

# Kluwer Arbitration Blog

## Arbitration in Times of Crisis

Andrew Newcombe (University of Victoria Faculty of Law) · Saturday, March 17th, 2012

International arbitration has long played an important role in resolving disputes that arise out of political and economic crises. “Arbitration in Times of Crisis” is the theme of the 9<sup>th</sup> Annual ITA-ASIL Conference on 28 March 2012 in Washington, D.C. ([see program](#)). The conference will focus on lessons from the past use of arbitral mechanisms in times of crisis and an evaluation of 10 years of investor-state arbitration arising from the Argentine economic crisis.

From the Jay Treaty (1794) to the current investor-state arbitration regime under investment treaties, states have used international arbitral mechanisms to resolve complex disputes involving key areas of national interest. Although arbitration has often been used to deal with legal disputes arising out of times of crisis, in most cases the arbitral institution in question, whether called a commission or tribunal, has been a bespoke institution, created after the fact and designed to address the specific type of dispute at issue. In contrast, a defining feature of the investment treaty claims against Argentina resulting from its emergency laws is the use of “all-purpose” tribunals based on a standing offer to arbitrate in an investment treaty, rather than a custom-made mechanism created after the fact.

The modern history of international arbitration is often traced to the Jay Treaty (1794), which established three mixed commissions to decide boundary, debt and shipping related claims. The Jay Treaty was significant in reviving the state practice of arbitrating claims before mixed commissions, comprising commissioners or arbitrators appointed by the two states. Further, it is an early example of a Friendship, Commerce and Navigation Treaty, precursor to international investment treaties. From that early history, claims to injuries to persons and property have often been addressed through arbitral mechanisms. Indeed, from 1840-1940, states established over sixty arbitral commissions to deal with disputes arising from injuries to foreign nationals.

The Conference will examine three important claims mechanisms in the 20<sup>th</sup> century: the Mexican Mixed Claims Commission, the Iran-US Claims Tribunal and the United Nations Claims Commission. What lessons can be learned from these mechanisms in terms of dealing with mass claims arising out of crises? How did these institutions manage a large number and variety of claims, the consistency and coherence of awards, and funding and enforcement mechanisms?

The second part of the conference will turn to the investor-state arbitration cases arising out of the Argentine economic crisis. Unlike the three institutions that will be discussed in the first part of the conference, which were designed after the fact, the investor-state arbitration process under investment treaties was not specifically designed to address mass claims arising out of crises. At

the same time, investment treaties were created in part to provide investors protection in periods of fundamental economic and political change. Can the investor-state mechanism, which arguably is best suited to address one-off cases of nationalization, expropriation and breaches of other minimum standards of treatment, deal efficiently and coherently with mass claims? Are the control mechanisms for review of arbitral awards in ICSID and the New York Convention suitable in the case of mass claims? And, is the mechanism failing the ultimate test because awards are not being paid?

The Conference is co-chaired by Prof. John R. Crook and Prof. Andrew Newcombe and will begin with keynote address by V.V. Veeder, Q.C. on “Economic Crises and Investor-State Arbitrations – A Historical Perspective”. The Conference will host a stellar faculty of presenters: José E. Alvarez, Mark Clodfelter, L. Yves Fortier, Cymie R. Payne and Jennifer Thornton.

Reports on the Conference, as well as the ASIL Annual Meeting, will be available on [ASIL Cables](#).

This post is written by Andrew Newcombe as a member of the ITA Academic Council.

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