or in full, means that the evidence supporting claims in Mass Claims Processes often cannot be assessed in the same manner judges and arbitrators assess cases in traditional judicial or arbitral proceedings. Modern Mass Claims Processes therefore have often been designed to require only the level of documentary or other evidence that can reasonably be expected in the circumstances.⁹⁴ As a result, Mass Claims Processes have generally used a relaxed standard of proof; instead of applying traditional legal standards such as requiring facts to be established by a preponderance of the evidence, Mass Claims Processes often resort to a test of ‘plausibility.’⁹⁵

In conjunction with, or instead of, relaxed standards of proof, Mass Claims Processes have also resorted to techniques, such as the discovery of evidence on their own motion and evidentiary presumptions. Administering institutions or secretariats can play an active role in seeking out evidence to support claims,⁹⁶ especially in cases in which it is difficult for claimants to access such evidence. Such a role raises issues of procedural fairness, as it impacts the allocation of the burden of proof. However, in certain cases, “the accuracy of outcome [is, for policy reasons,] considered more important than procedural neutrality.”⁹⁷ Evidentiary presumptions, which also impact the allocation of the burden of proof, are sometimes used for large-scale claims programmes in which individual research to substantiate individual claims would be too time-consuming and expensive, or in which the claimants have difficulties accessing the evidence. Such presumptions can, for example, be developed on the basis of research as to frequently occurring claim scenarios.⁹⁸

4. Mass Processing Techniques

A number of other techniques which have been developed in modern Mass Claims Processes, many of which originated in US class action lawsuits,⁹⁹

⁹⁴ See generally JJ Haersolte-van Hof, ‘Innovations in Mass Claims Dispute Resolution: Using New Standards of Proof’ 58 *Disp Resol J* (2003) 70.

⁹⁵ Holtzmann (above n 2) 16. The plausibility standard was first explicitly enunciated by the RT-I. See Rules of Procedure for the Claims Resolution Process (15 October 1997) http://www.crt-ii.org/crt-i/rules_procedure.html, art 22.

⁹⁶ Crook (above n 19) 56.

⁹⁷ Heiskanen (above n 2) 318.

⁹⁸ International Organization for Migration, ‘Property Restitution and Compensation: Practical and Experiences of Claims Programmes’ (2008) 246.

⁹⁹ V Heiskanen, ‘Innovations in Mass Claims Dispute Resolution: Speeding the Resolution of Mass Claims Using Information Technology’ 58 *Disp Resol J* (2003) 79, 80.

have contributed greatly to their efficiency. Among these are the extensive use of large-scale computerization,¹⁰⁰ which can facilitate the verification and evaluation of thousands of individual claims through computerised matching and advanced techniques, such as sampling and statistical modelling. The UNCC, for instance, used a large database to store all relevant data pertaining to the claims before it and to perform a number of statistical operations.¹⁰¹ These processing techniques are not new and have generally been borrowed from US class action lawsuits. Besides speeding up the management of the process, computer technology also facilitates the grouping of claims, which permits Mass Claims Processes to identify and resolve common issues in a single decision applicable to an entire group of claims, without having to resort to case-by-case adjudication.¹⁰²

In addition to computerization and other related techniques, such as the use of statistical methods, modern Mass Claims Processes have in many cases delegated review functions either to an administrative institution, such as a secretariat, or to an expert. For example, as mentioned above, the UNCC's procedural rules provided for the delegation to its Secretariat of claims review functions in respect of claims under USD 100,000. In addition, delegation of review functions can be used to assist in the grouping of claims, allowing common issues to be determined together, rather than on a case-by-case basis.¹⁰³

IV. MASS CLAIMS AND INTERNATIONAL INVESTMENT DISPUTES

An important development in recent years has been the submission of mass claims arising from economic and financial crises to international investment treaty arbitration.¹⁰⁴ Only one such arbitration has been initiated so far, namely the still ongoing *Abaclat v. Argentina* case, which involves the claims of 60,000 (initially 180,000) Italian nationals who are alleged holders of bonds on which Argentina defaulted. Other cases have also involved large numbers of claimants, such as the similar *Ambiente v. Argentina* and *Alemanni v. Argentina* cases, which were initiated by 90 (initially 119) and 183 Argentinian bondholders respectively; however, it is generally considered that these do not constitute mass claims.¹⁰⁵ Nevertheless, the emergence of mass claims in investment treaty arbitration has given rise to much debate.

¹⁰⁰ See generally *ibid*, 80.

¹⁰¹ Wühler (above n 34) 20.

¹⁰² Heiskanen (above n 99) 81. See eg the UNCC which resorted to this technique by grouping similar claims together and by submitting them to the same panel of Commissioners.

¹⁰³ Heiskanen (above n 2) 314.

¹⁰⁴ *Ibid*, 297–298, 302.

¹⁰⁵ The tribunal in the *Ambiente v. Argentina* case noted that the term 'mass claims' was not a

Unlike past Mass Claims Processes, the investment treaty arbitration framework was not specifically designed to handle mass claims. Indeed, the procedural rules applicable to investment treaty arbitrations, such as those set out in the ICSID Convention and in the ICSID Arbitration Rules, are silent on the specific issue of mass claims, and in particular, on the issue of arbitral tribunals' jurisdiction over such claims and their power to adopt the procedures or techniques which, from a practical point of view, would be necessary to deal with such claims. This has raised the question as to whether international investment tribunals can hear mass claims in the absence of a specific consent of the respondent State, as well as what procedures or techniques tribunals may resort to when hearing mass claims.

With respect to the first question, the respondent in *Abaclat v. Argentina* argued, *inter alia*, that it had not consented, in the applicable bilateral investment treaty (BIT) or in the ICSID Convention, to an “unprecedented mass action” which would “change the nature of ICSID claims.”¹⁰⁶ While one of the arbitrators dissented, noting in particular that all past Mass Claims Processes in international law were based on the consent of the States involved (or on the powers of the UN Security Council),¹⁰⁷ the tribunal ruled that no specific consent for mass claims was required. It explained in particular that if it could have jurisdiction over several individual claimants, there was no reason why it would lose that jurisdiction “where the number of [c]laimants outgrows a certain threshold.”¹⁰⁸ It also noted that the investments at issue in the case, namely bonds, which were protected by the applicable BIT, were:

susceptible of involving ... a high number of investors, and where such investments require a collective relief in order to provide effective protection

technical term with a precise meaning, and, after comparing the number of claimants in the proceedings before it with that in the *Abaclat v. Argentina* case, concluded that it would ‘stick to qualifying [the case] as a “multi-party action”.’ (*Ambiente v. Argentina*, Decision on Jurisdiction and Admissibility, 8 February 2013, ICSID Case No. ARB/08/9, paras 119–122; see S Blanchard, ‘Ambiente Ufficio S.p.A. and Others v. Argentine Republic’ 15 *Journal of World Investment and Trade* (2014) 314–323). The *Alemanni v. Argentina* tribunal reached a similar conclusion, noting that the number of claimants in the arbitration ‘does not in ordinary usage fit the descriptor “mass”.’ (*Alemanni v. Argentina*, Decision on Jurisdiction and Admissibility, 17 November 2014, ICSID Case No. ARB/07/8, para 276.) See also B Demirkol, ‘Does an Investment Treaty Tribunal Need Consent for Mass Claims?’ 2 *Cambridge Journal of International and Comparative Law* 3 (2013) 616–617.

¹⁰⁶ *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011, ICSID Case No. ARB/08/9, para 471.

¹⁰⁷ *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Professor Georges Abi-Saab, 28 October 2011, ICSID Case No. ARB/08/9, para 185.

¹⁰⁸ *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility (above n 106), para 490.

to such investment, it would be contrary to the purpose of the BIT and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration.¹⁰⁹

The tribunal's decision to hear the mass claims proved to be controversial.¹¹⁰ However, it has certainly opened the door to mass claims being brought in investment treaty arbitrations.

With respect to the procedures or techniques for hearing mass claims, the *Abaclat v. Argentina* tribunal ruled that it had the power under Article 44 of the ICSID Convention and Rule 19 of the ICSID Arbitration Rules to "fill the gaps" left by the ICSID framework in respect of mass claims, and therefore to adopt the necessary procedural mechanisms.¹¹¹ However, the tribunal recognized that its authority in this respect was limited by the provisions of the ICSID Convention and the ICSID Arbitration Rules, which it could not modify,¹¹² and that any procedural mechanism it adopted could not affect its duty to examine the elements necessary to establish its jurisdiction and the merits of the claims.¹¹³ In addition, certain procedures or techniques which are commonly provided for in the constituting instruments of Mass Claims Processes could raise issues concerning due process rights in the context of investment treaty arbitration.

The tribunal in *Abaclat v. Argentina* provided little indication in its Decision on Jurisdiction and Admissibility as to what procedural mechanisms it would adopt, although it did address the issue to a certain extent. In particular, the tribunal indicated that it would resort to "group treatment" or common issue determination, which is "one of the most commonly employed mass claims processing techniques,"¹¹⁴ by dividing the merits phase into two parts: the first will be "a general phase aimed at determining the core issues regarding the merits of the case, and in particular establishing what conditions must be fulfilled for further resolving claimants' claims and determining the best method to examine these issues and conditions."¹¹⁵ In the second phase, the tribunal will "rule on how to examine the relevant issues and conditions" and

¹⁰⁹ *Ibid.*

¹¹⁰ SI Strong, 'Mass Procedures as a Form of "Regulatory Arbitration" – *Abaclat v. Argentine Republic* and the International Investment Regime' 38 *The Journal of Corporation Law* 2 (2012/2013) 259–260.

¹¹¹ *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility (above n 119) paras 518–528.

¹¹² *Ibid.*, para 520. See D Donovan, 'Case Comment: *Abaclat and others v Argentine Republic As a Collective Claims Proceeding*' 27 *ICSID Review* 2 (2012) 261–267.

¹¹³ *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility (above n 119) para 529.

¹¹⁴ Heiskanen (above n 2) 315.

¹¹⁵ *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility (above n 119) para 671.

“put in place an appropriate mechanism of examination and will proceed with such examination.”¹¹⁶ In assessing whether or not group treatment was appropriate, the tribunal explored “whether claimants have homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by Argentina of homogeneous obligations provided for in the BIT,” which it found to be the case.¹¹⁷ According to commentators, the application of such common issue determination in investment treaty arbitration would not raise due process concerns provided that the parties are given the opportunity to be heard on the issue and as to the applicability of a decision on an issue to a particular group of claims.¹¹⁸ Similarly, pilot cases or bellwether proceedings, which were also considered by the *Abaclat v. Argentina* tribunal,¹¹⁹ and which can assist parties to settle the remaining cases, should also not impact procedural fairness as they do not affect the parties’ rights to be heard on individual claims.¹²⁰

As mentioned above, another procedural mechanism used in Mass Claims Processes is the delegation of claims review to a secretariat or an expert. This was the approach adopted by the tribunal in *Abaclat v. Argentina* in order to verify whether the 60,000 claimants in the case met the specific jurisdictional requirements set out in its Decision on Jurisdiction and Admissibility.¹²¹ The tribunal in that case appointed an expert to review the information contained in the database of individual claims, which the claimants had set up, to verify whether each claimant met the specific jurisdictional requirements, which included the requirement that natural persons had held Italian nationality between certain specific dates.¹²² The expert then submitted a report of his findings to the tribunal and the parties. Some commentators have taken the position that such delegation by an arbitral tribunal may be permissible provided that the tribunal does not delegate its decision-making function, and that the expert’s review is conducted under the guidance and supervision of the tribunal.¹²³ However, the approach adopted in *Abaclat v. Argentina*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, paras 541 and 543.

¹¹⁸ Donovan (above n 112) 265; Heiskanen (above n 2) 316.

¹¹⁹ *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility (above n 119) para 666.

¹²⁰ Donovan (above n 112) 264.

¹²¹ *Abaclat v. Argentina*, Procedural Order No. 12, 7 July 2012, ICSID Case No. ARB/08/9, para 4.

¹²² See *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility (above n 106) para 501 (iii).

¹²³ Heiskanen (above n 2) 314–315. See also Donovan (above n 112) 265, who states that the delegation of any decision-making function, “if permissible at all, would need to be provisional – that is, any initial determination would need, upon objection, to be subject to plenary review and determination by the tribunal.”

may raise due process concerns. Indeed, the respondent in the case objected that the expert's review, which would be limited to a mere six minutes per claim, would fail "to provide for an analysis of the circumstances of each claim," including the validity of the documentary evidence submitted, and therefore would "fail to provide [it] with the opportunity to respond to each claim."¹²⁴

The use of statistical sampling in investment treaty arbitration, in the absence of the agreement of the parties, raises even greater due process concerns. Indeed, the tribunal granting claims without having reviewed all of them "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."¹²⁵ The tribunal in *Abaclat v. Argentina* appears to have recognized this concern, as it declined to accept a proposal by the expert it appointed to only review whether jurisdictional requirements were met in respect to a sample of claims when it was faced with an objection from the respondent that such sampling would deprive it of "the right to defend itself against each claim and claimant individually."¹²⁶ Resorting to certain other procedural mechanisms used in Mass Claims Processes, such as the discovery of evidence *ex officio* by the tribunal or secretariat, or the use of evidentiary presumptions and relaxed standards of proof will also likely be considered inappropriate in investment treaty arbitration.

V. CONCLUSION

It is unclear how international Mass Claims Processes, which historically have contributed greatly to the development of public international law, will develop in the future. As public international law evolves to grant individuals and entities greater rights and protection, Mass Claims Processes may play an even more important role than in the past in the wake of various crises and incidents, such as armed conflicts, environmental disasters or large-scale economic crises. However, there has been a tendency towards the nationalization of Mass Claims Processes. Indeed, a number of Mass Claims Processes which might have been "created under an international umbrella" are now being established under domestic law, due in part to the "increasing reluctance on the part of the international community to carry the burden of financing international claims programs and the practical difficulties associ-

¹²⁴ *Abaclat v. Argentina*, Procedural Order No. 17, 8 February 2013, ICSID Case No. ARB/08/9, para 14(iii).

¹²⁵ Heiskanen (above n 2) 322.

¹²⁶ *Abaclat v. Argentina*, Procedural Order No. 17 (above n 124), para 8(iv).

ated with ensuring the funding of compensation awards.”¹²⁷ This development underlines the importance of strong political support for the success of international Mass Claims Processes, in particular with respect to funding.

An exception to the trend of nationalization has been the emergence of mass claims in international investment treaty arbitration, the legal framework of which was not specifically designed to address mass claims. It remains to be seen whether the *Abaclat v. Argentina* case will open the door to a significant influx of mass claims in investment treaty arbitration. Nevertheless, the case has stirred an important debate as to the suitability of the investment treaty arbitration framework for hearing mass claims, and in particular as to the policy implications of its use with respect to issues such as sovereign debt restructuring, which the tribunal in *Abaclat v. Argentina* declined to take into consideration.¹²⁸

Time will tell whether mass claims will become more prevalent in international investment arbitration, as well as what role other types of Mass Claims Processes will play and what form they will take in the future. In any event, traditional mechanisms of dispute resolution will, in many cases, be unable to provide adequate redress to high numbers of individuals and entities affected by extraordinary events with widespread impact. Mass Claims Processes, in their various forms, will therefore undoubtedly remain relevant as extraordinary mechanisms to address extraordinary disputes.

¹²⁷ Heiskanen (above n 2) 302.

¹²⁸ *Abaclat v. Argentina*, Decision on Jurisdiction and Admissibility (above n 106) para 660: “Respondent’s policy arguments regarding the appropriateness of ICSID proceedings in the context of sovereign debt restructuring are irrelevant for the determination of the admissibility of the claims.”

