International Claims Commissions: Balancing State Responsibility and Individual Rights

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The Russian war against Ukraine highlights the profound human tragedies behind conflicts, reminding us of the crucial role international law can play in mitigating damage. Historically, post-war disputes have been addressed by specially established commissions or tribunals, with varying success. For example, the 1794 Jay Treaty between the UK and the US set up commissions for resolving merchant and ship-owner claims, one of which was more effective than the other. Over time, mechanisms evolved from subjective judgments to rule-based processes, emphasizing justice and fairness. In modern times, these mechanisms handle mass claims, focusing on awarding reparations to individuals and entities impacted by war.

As I have discussed in more detail in another piece (The Path of Investor-State Disputes: From Compensation Commissions to Arbitral Institutions), the protection of aliens under international law has progressed from the alien being a 'clanless' individual or outlaw completely at the mercy of the local lord, with no entitlement to the peace and protection of the locality in the earliest times to the modern, sophisticated investor-State dispute settlement mechanisms. It was only after the end of the Cold War, when foreign investments grew dramatically and hundreds of major investor-State disputes emerged, that interest in investor-State disputes sharpened and the area of investor-state disputes started to develop. Prior to that, international compensation commissions served as the main route for compensation claims of individuals.

Setting the Scene

Specially established 'commissions' or 'tribunals' emerged to deal with post-war damage. Such commissions may be established for a variety of purposes: to resolve State-State territorial and boundary disputes, adjudicate claims arising from conflicts, or address other legal issues between the participating States. Further, they may also be used to establish the responsibility of individuals for war crimes (e.g., the International Criminal Tribunal for Yugoslavia), and traditional investor-State disputes.

Being created after conflicts have arisen, such commissions are - in a sense - backwards-looking institutions, whereas permanent tribunals like the International Court of Justice are forwards-looking as the identity of the disputes they hear may be unknown at the time of their creation. This blog post focuses on international mass claims commissions (IMCCs) used to award damages to individuals and legal entities post-conflict.

Historical Development of international claims commissions

The 1794 Jay Treaty between the United Kingdom (UK) and the United States (US) birthed the first mass claims commissions. It established two commissions to resolve claims of British merchants against the US and those of US ship-owners against the UK. That treaty established: (a) a commission to award damages to British creditors (Art 6); (b) a commission to award damages to either country's nationals for the seizure of ships at sea (Art 7); (c) a commission to resolve a territorial dispute (Art 5).

The first commission established under this treaty had a rather broad and ambiguous mandate, so it did not really work well in practice. The second commission achieved more success however, in part due to its expeditiousness and its upholding its own power to decide issues regarding its own jurisdiction (Kompetenz-Kompetenz). At the end of its lifespan, it had awarded nearly US$12 million to American claimants and over US$143,000 to British claimants. In the following decades, several more claims commissions were created, most of which were set up to decide claims arising from conflicts - the details of a number of these are captured in the table below.

Before the 20th century, Heads of States played a greater role in resolving disputes. For example, the Great Britain-United States commission was set up to restore all property, both public and private, that the US and Great Britain had seised from each other during the War of 1812. Great Britain and the US had first agreed to refer their dispute to Alexander I of Russia, instead of a panel

of commissioners. The Czar of Russia then decided that Britain had failed to meet its obligations and should pay an indemnity. Upon his recommendation, the US and Great Britain concluded a convention setting up a commission to decide the amount due to the US and eventually accepted its decision.

Similarly, with regard to the Alabama Claims Commission, the King of Italy, the President of the Swiss Confederation, and the Emperor of Brazil each appointed one arbitrator out of the five that were to sit on the panel (the remaining two being appointed by the UK and the US).

Choice of Applicable 'Law'

The choice of applicable law also experienced a development. Early instruments like the 1794 Jay Treaty provided that the commissioners would decide cases on the basis of 'Equity and Justice' (see Arts. 6-7). By contrast, the establishing instruments of more recent claims commissions have provided that cases are to be decided according to 'such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable' (Iran-US Claims Tribunal), certain UN Security Council resolutions and specialised criteria and where necessary 'other relevant rules of international law' (UN Compensation Commission), and relevant rules of international law (Eritrea-Ethiopia Claims Commission).

Merits of International Mass Claims Commissions

What makes IMCCs so attractive and effective is that they allow individuals to have standing to submit their claims vis-à-vis States, and remove the need for individuals to rely on their home State to espouse their claim in the hopes that the State will give them their rightful share of any damages awarded.

Barring certain fora (notably those connected with the protection of human rights like the European Court of Human Rights) and provisions for mixed arbitration (notably investor-State arbitration), individuals generally lack standing to bring claims against States at international law. One workaround is to petition one's home State to espouse one's claim and submit it to dispute resolution at the State-State level, but that depends on the home State being willing and able to do so in the first place.

Mass claims commissions alleviate this problem by giving individuals a platform to directly submit claims against another State. Moreover, even where diplomatic protection is relied upon, there may be no guarantee that the injured individuals end up receiving their rightful proportion of any compensatory award from their home State. Again, mass claims commissions are advantageous for individuals in this regard, as they do not require the claimant-individuals to wait for compensation to 'trickle down' from their home State.

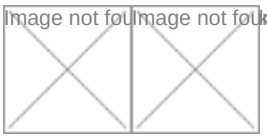
Comparing Modern International Mass Claims Commissions

The table below draws a comparison between five recent IMCCs created in the aftermath of conflicts. The Iran-US Claims Tribunal created after the 1979 Islamic Revolution and US embassy hostage crisis, handled claims between private nationals and governments of both countries, awarding over $2.5 billion for around 4,000 claims. It used modified UNCITRAL rules and relied on a special account funded by Iran for enforcement.

The UN Compensation Commission, triggered by Iraq's invasion of Kuwait, received 2.7 million claims, awarding over $52 billion. It followed unique procedural rules and was funded through Iraq's oil exports, with resistance from Saddam Hussein but later cooperation from the coalition government. The Eritrea-Ethiopia Claims Commission was formed after a boundary war, adjudicated state-to-state claims but did not pursue mass individual claims. Its rulings followed special rules under the auspices of the Permanent Court of Arbitration (PCA).

The Commission for Real Property Claims of Displaced Persons and Refugees addressed claims from those displaced during the Bosnian War, with 300,000 claims submitted. Limited restitution and monetary compensation were provided. The Foreign Claims Settlement Commission addressed various claims, including those from the Cuban Claims Program and Holocaust Claims Program, with 660,000 claims processed. It relied on congressional appropriations and liquidation of foreign assets for enforcement.

All five entities were created by way of an international agreement and involved odd numbers of adjudicators, and in most cases a number of which would be 'neutral' members. Some of them - like the Foreign Claims Settlement Commission and Commission for Real Property Claims of Displaced Persons and Refugees - involved the use of specially drafted procedural rules, whereas the Iran-US Claims Tribunal adopted a modified version of the UNCITRAL rules. The number of claims submitted to each IMCC varied significantly, from around 4,000 in the case of the Iran-US Claims Tribunal, to around 2.7 million in the case of the UN Compensation Commission.



IMCCs help streamline the settlement of post-conflict disputes with regard to compensation to be made to individuals in victim States. From their inception in the late 18th century to more modern IMCCs, they reveal their strength in settling vast numbers of individual claims. For the many individuals who usually remain completely divorced from the geopolitical tensions surrounding such conflicts, IMCCs provide one good way for them to seek redress for a conflict they may never have intended to be a part of.

This blog post builds upon the author's presentation at the seminar on 'Disputes involving States arising out of war' held on 18 May 2023 as a part of the London International Disputes Week. The panel discussed how post-war disputes would be resolved in a State-to-State and investor-State context, the implication of sanctions, war clauses bilateral investment treaties and other mechanisms, as well as disputes in English courts. The author is thankful to Darren Leow Yee Kiat for his research assistance.

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