1. What is mass claims processing?

INTRODUCTION

As compensation and remedies for damages become more global and international processes are designed to resolve mass claims, reparations in both the domestic and international arenas have arisen through methods of dispute resolution beyond traditional domestic litigation in courts. Central to any discussion of compensation and remedies is a critical and comprehensive understanding of mass claims litigation, both in United States courts and extra-judicially in the United States, and in international reparations programs, through both international mass claims processes and international arbitration. Through the juxtaposition of U.S. domestic mass claims and U.S. class action processes and procedures, international mass claims processes established under international law, and international arbitration of mass claims, the history and future of reparations for mass claims processing can be effectively analyzed and critiqued.

Effective and efficient reparations is the lens through which the processes discussed in this book will be evaluated. “Reparations must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”

Reparations in this context may take two forms: restitution and compensation. Restitution refers to those devices that allow the individual to reestablish the status quo ante, for instance, restitution or return of lost property. Compensation refers to those devices that allow for the provision of monetary recompense to make up for the harm suffered. In other words, compensation is supposed to make the victim whole by returning him or her to the status that person had prior to the wrongdoing.

To require a State to pay compensation, a valid legal reason must exist for the State to be required to

3 Gabčíkovo-Nagymaros Project (Hung.v. Slov.), Judgment, 1997 I.C.J. Rep. 7, ¶ 152 (Sept. 25) (“It is a well established rule of international law that an injured State is
What is mass claims processing?

pay. Mass claims procedures award monetary compensation when restitution of property or assets is not available,4 or where personal injury is the harm redressed.5

Claims processes rise or fall on the strength of their reparations regime, whether domestic mass claims, extra-judicial programs, or international mass claims tribunals. The processes that are discussed in this book will be evaluated and critically analyzed using the rubric of (1) who is or will administer the reparations process; that is who or what is the governing body; is it trustworthy and viable; how will it operate; is it efficient and effective; and what are its resources and processes for determination of compensatory awards; (2) how will the reparations be funded and who will fund it; most importantly, is the source of funding stable and either limitless or capped (finite); and (3) how will the reparations be distributed to the intended beneficiaries, including sources of distribution and verification of payments. As stated by Pablo de Greiff in his book The Handbook of Reparations, “reparations are the most tangible manifestation of the efforts of the state to remedy the harms that [victims] have suffered.”6

TRADITIONAL MASS CLAIMS ACTIONS IN THE UNITED STATES

In examining compensation that has been awarded to successful individuals, the book will begin with an analysis of class actions and mass actions in the United States. Under U.S. law, class actions are governed by federal rules and require that the class and its representatives meet the requirements of numerosity, commonality, typicality, and adequacy (which will be discussed in greater detail in Chapter 2). Also under U.S. law, a mass action is any civil action where one hundred or more people seek monetary relief in a joint process on the basis that their claims have common questions of law and fact.7 Both mass actions and class actions are grounded in complicated procedural rules that require federal courts to first have jurisdiction to even hear the cases entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”).

5 Dinah Shelton, Remedies In International Human Rights Law 103 (2d ed. 2005) (noting “[i]t appears from the law of state responsibility for injury to aliens that restitution is often impossible due to the nature of the injury and that compensation for material and moral harm therefore constitutes the general form of reparation.”).
and then involve complex and often lengthy legal proceedings that may take years or even decades to resolve. Additionally, while the recompense received may serve the greater good of providing a remedy for a wrong that otherwise would go unpunished, the compensation is often financially insignificant to many of the putative class action plaintiffs. These shortcomings will be further analyzed in Chapter 2.

In 2005, Congress passed the Class Action Fairness Act ("CAFA").\(^8\) CAFA substantially enlarged federal jurisdiction for class actions and created a completely new litigation device, the “mass action.” CAFA provided original jurisdiction to federal district courts in class actions where the amount in controversy is greater than $5 million and “in which any member of a class of plaintiffs is a citizen of a State different from any defendant.”\(^9\) Class member claims are aggregated to determine if the $5 million threshold is met. Congress enacted CAFA to address the perceived unfairness with the then-existing law on diversity jurisdiction and removal, which made it difficult for defendants to move nationwide class actions from state to federal court. Prior to CAFA, defendants had to satisfy diversity jurisdiction, that is, complete diversity between all plaintiffs and defendants and an amount in controversy of $75,000 per claimant. CAFA removed the jurisdictional impediments by allowing removal with “minimal” diversity—as long as any class member plaintiff is diverse from any defendant—and providing for an amount in controversy for the entire class of more than $5 million. This legislative change effectively removed jurisdiction from state courts to hear multistate class action lawsuits, with the vast majority of significant class actions now heard in federal court.

In addition to creating new jurisdictional requirements for class actions, CAFA created a new category of class action—the “mass action.”\(^10\) Mass action is defined as:

any civil action … in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).\(^11\)

CAFA’s mass actions provisions were intended to address aggregate state litigation pursued through joinder of claims outside of state equivalents of Rule

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\(^9\) Id.

\(^10\) 28 U.S.C. § 1332(d). “[A] mass action shall be deemed to be a class action removable under paragraph (2) through (10), if it otherwise meets the provisions of those paragraphs.” Id. § 1332(d)(11)(A).

\(^11\) Id. § 1332(d)(11)(B)(i).
What is mass claims processing?

23 of the Federal Rules of Civil Procedure. As with class actions, CAFA’s provisions regarding mass actions were designed to frustrate large-scale, complicated state litigation. Thus, the mass action statutory requirements cross-reference the CAFA requirements and are designed to be treated as a class action for jurisdictional and removal purposes.

Yet mass actions are not bound by the Rule 23 requirements. In other words, mass actions are not litigated by a Rule 23 class representative and lack other procedural safeguards, such as the opportunity to opt out and to bind non-present plaintiffs on litigated issues. However, while mass actions escape the stringent requirements of Rule 23 class actions, they are still subject to fairly rigorous statutory threshold requirements before they may be heard by federal courts.

Even before the reforms to class actions and the mass actions envisioned by CAFA, courts were looking for methods to group civil actions together through informal ways. As with the changes promulgated to Rule 23 class actions in 1966, the multidistrict litigation (MDL) statute was enacted by Congress in 1968 as a procedural device to have a formalized procedure for handling numerous cases filed in multiple federal courts that arose from the same common issues. The U.S. Panel on Multidistrict Litigation, created by the MDL statute, is a panel of U.S. judges authorized to transfer cases with “common questions of fact” to a single judge “for coordinated or consolidated pretrial proceedings.”12 One of the most critical decisions for the Panel is the selection of the judge to whom the cases will be transferred. Factors involved in this determination include geographical location of the witnesses and evidence, as well as availability and experience of the transferee judge. The main benefits of transfer are coordinated discovery among all cases, along with a managerial role over the litigation, resulting in the transferee judge making dispositive pretrial motions and encouraging pretrial settlement.

The MDL process is initiated by the Panel upon either its own motion or the motion of any party in any action that potentially fulfills the requirements of the statute. If the panel concludes that it “will be for the convenience of parties and witnesses and will promote the just and efficient conduct of [the] actions,” it may transfer all of the pending cases to a single district judge that it selects to consolidate the pretrial proceedings.13 Any future cases that involve the same subject matter is subsequently transferred as “tagalong cases” to the same MDL judge. While the MDL is in process, all actions in the other district courts are stayed. Once pretrial proceedings are concluded, the court remands.

13 Id. § 1407(a).
all of the cases back to the districts from which they originated.\textsuperscript{14} However, due to the MDL judge’s ability to settle the cases, few cases are remanded to their originating district courts.

MDLs have been used to resolve mass torts cases, including product liability and defective drug cases, which previously would have been ripe for Rule 23 class action litigation. An MDL is not, however, a representative lawsuit, and unlike class actions, parties cannot opt out of an MDL proceeding. The parties remain part of the MDL until the pretrial proceedings have completed and the case is remanded to the original district court or a settlement is reached. In the case of settlement, unlike a class action where a judge reviews the settlement for fairness, no such process exists in the MDL proceeding. Some therefore argue that the MDL provides inadequate protections to the plaintiffs who are swept into its procedures and no limitations on judges who are appointed to oversee the proceedings and essentially attempt to coerce a settlement. These points will be further developed in Chapter 3, where the claims resulting from the tremendous environmental damage that resulted from the Deepwater Horizon Gulf oil spill were ultimately resolved through an amalgamated process involving both extra-judicial mass claims processing and MDL proceedings consolidated in the United States District Court for the Eastern District of Louisiana.

EXTRAJUDICIAL MASS CLAIMS PROCESSES IN THE UNITED STATES

Along with the mass claims litigation prevalent in U.S. courts, mass claims commissions have been providing compensation to U.S. citizens for losses due to injury and death caused at the hands of foreign governments. These claims, while international in character, are resolved by a U.S. domestic governmental agency. For instance, within the Department of Justice, the Foreign Claims Settlement Commission (FCSC) is tasked with creating settlement programs for U.S. nationals that have suffered mass losses at the hands of foreign governments. The FCSC is an administrative and quasi-judicial body that operates to effectuate settlement payments against foreign governments. The FCSC’s jurisdiction can occur from an international claims settlement agreement or result as a request from the Secretary of State, and the funds for compensation arise from either Congressional appropriation, a settlement from the foreign government, or liquidating foreign assets held in the United States.\textsuperscript{15}

\textsuperscript{14} Id.
Successful foreign claims settlement programs include ones against the governments of Czechoslovakia, German Democratic Republic (East Germany), Hungary, Libya, and Yugoslavia, among others.\(^{16}\)

Most importantly for the successful resolution of these claims was the ability to fund awards to accepted claimants. For instance, the Czechoslovakia claim fund was established for claims of U.S. nationals against the Government of Czechoslovakia due to monetary losses suffered due to the nationalization of property by Czechoslovakia. Funds paid to successful claimants resulted from the liquidation of blocked Czechoslovakian governmental assets held in the United States. With an available source of funding for these FCSC awards, 2,630 claimants were found to have compensable claims and were awarded amounts totaling $72,614,634, with $41,030,517 in interest. Approximately 30 years after the liquidation of these assets that provided partial payment of the awarded amounts, the United States and Czechoslovakia negotiated a claims settlement agreement. This agreement provided Czechoslovakia would pay to the United States a total of $81.5 million in settlement of all claims between the countries. This settlement amount was in addition to the $8.5 million already paid out of the liquidated Czechoslovakian assets in the United States.\(^{17}\)

As a result of the liquidation of assets and subsequent settlement agreement, claimants, while not receiving the full value of their claims, were able to receive substantial payments on their awards.\(^{18}\)

Outside traditional U.S. litigation, a more cost-efficient and perhaps more effective alternative to mass claims litigation has arisen with the independent, extra-judicial mass claims processes created as a result of the BP Gulf oil spill and September 11, 2001 terrorist attacks. These processes, mirrored on international mass claims efforts, have provided speedy remuneration for victims, but often at a fraction of the recovery amounts for which the claimants requested. For instance, claimants expressed dissatisfaction to the Gulf Coast Claims Facility with the methodologies used to calculate losses as a result of the damages that resulted from the BP Gulf oil spill. Likewise, claimants to the 9/11 Compensation Fund expressed frustration due to the complexity of the application process and the resulting differing compensation amounts that were awarded.\(^{19}\) One of the 9/11 claimants stated, “We’ve come to the point now where my son’s life has been measured and reduced to tables, percentages and numbers, and the fact that he was single further reduces those numbers,

\(^{16}\) Id., https://www.justice.gov/fcsc/completed-programs.

\(^{17}\) Id., https://www.justice.gov/fcsc/completed-programs-czechoslovakia.

\(^{18}\) Id. For instance, claimants in the First Czechoslovakian Claims Program received approximately 73% of the awarded amounts.

\(^{19}\) Kenneth R. Feinberg, What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11 142 (2005).
Reparations in domestic and international mass claims processes

and it seems to reduce the compensation or the award that I’m going to get simply because I’m a parent.” In its defense, the 9/11 Claims Commission’s role was to award financial remuneration to provide a measure of compensation for those individuals who lost loved ones to terrorist attacks on the World Trade Center, the Pentagon, and in Pennsylvania. Chapters 3 and 4 will analyze whether the benefits of these domestic reparation programs, including ultimate amounts awarded as compensation, can be viewed as outweighing the costs, financially and logistically.

INTERNATIONAL MASS CLAIMS PROCEDURES

Turning from United States domestic processes to the international arena, a foundational principle of international law underlying international mass claims procedures is that States must take responsibility for their internationally wrongful acts. In redressing wrongful acts, international mass claims procedures are implemented to compensate successful claimants for losses suffered. According to the authors of International Claims Commissions: Righting Wrongs after Conflict, international mass claims procedures have six shared characteristics: (1) they implement binding dispute resolution process; (2) they are constructed and perform like judicial bodies; (3) they are formed after a significant international event; (4) they are creatures of international law; (5) they rely on state responsibility to operate; and (6) they are ad hoc bodies. Adding one more characteristic to the list, they also need to provide just, effective reparations.

Generally speaking, in the majority of international mass claims processes, the reparation awarded to successful claimants is limited to either monetary compensation or restitution of property or assets. Of the ten international mass claims procedures examined by Howard Holtzmann and Edda Kristjansdottir in their analysis for the Permanent Court of Arbitration, every one provided predominantly, if not exclusively, for compensation or restitution as a remedy for property loss. In those circumstances where personal injuries have been

20 Id. at 142–43.
addressed by an international mass claims process—for instance, by the United Nations Compensation Commission for losses suffered as a result of Iraq’s invasion and occupation of Kuwait in 1991—monetary compensation again was the sole remedy. Therefore, international mass claims procedures based on state responsibility principles are characterized by a remedial focus on monetary compensation. For successful mass claims processes, “reparations are often important components of settlement and emotional closure for victims.”24

In designing and implementing international mass claims processes, the state qua state is the engine behind the process, whether acting individually or collectively. The treaties, international agreements, and United Nations resolutions that are drafted to resolve disputed claims result from state acquiescence to the principles of international law, specifically the concept of state responsibility.25 For example, third party mediation by the Government of Algeria between Iran and the United States created the Iran–U.S. Claims Tribunal, which then adjudicated claims of expropriation and breach of contract resulting from Iran’s wrongful seizure of the U.S. Embassy in Tehran, Iran. Similarly, negotiated peace agreements to adjudicate claims of property losses that were the result of hostilities between State parties resulted in the establishment of the Commission for Real Property Claims of Displaced Persons (CRPC) in Bosnia and Herzegovina and the Eritrea–Ethiopia Claims Commission. State responsibility was also clearly implicated when the United Nations Security Council unanimously adopted Resolution 687 imposing a duty on Iraq to provide reparations for the losses suffered as a result of its invasion and occupation of Kuwait, as well as the United Nations Security Council resolution that created the United Nations Compensation Commission.26 Thus, the willingness of states to submit to treaties, international agreements, or other

25 See generally International Law Commission, Articles on the Responsibilities of States for Internationally Wrongful Acts, U.N. Doc A/CN.4/L.602/Rev.1 (July 2001). States recognize that “[e]very internationally wrongful act of a State entails the international responsibility of that State.” Id. art. 1. The corresponding precept is that a party injured due to an internationally wrongful act must be repaired. See Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 27, 28 (Sept. 13, 1928). In order to make these reparations, dispute resolution mechanisms are usually (although not exclusively) established by multilateral or bilateral government-to-government negotiations.
Reparations in domestic and international mass claims processes

international instrumentalities in resolving the disputes between them is the *sine qua non* for the existence of most international mass claims processes.

The modern era of the international mass claims process began with the establishment of the Iran–U.S. Claims Tribunal, and its use as a tool for providing reparations in international mass actions was solidified by the United Nations Compensation Commission. Based on the success of these institutions, other mass claims processes were developed, most notably the Claims Resolution Tribunal for Dormant Accounts in Switzerland. These claims processes are viewed as successful programs that provided reparations for property and other losses. These tribunals broke new ground through the use of arbitration-like techniques and methodologies to resolve a significantly large number of claims arising from common situations and compensate victims for losses suffered. Each of these tribunals is widely regarded as a successful mass claim process that furthered the approach of claims resolution through mass procedures. The Iran–U.S. Claims Tribunal, the United Nations Compensation Commission, and the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I) had a significant volume of claims, ranging from approximately 4,000 filed at the Iran–U.S. Claims Tribunal, to almost 10,000 claims at the CRT-I, and over 2.6 million at the United Nations Compensation Commission.\(^27\)

These international mass claims processes are created as a substitute for judicial and other dispute resolution mechanisms, often in the interest of promoting international peace and stability. International mass claims processes are “*ad hoc* bodies and their structure, jurisdiction, procedure and ability to remedy vary considerably.”\(^28\) It is no coincidence that modern-day international mass claims processes evolved from international arbitration procedures and corresponding institutions such as the Permanent Court of Arbitration. Indeed, international mass claims processes often have been charged with adjudicating the liability of a state or other party before establishing the arbitral award or granting compensation. The overarching goal of any international mass claims procedure is to provide “effective remedies for numerous individuals who suffered losses, damage or injuries as a result of an armed conflict or a similar event causing widespread damage.”\(^29\) These remedies, as indicated by Howard Holtzmann, former judge at the Iran–U.S. Claims Tribunal, are generally limited in practice to monetary compensation or restitution as they are geared


\(^{28}\)Lea Brilmayer, Chiara Giorgetti, & Lorraine Charlton, *supra* note 22, at 3.

\(^{29}\)See Hans Das, *supra* note 27, at 5.
What is mass claims processing?

What is mass claims processing? Toward redressing property claims. With few exceptions, compensation for personal injuries or wrongful death has been neglected in international mass claims procedures. On the other hand, international mass claims procedures are generally successful at achieving some level of finality—that is, ensuring that all claimants who have suffered loss receive some level of redress. Along with the measure of compensatory redress is the punishment for the unlawful conduct that has caused the victim’s harm. Thus, a critical component that goes hand in glove with physical compensation is the feeling of mental retribution for the harm suffered. The question remains open as to whether the reparation provided by international mass claims processes achieves the goal of the institution, that is, does it provide adequate, just, and effective compensation?

In determining compensation for the wronged victims, most international mass claims processes share a defining feature with courts, that is, an adjudicatory or administrative body, called a tribunal or commission, which is tasked with implementing the compensatory mandate outlined by the parties in the underlying agreement that created the adjudicatory body. In respecting the key mandate of these mass claims processes, the tribunal or commission must reconcile “the tension between individualized justice, on the one hand, and efficiency and speed, on the other…. [In other words, a] balance must be struck between the traditional requirements of fairness [in individual cases] and the imperative to provide justice quickly to all claimants.”

These fairness or equity goals can be viewed through the lens of either, or both, corrective justice and distributive justice. Full corrective justice mandates that the compensation remedies the actual losses incurred by the victim. Compensation therefore provides full redress for both economic losses such as health care costs and lost wages as well as noneconomic losses such as pain and suffering. Distributive justice, on the other hand, addresses how the compensation is provided among possible claimants. Through distributive justice, compensation is apportioned equally among claimants, according to need or based on contribution.

All claims processes, whether domestic or international, have some measure of either corrective or distributive justice underpinning their goals and efforts. With respect to international mass claims processes, the emphasis is usually focused on efficiency. International mass claims processes are deemed successful based on their ability to advance procedural goals such as “speed of process, cost-effectiveness, and consistency in the handling of claims and deci-

31 Id.
Reparations in domestic and international mass claims processes

sion making.”32 Therefore, the theory for an international mass claims process is that “[t]he guiding principle … is one of ‘practical justice: that is, a justice that would be swift and efficient, yet not rough.”33 Efficiency requires the process be as cost-effective as possible, minimizing administrative, legal and other transaction costs. International mass claims processes that have successfully awarded compensation, however, have lasted anywhere from over a decade to over forty years.34 Thus, the question must be raised about just how speedy the resolution and resulting compensation actually is. As a result of this dichotomy, international claims tribunals face a tension between awarding compensation for losses and rapid finality of decision-making that terminates the process. For instance, simplified procedures may promote finality but may impact careful determinations regarding meritorious claims.

To balance the oft-times competing interests, international mass claims require the formation of an institution that will fairly consider the merits of the claims and award compensation. Generally speaking, international mass claims institutions are divided into two kinds: those in which the body charged with examining claims—called a tribunal or commission—makes the final decision on the merits, and those in which the body “makes recommendations or rulings that are subject to approval by a supervisory organ.”35 Examples of the former include the Iran–U.S. Claims Tribunal and the Eritrea–Ethiopia Claims Commission (EECC), while the United Nations Compensation Commission (UNCC) is a perfect illustration of the latter approach. Moreover, international mass claims processes often grapple with questions of liability, which can be central to the kind of decision-maker selected. Thus, regardless of the type of international mass claims process chosen, to bolster the credibility of the compensation program and validate the awards issued, the individuals selected to make final determinations tend to be persons of various nationalities with extensive prior experience in the field of international arbitration and/or mass claim processing.36 Such experts, whether they are called “judge” or

32 Van den Hout, supra note 24, at xxx.
34 The United Nations Compensation Commission operated for 14 years (from 1991 to 2005) and the Claims Resolution Tribunal for Dormant Accounts (CRT-I and CRT-II) operated for approximately 15 years (from 1998 to 2013), while the Iran–U.S. Claims Tribunal has been in operation for over 40 years, having been established by the Algiers Accords in 1981.
36 The United Nations Compensation Commission’s Panels of Commissioners were from geographically diverse regions and were experts in finance, law, accounting, insurance, and engineering. The judges of the Claims Resolution Tribunal for Dormant Accounts in Switzerland were lawyers, judges, professors, accountants, and banking.
“commissioner” or any other of the terms applied to international mass claims decision-makers, are always appointed through a carefully balanced selection process that emphasizes the individual’s impartiality and expertise.

International mass claims processes are established to resolve liability between States or between the State and nationals of other States, as well as provide the mechanisms to ensure that successful claims are compensated. The first international mass claims process of modern times, the Iran–U.S. Claims Tribunal, was charged with deciding contractual and property-related claims by nationals of the United States brought against Iran, as well as adjudicating disputes between the two States themselves. Another recent experience is the Eritrea–Ethiopia Claims Commission, which adjudicated the responsibility of each state party for the harm unlawfully inflicted on the nationals of the opposing state and their property during the course of the war between them. An arbitral approach to claims between private parties as opposed to states can be seen in the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I), which had “arbitrators acting pursuant to arbitration law, with the power to issue final and binding [judgments and] awards.” And, even where an international mass claims process (IMCP) is engaged in a systematic sampling of claims, as with the UNCC Category “C” claims for property losses under $100,000, to extrapolate those results to the general claimant population, examining the merits of the sampled claims implicates decision-making of an administrative and quasi-judicial nature.

Due to the exclusive role of the State in negotiating the treaties, international agreements, and United Nations resolutions that often govern international mass claims processes, actual claimant groups have little or no input into the development of international mass claims processes. International mass claims processes only exist because governments make binding international agreements from Switzerland, the United States, United Kingdom, Canada, Cyprus, and Israel.


38 International Mass Claims Processes, supra note 23, at 99–100. Even though the arbitration was between private parties, the participation of the Swiss and United States governments was critical to the establishment of the Claims Resolution Tribunal. See infra Chapter 6.

39 The UNCC Panel of Commissioners decided the claims and issued reports that recommended payments to compensate for losses suffered. The Commissioners would review the factual details of the claims and apply the appropriate international legal principles to resolve the disputes. The UNCC Commissioner was vested with full discretion in reviewing the facts and applying the appropriate law. See infra Chapter 7.
obligations that create them. In so doing, the State exercises the sovereign right to negotiate treaties under international law, thereby eliminating the citizens’ ability to provide meaningful input into the formation of the dispute resolution mechanism. When the Iran–U.S. Claims Tribunal was created, tens of thousands of U.S. citizens who had claims against Iran were impacted by the United States’ exercise of its sovereign authority. Yet there was no claimant participation in the negotiation of the Algiers Accords. In the negotiation, the U.S. agreed to nullify the opportunity for U.S. citizens to litigate such claims in U.S. courts. Instead, the aggrieved parties were required to bring their claims exclusively to the Iran–U.S. Claims Tribunal. Indeed, since States are the constituting parties behind most international mass claims processes, they often play the role of formal claimant on behalf of their citizens who have suffered losses or injuries. At the UNCC, for instance, eligible governments filed claims on behalf of their citizens and then were responsible for the distribution of the awards received to the individual beneficiaries.

Regardless of how an international mass claims process is constituted, what type of entity it is, or who the judge or commissioners are and how they are appointed, the critical issue for any international mass claims process is funding. Capital, both in terms of operational funding as well as funds for compensation, is a function of the political strength of the State parties that create the international mass claims process. Without the capacity to obtain money to finance the process, organizational operations cannot occur. Along with operational funding for administrative and other expenses, funding for compensation must be available for successful claimants. Compensation for claimants’ property losses or personal harm suffered is the raison d’être for the establishment of the claims process under international law. Accordingly, either the governments that have created the international mass claims process or independent sources that have a vested interest in ensuring the international mass claims processes’ success usually guarantee the availability of funds for both the operation of the institution as well as payment of its awards. When

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40 For instance, only officials of the United States and Iran, through Algerian government officials, negotiated the Algiers Accords, with no expectation of a role for individual claimants in either the formation of the Tribunal’s policy or procedure.


42 See infra Chapter 7.

43 This observation is not suggesting that the financing of international mass claims processes is necessarily straightforward or noncontentious. States and other administering bodies involved in such initiatives can struggle to ensure availability of sufficient resources, as has been the case with the Iran–U.S. Claims Tribunal. See C. Pinto,
What is mass claims processing?

Governments cannot (or will not) commit the necessary funds to award compensation, the claims program is doomed from the start.44 Sources for funding an IMCP are often quite divergent and depend upon the type of mechanism that the constituting instruments have created. “Each arrangement is largely the result of political circumstances, as well as the relative financial abilities and bargaining strengths of the parties funding the particular [p]rocess.”45 In the international mass claims context, governments, as sovereign actors, are usually creating institutions to resolve property disputes between them. As a result, they tend to possess the political will and financial wherewithal to achieve successful funding. In addition, international mass claims processes are often structured such that the party-governments fund the operating expenses of the institution. For example, the Algiers Accords explicitly set forth the funding for the Iran–U.S. Claims Tribunal, providing that each government would pay one-half of the expenses of the Tribunal.46 Likewise, the Eritrea–Ethiopia Agreement provided that the two governments were to fund the EECC Claims Process.47

Other IMCPs have had their expenses paid from a settlement funded by one party whose obligations for funding the IMCP were explicitly delineated or imposed by the party-governments establishing the mechanism. At the UNCC, pursuant to UN Security Council Resolution 687, Iraq had to pay all expenses for the operating costs of the UNCC.48 Similarly, the Swiss banks (with the tacit approval of the Swiss government) paid all expenses for the Claims Resolution Tribunal.49 In the latter two circumstances, the party that had to pay the operating expenses had the economic capacity to comply with this obligation.


47 Ethiopia–Eritrea Agreement, supra note 37.


An important question that remains to be answered is whether the lack of funding to ultimately pay full compensation will affect the day-to-day operations of an international mass claims process. When State liability is implicated, State parties often recognize their international legal obligations and tend to ensure suitable funding exists for the payment of awards. State responsibility principles, especially the duty incumbent upon States to repair the harm caused by their wrongful acts, which often consists of compensation, likely play an important role in ensuring that many international mass claims processes receive funding. In other words, wrongdoers, including States, are most likely to produce funds, voluntarily or involuntarily, when they have engaged in serious violations of international legal obligations held vis-à-vis other states or individuals. This principle will play out in the analysis of both domestic and international mass claims processes, including the BP Deepwater Horizon Gulf oil spill, the 9/11 Claims Commission, the Claims Resolution Tribunal, the Iran–U.S. Claims Tribunal, and the United Nations Compensation Commission.