Part V.
Arbitral Awards as Sources of International Law: Assessing the Impact of the MATs' Case Law

Chapter 11: The Contribution of the Mixed Arbitral Tribunals to the Law of Treaties

Guillaume Guez Maillard[*]

When asked what one of the most important events of the year 1920 was, Professor Francisco de la Barra, future President of the Franco-Austrian, Franco-Bulgarian, Greek-Austrian and Greek-Bulgarian Mixed Arbitral Tribunals, gave the following answer: 'I consider that one of the facts whose influence will be considerable is the creation of the Mixed Arbitral Tribunals provided for by the Treaties of Versailles, Trianon, Saint-Germain and Neuilly, which were constituted in 1920'.[1]

Professor de la Barra was certainly not wrong. For more than a decade, the 39 Mixed Arbitral Tribunals (MATs) set up by the Peace Treaties produced a considerable body of work with more than 90 000 cases decided. Through their activity, the MATs made a major contribution to the development of 'international law, then in its infancy'.[2] Interestingly, this significant contribution ignores the *summa divisio* of international law between public and private and touches upon areas as diverse as conflict of laws rules, the valuation of debts and claims in depreciated currency or nationality issues.[3] Another important contribution, which is the focus of this chapter, concerns the law of treaties.

Established by Part X (Economic Clauses) of the Treaties of Versailles, Saint-Germain and Trianon, by Part IX (Economic Clauses) of the Treaty of Neuilly and by Part III (Economic Clauses) of the Treaty of Lausanne, the MATs constituted 'special international tribunals' whose competence and functions were strictly regulated by the provisions of the Peace

* PhD Student at the University of Geneva and Paris 1 Panthéon-Sorbonne University, Research and Teaching Assistant at the Law Faculty of the University of Geneva.

1 H-E Barrault, 'La Jurisprudence du Tribunal Arbitral Mixte' (1922) 49 Journal du droit international 298, 298 (translation by the author).

2 Romanian-German MAT, *P Negreanu et Fils c Meyer et Fils* (16 June 1925) 5 Recueil TAM 200, 210–11 (translation by the author).

3 For the input of the MATs in some of the area of nationality, see Zollmann (ch 4) and Castellarin (ch 5).

Treaties.[4] At times, however, these provisions proved to be unclear or ambiguous. Discrepancies between different authentic versions of the same treaty also emerged. In addition to these problems of treaty interpretation, the MATs encountered questions regarding the temporal and spatial applicability of the peace treaties. More rarely, but no less importantly, the MATs sometimes had to face states that wanted to evade their treaty commitments before their entry into force.

Faced with all these difficulties, the MATs had only an incomplete body of customary law with which to solve them; there was no Vienna Convention on the Law of Treaties ('VCLT' or 'Convention'). Therefore, it was only as problems related to the law of treaties arose in concrete cases that they were able to develop a body of law on these issues. Surprisingly, although the MATs had the possibility to take declaratory decisions,[5] they were not seized with such requests.

The contribution of the MATs to the law of treaties is thus spread over thousands of decisions. While it is impossible, in light of this number, to give an exhaustive overview of the decisions involving the law of treaties, this chapter intends to study the different stages in the life of a treaty through the relevant decisions of the MATs. Thus, in a first section, the chapter will focus on the birth of treaties, from their conclusion to their entry into force (Section 1). The chapter will then turn to the life of treaties in force, through the notions of observance, application and interpretation (Section 2). In the third and final part, the demise of those treaties will be briefly addressed by examining one of the grounds for termination of treaties and the consequences of such termination (Section 3).

A comparison with the VCLT, adopted almost fifty years later in 1969, reveals the great modernity of the solutions adopted by the MATs. The provisions of the VCLT, the reference standard in the law of treaties, and the solutions developed by the MATs coincide on many points. This is all the more remarkable since, unlike the drafters of the Convention, the MATs had only limited customary law and few decisions on the subject. The international case law that existed at that time consisted of a small number of decisions, some of which, due to the stature of the arbitrator, were not reasoned. Although the authorship of the VCLT is

4 German-Czechoslovak MAT, *Rychnewsky et Alt c Empire allemand* (27 April 1923) 3 Recueil TAM 1011, 1015; German-Polish MAT, *Leo von Tiedemann c État polonais* (21 May 1923) 3 TAM 596, 604; Greek-Bulgarian MAT, *Sarropoulos c État bulgare* (14 February 1927) 7 Recueil TAM 47, 53.

5 Franco-German MAT, *État français c État allemand (Section I-1295)* (3 December 1925) 5 Recueil des décisions 843, 845.

not attributable to the case law of the MATs, its contribution cannot be overlooked. The decisions of the MATs contributed to the incremental development of customary law and provided the drafters of the Convention with a substantial body of practice. Together with the rest of the international case law on the subject, this practice served as a guide or point of comparison. More significantly, some provisions of the Convention draw directly on certain decisions of the MATs, which are considered the 'judicial *locus classicus*' on the issue.[6] This is the case, for example, with Article 18 on the obligation not to defeat the object and purpose of a treaty prior to its entry into force, which is derived from the *Megalidis* decision of the Greek-Turkish Mixed Arbitral Tribunal.[7] It is to this contribution, which has received little attention in the literature, that we now turn.

1. The Birth of Treaties: From their Conclusion to their Entry into Force

The first stage in the life of a treaty is its conclusion. In order to 'ensure the security and certainty of international transactions',[8] a number of requirements must be met to make treaties valid. Among these requirements is the question of the form in which treaties are entered into. Can a treaty only be concluded by means of a written instrument or is an oral agreement also permissible? (Section 1.1) Once a treaty has been concluded, it may take a number of months or even years before it enters into force. While the treaty is not formally binding, are the parties free to operate? (Section 1.2)

1.1. The Form(s) of Conclusion of Treaties

The requirement of written form as a condition for the validity of treaties has long been debated. As early as 1889, an arbitrator had to determine whether a convention existed on the basis of oral undertakings allegedly

6 Robert Kolb, *La bonne foi en droit international public: Contribution à l'étude des principes généraux de droit* (Graduate Institute Publications 2000) 8, para 39.

7 Greek-Turkish MAT, *Aristotelis A Megalidis c État turc* (26 July 1928) 8 Recueil TAM 386, 395.

8 Hersh Lauterpacht, 'Law of Treaties. Report by Mr H. Lauterpacht, Special Rapporteur', (1953-II) Yearbook of the International Law Commission 90, 160.

given by the Sultans of Zanzibar.[9] While rejecting the existence of a treaty on the facts, Baron Lambermont explained that 'although there is no law which prescribes a written form for agreements between States, it is nevertheless contrary to international usage to contract orally engagements of this nature and character'.[10] Tempering his words somewhat, he added that 'the existence of an oral convention must be inferred from the formal statements and cannot, without seriously impairing the security and ease of international relations, be inferred from the mere statement that a concession is to be granted'.[11] In sum, the arbitrator adopted the middle ground. Without rejecting the validity of oral agreements but finding them contrary to international usage, their recognition is conditioned by very clear language in a formal context.

As the International Law Commission's Special Rapporteur on the Law of Treaties, Sir Hersch Lauterpacht, noted, decisions on oral agreements are rare.[12] However, the case law of the MATs provides another example through a decision of the Romanian-Hungarian Mixed Arbitral Tribunal. In *Emeric Kulin père c État roumain*, a Hungarian national claimed that the Romanian State's land reform expropriations were incompatible with Article 250 of the Treaty of Trianon.[13] In reply, the Romanian State argued that the compatibility of the expropriations with the Treaty of Trianon had been acknowledged orally by the representatives of the Hungarian Government at certain meetings held in Brussels on 27 May 1923 between the representatives of the two Governments.[14]

The Tribunal rejected the Romanian argument, not on the grounds that an oral agreement between the States could not have confirmed the compatibility of the expropriations with the Treaty of Trianon, but on the grounds that no such agreement existed in the present case.[15] The Tribunal conducted a thorough analysis of the minutes of the Brussels meetings, in an attempt to discover a written transcript of the alleged oral agreement. It did not find any. It found that, contrary to Romania's allegation, the minutes of the meeting invariably showed a disagreement between the

9 *Arbitration between Germany and the United Kingdom relating to Lamu Island* (17 August 1889) XXVIII Reports of International Arbitral Awards 237.
10 ibid, 243 (translation by H Lauterpacht (n 8), 160).
11 ibid (translation by the author).
12 Lauterpacht (n 8), 159–60.
13 Romanian-Hungarian Mixed Arbitral Tribunal, *Emeric Kulin père c État roumain* (10 January 1927) 7 Recueil TAM 138, 144.
14 ibid, 148.
15 ibid, 149.

two States. In particular, the Tribunal noted that the subject matter of the dispute between the two Governments comprised five points. It then explained that a conciliatory statement on one of these points could not constitute an agreement. In fact, such a behaviour was part of the negotiation process and could indicate a willingness to reach an agreement or an expectation of obtaining a concession from the other party in return.[16] Ultimately, 'a concession made in these circumstances could only be held against the party who made it if it forms part of a subsequent agreement covering the whole issue in dispute'.[17]

Therefore, the Mixed Arbitral Tribunal did not, in principle, reject an oral agreement between two States. However, as in the above-mentioned *Arbitration between Germany and the United Kingdom relating to Lamu Island*, it must meet the criteria of clarity and formality. The *Kulin* case, though, highlights the risks associated with an oral agreement. Romania's failure to consider the context completely altered the meaning of the concession by the Hungarian Government. It took a careful examination of the Brussels minutes by the Tribunal to reject such an interpretation of the concession.

This uncertainty surrounding an oral agreement can be a serious blow to the stability of international relations. This led the ILC Special Rapporteur on the Law of Treaties to include the requirement of a written form.[18] For Sir Hersch Lauterpacht, it was indeed 'desirable, having regard to the security and certainty of international transactions and to the significance of their subject matter, that treaties be recorded in writing'.[19] This point was retained in the VCLT. Thus, Article 2 1(a), defines a treaty as 'an international agreement concluded between States *in written form* and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[20] While Article 3 of the 1969 Convention does not completely rule out the possibility of a treaty being concluded orally,[21] the exclusion of this form from its scope is telling.

For both the ILC Special Rapporteur on the Law of Treaties and the drafters of the 1969 Vienna Convention, the decision of the Romanian-

16 ibid.
17 ibid (translation by the author).
18 Lauterpacht (n 8) 159.
19 ibid, 160.
20 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 332, 333, art 2(1)(a) (emphasis added).
21 ibid, 333–34, art 3.

Hungarian Tribunal was one of the few examples dealing with oral commitments. This represents an important contribution of the case law of the MATs to the law of treaties.

1.2. *The Obligation not to Defeat the Object and Purpose of a Treaty Prior to its Entry into Force*

Once the text of a treaty has been negotiated, each state must express its consent to be bound by it. This expression of consent is an act of sovereignty *par excellence*[22] and can take several forms. It can be done by simply signing the treaty or by ratifying, accepting or approving it. The latter are two-step procedures that involve the application of domestic law. After signing the treaty, the state initiates an internal procedure to ratify, accept or approve it. There is thus a time lag between the moment when the state has signed the treaty and the result of the internal procedure which marks its consent to be bound. Moreover, this expression of consent may not be immediately accompanied by the entry into force of the treaty. The treaty may provide for a period of time before its entry into force or for a minimum number of states to have expressed their consent. For example, the VCLT, signed on 23 May 1969, did not enter into force until 27 January 1980, after the deposit of thirty-five instruments of ratification or accession.[23]

In these cases of a time lag between signature and the deposit of the instrument of ratification or accession, or between the expression of consent to be bound and the entry into force of the treaty, are states somehow bound by the content of the treaty or are they free to proceed as they see fit?

The *locus classicus* in this respect is a decision of the Greek-Turkish Mixed Arbitral Tribunal of 26 July 1928.[24] In *Aristotelis A Megalidis c État turc*, the Turkish authorities had seized coins, banknotes and jewellery, belonging to Mr Megalidis, at some point between Turkey's signature of the Treaty of Lausanne and its entry into force. Invoking the Treaty, Mr Megalidis lodged a claim for the return of his property or compensation. For its part, Turkey, not considering itself bound by a treaty not yet in

22 Franco-German MAT, *Office de vérification et de compensation pour l'Alsace-Lorraine c Reichsausgleichsamt* (23 September 1922) 3 Recueil TAM 67, 73.
23 VCLT, 352, art 84(1).
24 Kolb (n 6) 8, para 39.

force, took the view that the Tribunal could not assess the legality of the seizure under the Treaty. Consequently, it was under no obligation to make restitution or pay compensation.

The Mixed Arbitral Tribunal ruled against Turkey on the basis of the principle of good faith:

> That, on the other hand, it is clear that the seizure could not have been carried out with the aim of appropriating the objects, given that it is a principle that, as soon as a treaty is signed and before it enters into force, there is an obligation on the contracting parties not to do anything that might undermine the treaty by diminishing the scope of its clauses ....
> That it is interesting to note that this principle – which is, in short, nothing more than a manifestation of good faith, which is the basis of all laws and conventions – has received a number of applications in various treaties and, among others, it appears on a particular point in the convention recently concluded between Turkey and Italy (see Art 8 of the annexed Protocol);[25]

On the basis of this conclusion, the Tribunal found that the seizure was contrary to the treaty and ordered Turkey to compensate Mr Megalidis.

In other words, a treaty that has been signed but not yet ratified, or a treaty that has been concluded but not yet entered into force, carries certain obligations. These obligations, known as interim obligations, are based on the principle of good faith and aim at preserving the essential content of the treaty. In doing so, the object and purpose of the treaty is preserved. Among these interim obligations is the obligation recognised by the MAT not to act contrary to the treaty pending its ratification or entry into force. This obligation was subsequently endorsed by the drafters of the VCLT in what became Article 18.

2. *The Life of Treaties in Force: Observance, Application, and Interpretation*

Once in force, a treaty unfolds its full effects. States are thus bound to respect the obligations they have undertaken. This cardinal principle of international law, also known as *pacta sunt servanda*, prevents a State from reneging on its commitments, whatever the reason (Section 2.1). In principle, this obligation applies throughout the territory of the state parties up-

25 *Aristotelis A Megalidis c État turc* (n 7), 395 (translation by the author).

on their entry into force (Section 2.2). But this respect for the obligations entered into also requires a clear understanding of their precise meaning and scope. This process of interpretation is governed by a number of rules (Section 2.3), the importance of which was underlined by Emmerich de Vattel. He pointed out that 'if rules are not recognised which determine the meaning of expressions, treaties will be no more than a game; nothing can be agreed upon with certainty, and it will be almost ridiculous to rely on the effect of conventions'.[26]

2.1. Observance of Treaties

As discussed above, states that have expressed their consent to be bound by a treaty are obliged to respect its object and purpose even before it enters into force. *A fortiori*, this observance continues once the treaty is in force. A state cannot renege on its commitments. In particular, a State cannot repudiate its undertakings through its national legislation (Sub-section 2.1.1). But conversely, and obviously, a state is not bound by a treaty to which it has not consented (Sub-section 2.1.2).

2.1.1. Internal Law and Observance of Treaties

Bound by the provisions of the peace treaties, the MATs were also required to apply the domestic law of the various state parties to the treaties. In this delicate exercise, the MATs were sometimes confronted with national laws that diverged from the provisions of the peace treaties.

For example, in *Hourcade c État allemand*, the Franco-German Mixed Arbitral Tribunal had to set aside German law in favour of the provisions of the Treaty of Versailles. In this case, the claimant complained that his underage son's luggage had been sequestered and then sold by the German railways and sought compensation.[27] In order to escape liability, Germany argued that the contract was governed by German law and that, according to the latter, war constituted *force majeure* exempting it from liability.[28]

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26 Émer de Vattel, *Le droit des gens ou Principes de la loi naturelle* (first published 1758, Carnegie 1916) book II, chapter XVII, para 268.

27 Franco-German MAT, *Hourcade c État allemand* (11 February 1922) 1 Recueil TAM 786, 786.

28 ibid, 787–88.

The Tribunal rejected this argument. In a statement of principle, it explained that:

> It must be borne in mind, however, that this legislation is applicable only insofar as it is in conformity with the provisions of the Peace Treaty, since it is clear that these provisions take precedence over any stipulation to the contrary, either in the national laws of the High Contracting Parties or in the arrangements concluded between the parties concerned;[29]

On this basis, the Tribunal dismissed the German law recognising war as *force majeure*. It held that under Article 231 of the Treaty of Versailles, Germany had recognised its responsibility for the war and its consequences. Germany could not therefore depart from this recognition by its national legislation.

As mentioned above, the fact that domestic law was part of the applicable law led the MATs to regularly address the interaction between the two sets of rules. The position of the different MATs was unanimous. International law takes precedence over national law.[30] This position is now reflected in the VCLT in Article 27.

2.1.2. Third States and Observance of Treaties

While there are many similarities between the Peace Treaties, each treaty was drawn up and signed at different times, in different circumstances and between different parties. This explains why they also contain some differences in their provisions.

In some rare proceedings before the MATs, the respondent States attempted to rely on these differences to invoke the more favourable provisions of other peace treaties. The problem was that this reliance on other treaties ignored the fact that the state of the plaintiff was not a party to them. This gave these tribunals the opportunity to recall the basic rule that a State cannot be bound by the provisions of a treaty to which it is not a party.

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29 ibid, 788 (translation by the author). For a similar statement, see, Franco-German MAT, *Dame Franz c État allemand* (1 February 1922) 1 Recueil TAM 781, 785.

30 See, eg, Anglo-German MAT, *In re Hardt et CO v M B Stern* (23 March 1923) 3 Recueil TAM 12, 16–17; Franco-German MAT, *Lorrain c État allemand* (8 June 1923) 3 Recueil TAM 623, 625–26; Anglo-Turkish MAT, *Richard La Fontaine c le gouvernement turc* (10 April 1929) 9 Recueil TAM 230, 233.

The case of *Ungarische Erdgas AG c État roumain* provides a good example of this.[31] In this case, the Romanian-Hungarian Mixed Arbitral Tribunal was seized with a claim, based on Article 250 of the Treaty of Trianon, for restitution or compensation of property confiscated from a Hungarian company. In reply, Romania argued that the Tribunal lacked jurisdiction because the company did not meet the nationality criteria. It submitted that 'the mere fact that a company is incorporated under Hungarian law and has its seat in Hungary is not sufficient to enable it to benefit from the protection of Article 250'.[32] It explained that what matters is that the company is controlled by Hungarian nationals. The defendant substantiated this argument by referring to Article 297 of the Treaty of Versailles, which contains the control doctrine.[33] It even went so far as to argue that there was a conflict between Article 250 of the Treaty of Trianon and Article 297 of the Treaty of Versailles.[34]

The Tribunal rejected this attempt to rely on the provisions of the Treaty of Versailles. It first recalled that the two Treaties were 'absolutely distinct'.[35] It then dismissed the idea that there could be a conflict between the two Treaties, stating that there can only be a conflict between two conventions whose subject matter and parties coincide.[36] It concluded by pointing out that:

> the Allied or Associated Powers, by including respectively and without reservation in the Treaties of Saint-Germain and Trianon – long after the signing of the Treaty of Versailles – Art. 267 and 250, intended that the principle contained in these two articles and resulting from laborious negotiations should constitute the exclusive law of the parties signatory to the two diplomatic instruments referred to in the first place in the present paragraph, and that it is not possible, in order to frustrate it, to invoke against Austria and Hungary the provisions of a treaty to which they did not participate.[37]

It was therefore not open to Romania to defeat the Treaty of Trianon, which was applicable in this case, by invoking a treaty to which Hungary

31 Romanian-Hungarian MAT, *Ungarische Erdgas AG c État roumain* (8 July 1929) 9 Recueil TAM 448.
32 ibid, 451–52 (translation by the author).
33 ibid, 452.
34 ibid, 454.
35 ibid.
36 ibid.
37 ibid, 455 (translation by the author).

was not a party. This is all the more true given that the different Peace Treaties were devised in response to different problems and circumstances. In the present case, according to the Tribunal, the insertion of this new Article 250 reflected, the desire of the Allied and Associated Powers 'to avoid, as far as possible, any prejudice to the economic life of Hungary'.[38]

The Romanian-Hungarian Mixed Arbitral Tribunal issued a salutary reminder. The rule that a State is not bound by treaties to which it is not a party responds to a set of considerations, including respect for the fundamental principles of sovereignty and independence[39] and the specificities of the different treaties.

2.2. The Scope of Application of Treaties

The scope of the treaties covers two dimensions: a spatial dimension (Subsection 2.2.1) and a temporal dimension (Sub-section 2.2.2).

2.2.1. The Spatial Dimension of the Scope of Treaties

While logic dictates that when a treaty is concluded, it binds each party for the whole of its territory, the MATs were confronted with the unfortunate question of the status of colonies within the territory of the state parties. Were they to be considered an integral part of the State or autonomous territories under the law of treaties?

The issue was addressed by the Anglo-German Mixed Arbitral Tribunal in *Niger Company Limited c État allemand*. The Tribunal was seized of a dispute concerning compensation for debts incurred by the former German Protectorate of Cameroon.[40] The question arose as to whether the former German Protectorate of Cameroon was considered part of German territory, a necessary condition for the application of the Treaty of Versailles. Analysing the relations between the former Protectorate and the German Empire, the Tribunal found that in commercial matters the Protectorate was not identical with the German Empire.[41] It explained that:

38 ibid, 454 (translation by the author).
39 ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966-II) Yearbook of the International Law Commission 187, 226, art 30, para 1.
40 Anglo-German MAT, *Niger Company Limited c État allemand* (25 July 1923) 3 Recueil TAM 232, 233–34.
41 ibid, 235.

> The administrative tutelage exercised for the Protectorate and exemplified by the necessity for the budget of the Protectorate to be settled by the German Empire at Berlin does not exclude the separate existence of the Protectorate as a legal entity in private law, and with regard to commercial matters. This separate existence is exemplified, inter alia, by the German law of March 30th 1892 under Section V of which it is provided that the pecuniary liabilities arising from the administration of the Protectorate are to be covered only by the assets of the Protectorate. This excludes any debt or liability of the Empire with regard to transactions entered into by the officials of the Protectorate.[42]

In other words, the Protectorate of Cameroon enjoyed autonomy in commercial matters. Consequently, it could not be considered part of German territory in matters falling within this area. In the similar case of *Loy et Markus c Empire allemand et Deutsch Ostafrikanische Bank AG*, the German-Czechoslovak Mixed Arbitral Tribunal took a different approach. It stated that:

> It must therefore be accepted that the right to compensation under Art. 297 *e* is limited to damage caused on German territory. It is not permissible to include the German colonies in "German territory", as this would be an extensive interpretation, which is all the less permissible since – according to the generally accepted rule of international law – treaties do not apply *ipso facto* to colonies. Their express mention is therefore probably necessary.[43]

The Tribunal therefore rejected any distinction based on the subject matter of the Treaty and the constitutional arrangements between the Colony and the State. What mattered was that the Treaty contained an express clause extending its scope to the Colonies. This apparent contradiction between the two solutions adopted by the MATs was not uncommon. Each Tribunal was independent and there was no high-level committee to resolve these inconsistencies.

Of the two solutions proposed by the MATs, the first one prevails today. A treaty is binding on each party throughout its territory. However, in applying this rule, the special status of certain autonomous entities must

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42 ibid, 236.

43 German-Czechoslovak MAT, *Loy et Markus c Empire allemand et Deutsch Ostafrikanische Bank AG (Nº 9)* (27 April 1923) 3 Recueil TAM 998, 1005 (translation by the author); see also, Anglo-Austrian MAT, *The National Bank of Egypt c la Banque d'Autriche-Hongrie* (9 and 13 July 1923) 3 Recueil TAM 236, 239.

be taken into account. Depending on the constitutional rules governing the regime of these entities, treaties may be applicable to them as of right or by express provision. But depending on the subject matter of the treaty, these entities may also be excluded from the application of the relevant treaty.

2.2.2. The Temporal Dimension of the Scope of Treaties

The peace treaties ending the First World War were concluded in 1919–20. While they were intended to pave the way for the future between the former belligerents, a large number of clauses, including those falling within the jurisdiction of the MATs, concerned measures taken before the entry into force of these treaties. While these measures were essentially continuing acts, the effects of which were still in existence at the time of the entry into force of the treaties, others were individual acts, fully completed at the time of the entry into force of the treaty. This raised the question of the potential retroactivity of the peace treaties to deal with such acts.

The Italo-Austrian Mixed Arbitral Tribunal was confronted with the problem of an individual act predating the treaty. In *Paris c Impresa Auteried e C*, a debt owed by an Austrian company to an Italian company was paid directly to the latter before the entry into force of the Treaty of Saint-Germain. Somewhat surprisingly, when the Treaty entered into force, the Italian company brought a claim against the Austrian company before the MAT to obtain payment of its debt. It argued that the payment made by the Austrian company could not have the effect of extinguishing the debt, as direct payment had become prohibited by the Treaty of Saint-Germain, which gave exclusive rights in this respect to the Clearing Office.[44]

The Tribunal firmly rejected this claim. It explained that since 'at the entry into force of the Treaty the claim no longer existed',[45] it was therefore not covered by the provisions of the Treaty of Saint-Germain. Accordingly, the direct payment made by the Austrian company was valid.

In *Franz Peinitsch c 1. État allemand; 2. État prussien; 3. Banque Bleichrœder*, the German-Yugoslav Mixed Arbitral Tribunal addressed another dimension of the temporal scope of treaties. In order to benefit from

44 Italo-Austrian MAT, *Paris c Impresa Auteried e C.* (5 October 1925) 6 Recueil TAM 436, 438–39 (translation by the author).

45 ibid, 440.

the protection of the Treaty of Versailles, the claimant alleged that from October 1918 he had been a national of a so-called South-Slave State which would have been considered an Allied or Associated Power at war with Germany and its allies.[46] The respondent, on the other hand, claimed that the Tribunal had no jurisdiction. It argued that Mr Peinitsch had not been a national of an Allied or Associated Power under the Treaty of Versailles, and that, if he had become one, he had only 'acquired that new nationality by the effect of the Treaty of Saint-Germain, that is to say, after the Treaty of Versailles had come into force' on 10 January 1920.[47]

The Tribunal found in favour of the respondent. It first stated that the existence of a South-Slave State had not been demonstrated.[48] It then explained that if Mr Peinitsch had been able to become a national of an Allied or Associated Power, it was only by virtue of the Treaty of Saint-Germain. However, this treaty was posterior to the Treaty of Versailles and did not contain a 'provision giving retroactive effect to the clauses of that Treaty relating to nationality'.[49] The Tribunal therefore declared that it had no jurisdiction.

The latter decision thus highlights the possibility for states to give retroactive effect to treaties. More generally, these two decisions contributed to the constitution of a legal corpus in this field. In this respect, it is interesting to note that, once again, the two decisions examined are fully in line with the solution adopted by the VCLT. Indeed, under Article 28,

> [u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[50]

2.3. *Interpretation of Treaties*

In carrying out their activities, the MATs regularly had to clarify the meaning and scope of the peace treaties provisions before considering the facts of the case. However, as the German-Polish Mixed Arbitral Tribunal

46 German-Yugoslav MAT, *Franz Peinitsch c 1. État allemand; 2. État prussien; 3. Banque Bleichræder* (18 September 1922) 2 Recueil TAM 610, 613–14.
47 ibid, 615 (translation by the author).
48 ibid, 621.
49 ibid, 621–22 (translation by the author).
50 VCLT, 339, art 28.

rightly observed, this operation could not serve to 'disregard a text'[51] and 'make the text say something other than what it says'.[52] As cases arose, the Tribunals resorted to a number of rules designed to bring out the common intention of the state parties (Sub-section 2.3.1). Importantly, a number of these rules were related to a particular feature of the peace treaties, namely that they were concluded in different authentic languages. This multiplicity of authentic texts and the rules provided by the MATs to address the specific problems arising from them constitute an important added value of the case law of the MATs (Sub-section 2.3.2).

2.3.1. The Rules of Interpretation

The choice of the rules of interpretation to be used depends on the nature of the text to be interpreted. A legislative text will require a different interpretation process than a constitution or a contract. While this holds true for national law, the question arose as to whether this also applies to international law. In particular, do the rules of interpretation vary according to the nature of the treaties?

The case law of the MATs in this area is rather inconsistent, characterising the peace treaties sometimes as normative treaties (*traités-lois*) and sometimes as contractual treaties (*traités-contrats*). Some went further, distinguishing the nature of the different sections of the Peace Treaties. This was the case, for example, in *Brixhe et Deblon c Wurtembergische Transport Versicherungs Gesellschaft*. In this case, the German-Belgian Mixed Arbitral Tribunal explained that:

> Considering that it cannot be objected that the assimilation in paragraph 19 of the period preceding the time when the parties became enemies to the period preceding the war results in an extensive interpretation, and that such an extensive interpretation is inadmissible with regard to a treaty, which is not a law but a contract;
> That the provisions of Section V, which are to be interpreted, do not constitute an international contract of obligation, but international

51 German-Polish MAT, *Hirschberg et Wilczynski c État allemand; Makower c État allemand; Nasielski c État allemand; Potocki c État allemand; Ostrowski c État allemand; Zamowski c État allemand; Swiecicki c État allemand* (10 October 1925) 5 Recueil TAM 924, 930 (translation by the author).

52 ibid, 929 (translation by the author).

> legislation of private law which must be interpreted in accordance with universally accepted principles of law;[53]

In contrast, the Franco-German MAT rejected any assimilation of the treaty to a legislative act:

> Whereas the assimilation of a treaty to a legislative act is not correct; it is a contractual act; a treaty, like a contract, is certainly law between the signatory States, which must respect it at least as scrupulously as an internal law emanating from their respective sovereignty alone; but it does not follow that the treaty is assimilated to a law from the point of view of rules of interpretation;[54]

These differences in understanding of the nature of the treaty had, in practice, little influence on the rules of interpretation used. As a matter of fact, when the issue was examined almost thirty years later by the ILC, the then Special Rapporteur on the Law of Treaties, Sir Gerald Fitzmaurice, denied 'the existence of any fundamental juridical distinction between these categories and classes, especially as the same treaty may belong to more than one of them, under different aspects'.[55] As a result, this distinction was omitted from the VCLT.

As regards the rules used to determine the meaning and scope of the provisions of the Peace Treaties, the cardinal rule of all the MATs was to seek the common intention of the parties.[56] In practice, this meant that the treaty provisions had to be interpreted literally,[57] even if this was 'not satisfactory to the mind'.[58]

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53 German-Belgian MAT, *Brixhe et Deblon c Wurtembergische Transport Versicherungs Gesellschaft* (9 October 1922) 2 Recueil TAM 395, 400 (translation by the author).

54 Franco-German MAT, *Heim et Chamant c État allemand* (7 August and 25 September 1922) 3 Recueil TAM 50, 55 (translation by the author).

55 Gerald G Fitzmaurice, 'Law of Treaties. Report by G. G. Fitzmaurice, Special Rapporteur' (1956-II) Yearbook of the International Law Commission 104, 118, para 18.

56 *P Negreanu et Fils c Meyer et Fils* (n 2), 209; *Sarropoulos c État bulgare* (n 5), 52–53; Romanian-Austrian MAT, *Aron Kahane successeur c Francesco Parisi et État autrichien* (19 March 1929) 8 Recueil TAM 943, 962.

57 *Sarropoulos c État bulgare* (n 4), 53; Anglo-German MAT, *In re Albert Eberhardt Huebsch, Creditor v A E Huebsch and C° Ltd Debtor. German Clearing Office v British Clearing Office* (12 November 1925) 5 Recueil TAM 677, 684.

58 *Hirschberg et Wilczynski c État allemand* (n 51), 930.

The literal interpretation could, however, be set aside if there was a clear conflict between it and the general spirit of the treaty.[59] This occurred in a series of cases before the Turkish-Greek Mixed Arbitral Tribunal. The issue was whether, unlike Allied nationals, Greek nationals were entitled to bring claims under the Treaty of Lausanne for requisitions made by the Turkish Government. As the Tribunal noted, 'the provisions of the Treaty strongly support' a positive answer.[60] Yet, it rejected this literal interpretation of the Treaty, explaining that this was 'one of those cases where the text of the treaty does not reflect, with all desirable precision, the intentions of the High Contracting Parties'.[61] Analysing the historical context and the minutes of the Lausanne Conference, the Tribunal concluded that Greek nationals could not make a claim under the Treaty of Lausanne.[62]

In cases where the wording was open to different interpretations, or was obscure or ambiguous, the MATs resorted to supplementary means to clarify its meaning and scope. The first means was the context of the provision.[63] Thus, in order to determine the scope of Article 297 *h* (i), the German-Belgian Tribunal looked at all the other ten subparagraphs of Article 297 to determine the type of violation envisaged by the provision in question.[64]

The *travaux préparatoires* were also used on occasion by the MATs.[65] The case law of the latter on this issue emphasises the extreme caution required in their use. The Turkish-Greek Tribunal recalled that 'it is only with extreme caution that the *travaux préparatoires* may be used to interpret or supplement the text'.[66] The Tribunal added that such recourse could not be relied upon to modify the text of the Treaty.[67] In addition to the

59 *P Negreanu et Fils c Meyer et Fils* (n 2), 209; *Sarropoulos c État bulgare* (n 4), 53; *In re Albert Eberhardt Huebsch, Creditor v A E Huebsch and C° Ltd Debtor* (n 57), 684.

60 Turkish-Greek MAT, *Polyxène Plessa c Gouvernement turc* (9 February 1928) 8 Recueil TAM 224, 226.

61 ibid, 227 (translation by the author).

62 ibid, 230; see also Turkish-Greek MAT, *Alexandre D Photiadis c Gouvernement turc* (26 July 1928) 9 Recueil TAM 619, 621–26.

63 German-Belgian MAT, *Cie des Métaux Overpelt-Lemmel c Mitteldeutsche Creditbank* (8 December 1924) 5 Recueil TAM 83, 86–87; Romanian-German MAT, *Weitzenhoffer c État allemand* (18 January 1926) 5 Recueil TAM 935, 942.

64 *Cie des Métaux Overpelt-Lemmel c Mitteldeutsche Creditbank (N° 234)* (n 63) 86–87.

65 See, eg, *Polyxène Plessa c Gouvernement turc* (n 60), 226–230; *Alexandre D Photiadis c Gouvernement turc (N° 225)* (n 62) 621–26.

66 *Polyxène Plessa c Gouvernement turc* (n 60) 228.

67 ibid.

question of their use there is also the question of what actually constitutes *travaux préparatoires*, which must be treated with great caution. For example, in *Weitzenhoffer c État allemand*, the Romanian-German Tribunal rejected the preparatory work invoked, arguing that they were 'mere drafts'[68] and that 'the treaty had adopted a completely different set of rules'.[69] In *Heim et Chamant c État allemand*, the applicants relied on the minutes of the Alsace-Lorraine Conference as preparatory works in support of their claim. They explained that these minutes had 'inspired the draft of the Commission of the Bureau for Legislative Studies of Alsace-Lorraine, which was incorporated almost unchanged into the Treaty of Versailles'.[70] The Franco-German Tribunal refused to characterise the minutes as such. It found that the minutes did not emanate from an official authority and, above all, that they did not relate 'to the question of what rights the Treaty of Versailles confers on the Alsatians-Lorrains'.[71]

Apart from these supplementary means, some MATs invoked the *contra proferentem* rule, according to which an ambiguous clause is interpreted against its drafter.[72] In practice, however, this rule was rarely applied. The case of *Weitzenhoffer c État allemand* represents one of the very few cases where the Tribunal used this rule and spelled out its consequences. It explained that under the *contra proferentem* rule, the German State could not 'be bound beyond the reasonable meaning which it could and should give to the texts submitted for its acceptance'.[73] There are two reasons for the scarcity of this use. First, the MATs that regarded the treaty as normative refused to use a rule applied in a contractual context.[74] Second, such use implied recognition that the Peace Treaties had been imposed on, rather than negotiated with, the losing States.

Where available, the MATs also took into account the positions of the state parties as expressed in subsequent agreements. For example, in interpreting Article 249 of the Treaty of Saint-Germain, the Franco-Austrian Mixed Arbitral Tribunal relied on the agreements signed between the two Governments specifying the modalities of application of the said Article.[75]

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68 *Weitzenhoffer c État allemand* (n 63) 941.
69 ibid (translation by the author).
70 *Heim et Chamant c État allemand* (n 54) 52 (translation by the author).
71 ibid, 56 (translation by the author).
72 *P Negreanu et Fils c Meyer et Fils* (n 2) 206–207.
73 *Weitzenhoffer c État allemand* (n 63), 940 (translation by the author).
74 *Brixhe et Deblon c Wurtembergische Transport Versicherungs Gesellschaft* (n 53) 400.
75 Franco-Austrian MAT, *Société Dollfus-Mieg et Cie c État autrichien* (13 November 1922) 2 Recueil TAM 588, 590–91.

2.3.2. Interpretation of Treaties Authenticated in a Plurality of Languages

The Peace Treaties marked the beginning of a new era in multilateral treaty practice. They constituted one of the first instances when a multilateral treaty was concluded in several authentic languages. The Treaty of Versailles provided that both the French and English texts were authentic.[76] The Treaties of Saint-Germain, Neuilly and Trianon were drawn up in French, English and Italian. In case of divergence, the French text was to prevail, except in the parts relating to the Covenant of the League of Nations (Part I of the Treaties) and Labour (Part XII or XIII, depending on the treaty), where the French and English texts were of equal force.[77] Unlike its stillborn predecessor, the Treaty of Sevres, which contained the same provision as the Treaties of Saint-Germain, Neuilly and Trianon,[78] the Treaty of Lausanne was drafted solely in French.[79]

This plurality of authentic texts is not without consequences, since all the texts authoritatively record the terms of the agreement between the parties. Yet, as the ILC pointed out, 'in law there is only one treaty – one set of terms accepted by the parties and one common intention with respect to those terms – even when two authentic texts appear to diverge'.[80]

In practice, this plurality of authentic texts can make the interpreter's task more difficult because of the discrepancies between the languages. But it can also make the task easier, because where the text is subject to several interpretations or ambiguous and obscure in one language, it may be clear in another.

Needless to say, the MATs did not escape these linguistic complications. Faced with divergent but equally authoritative texts, they tried to reconcile them. This reconciliation was achieved primarily by comparing the texts and finding a common denominator. Thus, when one of the texts lent itself to several interpretations or was obscure or ambiguous, the MATs turned to the other authentic texts. If a coherent interpretation resulted

76 Treaty of Versailles (adopted 28 June 1919, entered into force 10 January 1920) 2 Bevans 43, 233, art 440.

77 Treaty of Saint-Germain (adopted 10 September 1919, entered into force 16 July 1920) art 381; Treaty of Neuilly (adopted 27 November 1919, entered into force 9 August 1920) art 296; Treaty of Trianon (adopted 4 June 1920, entered into force 31 July 1921) art 364.

78 Treaty of Sevres (adopted 10 August 1920, never entered into force) art 433.

79 Treaty of Lausanne (adopted 24 July 1923, entered into force 6 August 1924), art 143, which does not refer to any other languages.

80 ILC, 'Draft articles on the law of treaties with commentaries' (n 40) 225, para 6.

from them, it was adopted. If not, the tribunals had to continue the process of interpretation using the rules mentioned above.

The case of *Weitzenhoffer c. Etat allemand* provides a comprehensive overview of the issue. The Romanian-German MAT had to interpret Article 298 of the Treaty of Versailles. In the French version, the text was subject to several interpretations due to the possible linkage of a clause to different words. Faced with this uncertainty, the Tribunal began by recalling the possibilities available to it in the presence of a text with several interpretations.

> The French text of Part X is particularly defective, as several clauses can be interpreted in two or three different ways (e.g. para. 4 of the Annex, designation of a sole arbitrator, 304 *b*, paras 1 and 2, etc.). In some cases, the true meaning had to be determined by the MATs. In other cases, however, the English text – which is as authoritative as the French one (Article 440, para. 3) – resolves the difficulty, as its clear wording allows for only one interpretation.[81]

Turning to Article 298 of the Treaty, the Tribunal resorted to the English text of the provision, which proved sufficient to resolve the inadequacy of the French text.

> The French text is ambiguous, as the reference to "companies and associations" may be linked to that of "property" or to that of "nationals". The applicant adopts this second reading, which the positioning of the words in paragraph 1 certainly makes plausible at first sight. But the English text leaves no room for ambiguity, since it is grammatically impossible not to link the words "including companies and associations etc." to what precedes the word including, i.e. to the words "property, rights and interests", and to move them to the clause which follows and which mentions "nationals of the Allied Powers", without any link between them and the companies already mentioned.[82]

Examples abound of the MATs using another authentic language to corroborate or clarify the meaning and scope of a provision that is unclear or subject to multiple interpretations.[83]

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81 *Weitzenhoffer c État allemand* (n 63) 942 (translation by the author).

82 ibid (translation by the author).

83 For the use of English to clarify the French text, see, Italian-Austrian MAT, *Clorialdo Devoto c État autrichien* (23 April 1924) 4 Recueil TAM 500, 502; Italian-German MAT, *Deutsche Gaslicht AG and Osram GmbH v International General Electric Co Inc, New York* (23 June 1924) 5 Recueil TAM 477, 481; for the use of

More surprisingly, on occasion, the MATs disregarded the equality of the authentic texts in favour of the text that they considered to be the original version of the treaty. In other words, when confronted with a provision to be clarified, the MATs did not try to compare the different authentic versions of the Treaty. Instead, they determined the original version and based their interpretation on that version alone.

Such an approach can be found in the case of *Rymenans et Cie c État allemand* where the German-Belgian Mixed Arbitral Tribunal had to interpret paragraph 1 of the Annex to Section IV of Part X of the Treaty of Versailles. This provision read as follows in French and English:

> …est confirmée la validité de toutes mesures attributives de propriété, de toutes ordonnances pour la liquidation d'entreprises ou de sociétés ou de toutes autres ordonnances, règlements, décisions ou instructions rendues ou données… ou réputées avoir été rendues ou données par application de la législation de guerre concernant les biens, droits ou intérêts ennemis.[84]
>
> …
>
> …the validity of vesting orders and of orders for the winding up of businesses or companies, and of any other orders, directions, decisions or instructions … made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights and interests is confirmed.[85]

The French text was unclear as to what the word '*concernant*' referred to. Instead of comparing the different texts, the Tribunal rejected the French text as a poor translation of the English text:

> That the English text uses the expression "with regard to", which, while it may, in the absence of a preceding comma, refer to the noun "war legislation", refers rather to the verbs "made or given", so that the French text, which appears, from various indications, to be a translation of the English, should have said, as in paragraph 3: *rendues ou données par application de la législation de guerre "à l'égard de biens*

French to clarify the English text, see Anglo-German MAT, *Louis Stott v German Government* (1 May and 22 May 1925) 5 Recueil TAM 285, 481; Anglo-German MAT, *Stuttgarter Lebensversicherungsbank v John Turvill* and *German Clearing Office v British Clearing Office (Case 1955)* (19 February and 23 April 1926) 6 Recueil TAM 51, 55.

84 Traité de Versailles, reproduced in: Martens, *Nouveau Recueil Général*, 3rd series, vol 11, 323, Annex to Section IV of Part X, para 1 (emphasis added).

85 Treaty of Versailles (n 76) Annex to Section IV of Part X, para 1 (emphasis added).

> *ennemis*", or should at least have inserted a comma after the words "war legislation";[86]

This decision to set aside one of the official texts was unfortunate. As recalled above, a tribunal cannot use the interpretation process to 'disregard a text'[87] and 'make the text say something other than what it says'.[88] This is to some extent the impression left by the German-Belgian MAT. It failed to take into account the will of the parties to treat the French and English texts on an equal footing.

As a matter of fact, this solution was quickly reconsidered. Using the classic rule of comparing the authentic texts, the Anglo-German Mixed Arbitral Tribunal came to the exact opposite conclusion regarding the same provision.

> The meaning of the words "*in pursuance of war legislation with regard to enemy properly rights or interests*" cannot give rise to a doubt if one considers the French wording of the same paragraph 1. This wording does not run as in paragraph 3 "mesures prises à l'égard des biens ennemis", it runs "mesures prises ou mesures effectuées en exécution d'ordonnances etc... rendues ou réputées avoir été rendues *par application de la législation exceptionnelle de guerre concernant les biens, droits ou intérêts ennemis*". This wording shews, that paragraph 1 of the Annex contemplates only such measures which have been taken by virtue of the special war legislation concerning enemy property.[89]

As one of the first international courts and tribunals to be confronted with the problem of treaties authenticated in a plurality of languages, the case law of the MATs in this field is a major source of inspiration. Through their decisions, the MATs contributed to the development of the rule that prevails today and that can be found in Article 33, paragraph 4 of the VCLT: 'when a comparison of the authentic texts discloses a difference of meaning…, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'.[90]

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86 German-Belgian MAT, *Rymenans et C^o^ c État allemand* (11 February 1922) 1 Recueil TAM 878, 881.

87 *Hirschberg et Wilczynski c État allemand* (n 51) 930 (translation by the author).

88 ibid, 929 (translation by the author).

89 Anglo-German MAT, *Tesdorpf and C^o^ c État allemand* (8 November 1922 and 25 April 1923) 3 Recueil TAM 22, 28 (emphasis in original).

90 VCLT, 340, art 33 (4).

3. The Demise of Treaties: Grounds for Termination and Consequences

As their competence was limited to the application and interpretation of certain parts of the peace treaties,[91] the MATs were only rarely confronted with the topic of the termination of treaties. In one dispute, however, the Austro-Belgian Mixed Arbitral Tribunal was seized with the question of the survival of a treaty after a declaration of war.

The doctrine of the time was very divided as to the survival of treaties after a declaration of war. Thus, for some authors, 'war does not terminate treaties concluded with the enemy State; this would naturally be different for treaties incompatible with the war itself. However, the rule is not uncontested'.[92] On the other hand, for others, the declaration of war automatically terminated treaties concluded with the enemy state.[93] It was in this uncertain context that the decision of the Austro-Belgian MAT was taken.

In the case of *Mines et Charbonnages en Carniole c État autrichien*, the Mixed Arbitral Tribunal was seized of a claim for compensation following a military requisition by the Austro-Hungarian monarchy. In its defence, Austria argued that the Tribunal lacked jurisdiction, claiming that the measures suffered by the claimant were not directed against her as an enemy, but had been taken in application of Austrian law, which made no distinction between nationals and foreigners. This assimilation of Belgians to Austrians was, Austria added, also based on one of the provisions of the Treaty of Commerce and Navigation of 12 June 1906 between the two States.[94]

The Tribunal rejected the Austrian arguments. It first explained that military requisition was one of the measures covered by the Annex to Section IV of Part X of the Treaty of Saint-Germain.[95] Accordingly, the Tribunal had jurisdiction to hear the merits of the case. Although the Tribunal could have stopped at this conclusion, it nevertheless proceeded to examine the assimilation made between Belgian and Austrian citizens by the 1906 Treaty. In this respect, it explained:

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91 *Sarropoulos c État bulgare* (n 4) 53.

92 F Verraes, *Droit international: les lois de la guerre et la neutralité* (Oscar Schepens & Cie 1906), vol I, 58 (translation by the author).

93 ibid.

94 Austro-Belgian MAT, *Mines et Charbonnages en Carniole c État autrichien* (16 November 1923) 3 Recueil TAM 811, 813–14.

95 ibid.

> [t]hat it is of little importance that the Austro-Belgian Treaty of Commerce and Navigation of 12 June 1906 assimilates the nationals of the other contracting party to nationals as far as military requisitions and contributions are concerned, since this clause of *a treaty which became null and void as soon as the High Contracting Parties found themselves at war "with each other"* refers only to wars between one of the contracting parties and a third power;[96]

Not only did the Tribunal conclude that the clause was inapplicable in this case, but, more importantly, that the treaty had been terminated by the declaration of war between the two States. The Tribunal is silent, however, on the reasons for this finding. Is it a question of incompatibility between the treaty and the war itself, or does the Tribunal lean towards the doctrinal position that the declaration of war terminates all treaties between the two States?

Although this decision was incomplete, it contributed to the body of practice on the subject. As can be seen from the reports of the Institute of International Law and the ILC Special Rapporteur on 'The effects of armed conflicts on treaties', there have been few cases where this issue has been discussed.[97] The Austro-Belgian MAT decision therefore provides food for thought on the subject.

In view of the specificity of the effects of war on treaties and the problems associated with them, it was decided to exclude this issue from the VCLT. To this end, Article 73 was inserted in the Convention.[98] The subject was later taken up by the ILC from 2004. The latter adopted a nuanced position in its Draft Articles on the Effects of Armed Conflicts on Treaties. According to Article 3, '[t]he existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties'.[99] In fact, it is necessary to examine the provisions of the treaty to determine whether it survives such an event. If nothing is said and the interpretation does not yield any result, there are a number of factors to be taken into account in

96 ibid, 814 (emphasis added) (translation by the author).

97 Bengt Broms, 'The Effects of Armed Conflicts on Treaties. Provisional Report and Proposed Draft Resolution', (1981) 59-I Yearbook of the Institute of International Law 201; Ian Brownlie, 'First Report on the Effects of Armed Conflicts on Treaties', (2005-II(1)) Yearbook of the International Law Commission 209; Ian Brownlie, 'Second Report on the Effects of Armed Conflicts on Treaties', (2006-II(1)) Yearbook of the International Law Commission 251.

98 VCLT, 350, art 73.

99 ILC, 'Draft Articles on the Effects of Armed Conflicts on Treaties', (2011-II(2)) Yearbook of the International Law Commission 107, 107, art 3.

determining whether the treaty is susceptible to termination, withdrawal or suspension.[100]

In *The National Bank of Egypt c la Banque d'Autriche-Hongrie*, the Anglo-Austrian Mixed Arbitral Tribunal had to deal with the effects of the termination of a treaty. In this case, the Bank of Austria-Hungary had incurred a debt to the National Bank of Egypt. The latter invoked the protection of the Treaty of Saint-Germain to obtain payment. However, the Bank of Austria-Hungary disputed this reliance. It explained that, as an Egyptian legal person, it only benefited from the protection of the Treaty of Saint-Germain by virtue of express stipulations, including the Protectorate of Egypt, within the scope of the Treaty. Since the renunciation by Great Britain of its protectorate over Egypt in 1922, Egyptian nationals could therefore no longer avail themselves of the rights enshrined in the Treaty.[101]

The Tribunal rejected this argument. It explained that the independence of Egypt did not alter prior rights, unless explicitly provided otherwise. As such, the renunciation by Great Britain of the Protectorate over Egypt could not 'divest Egyptian nationals of the rights which were accorded to them by the Treaty'.[102] In fact, what mattered to the Tribunal was the situation at the date of entry into force of the Treaty of Saint-Germain. 'In the view of the Tribunal the material date in relation to the nationality of the Claimants within the meaning of the Treaty is the date on which the Treaty came into force and nothing which has subsequently occurred has altered their legal position in this connection'.[103]

Once again, this position of the MAT coincides with that adopted by the VCLT. Indeed, Article 70 on the consequences of the termination of a treaty provides that '[u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty… (*b*) [d]oes not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'.[104]

100 ibid, 107, arts 4–7.
101 *The National Bank of Egypt c la Banque d'Autriche-Hongrie (Claim 1922 A/23)* (n 43) 240.
102 ibid, 241.
103 ibid.
104 VCLT, 349, art 70 (1) (*b*).

4. Concluding Remarks

International tribunals of uncertain character, sometimes regarded as tribunals of private international law, occasionally as supreme national courts, and more rarely as tribunals of public international law, the MATs were a major innovation of the peace treaties of the First World War. As two authors of the time noted, their future was boundless, 'for their scope of development [was] unlimited'.[105]

Among these areas of development was international law. Identified by the Romanian-German Mixed Arbitral Tribunal as 'in its infancy'.[106], it offered an important playing field for the MATs. This was particularly the case with treaty law, where customary law was scarce and no Convention containing the various rules on the subject existed. Bound by the provisions of the Peace Treaties, the MATs had to develop their own solutions as and when problems arose. Thus, during more than a decade of activity and through more than 90 000 decisions, the entire life of the treaties passed through their hands. From interim obligations to termination, from interpretation to application, the MATs dealt with a wide range of treaty issues.

The result is a significant body of practice. While some decisions became the *locus classicus* of an issue, much of the case law contributed to building up the body of law in the field. And with a few exceptions, the solutions adopted coincide with those adopted by the VCLT, the reference standard in this area. This demonstrates, if it were still necessary, their great modernity.

105 Gilbert Gidel, H-E Barrault, *Le traité de paix avec l'Allemagne du 28 juin 1919 et les intérêts privés: commentaire des dispositions de la partie X du traité de Versailles* (Librairie générale de droit et de jurisprudence 1921), 325.

106 *P Negreanu et Fils c Meyer et Fils* (n 2), 210–11 (translation by the author).

Chapter 12: Investment Treaty Arbitration and the Nascent Legacy of the Mixed Arbitral Tribunals

Jarrod Hepburn[*]

1. Introduction

The advent of investment treaty arbitration, in which individuals may bring legal claims directly against foreign states under international law, has been described as 'a revolutionary development in international adjudication'.[1] When the first investment treaties were concluded in the 1960s,[2] their grant of advance consent by states to arbitration with individual and corporate investors ushered in a 'new world', marking the beginning of 'arbitration without privity'.[3] Unlike most earlier regimes of international adjudication, investment treaties permit prospective claims by individuals against states, heard by ad hoc tribunals composed solely for one dispute.[4]

Nevertheless, in some important respects, the novelty of investment treaty arbitration is 'overstated'.[5] The basic idea of individual claims before international tribunals was already well established before the 1960s. Rather than rely on the cumbersome traditional process of diplomatic protection, in which the individual's home state would take up their claim against the foreign state at the international level, it was 'often found more convenient to allow individual claimants to bring their own claims before international tribunals'.[6] A prominent example of this is found in

* Melbourne Law School, Australia.

1 Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP 2007) 4.

2 The 1968 Netherlands-Indonesia BIT was the first to contain consent to investor-state arbitration: Nico Schrijver and Vid Prislan, 'The Netherlands' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 580.

3 Jan Paulsson, 'Arbitration Without Privity' (1995) 10 ICSID Review 232.

4 Barton Legum, 'The Innovation of Investor-State Arbitration under NAFTA' (2002) 43 Harvard International Law Journal 531, 536, 538.

5 ibid, 531.

6 *Council of Canadians v Attorney-General of Canada* (Court File 01-CV-208141) Affidavit of James Crawford (15 July 2004) para 44 <www.italaw.com/sites/default/files/case-documents/ita0965_0.pdf> accessed 7 July 2020.

Mixed Arbitral Tribunals (MATs) established under the post-World War I Peace Treaties. The MATs had jurisdiction to hear a range of claims largely brought by nationals of the Allied states against either nationals of enemy states (notably Germany) or enemy states themselves.[7] Indeed, it has been suggested that the MATs themselves pioneered the concept of individual access to international tribunals.[8]

The early 20th century MATs therefore served as important conceptual forerunners of today's investment treaty tribunals. Certainly, the MATs have not gone entirely unnoticed by scholars of international adjudication; elements of MAT case law have previously been examined in texts on topics relevant to modern investment arbitration.[9] However, despite the apparent direct links to contemporary investment arbitration, there are relatively few citations to MAT decisions in investment treaty case law. This absence of MAT decisions in modern claims is in stark contrast to the frequent citation of decisions of the other mixed claims commissions established around the same time, such as the 1926 *Neer* decision of the US-Mexico Claims Commission.[10] Furthermore, there has been no sustained exposition and analysis of the particular relevance of MAT case law to contemporary investment treaty arbitration.

This chapter therefore aims to remedy that situation. In Section 2, the chapter examines the existing instances of use of MAT case law by parties and tribunals in investment treaty claims, detailing the issues on which inspiration was drawn from the MATs.[11] As elaborated in Section 2, these issues largely relate to questions of international procedural law.

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7 On the jurisdiction of the MATs, see Marta Requejo Isidro and Burkhard Hess, 'International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922' in Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Treaty and Dispute Settlement After World War I* (Nomos 2019) 243–45.

8 ibid, 245–46; Manley O Hudson, *International Tribunals: Past and Future* (Carnegie Endowment 1944) 68; N Wühler, 'Mixed Arbitral Tribunals' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 1, 146.

9 See, eg, Cameron A Miles, *Provisional Measures before International Courts and Tribunals* (CUP 2017); Chester Brown, *A Common Law of International Adjudication* (OUP 2007); Hudson (n 8); John L Simpson and Hazel Fox, *International Arbitration: Law and Practice* (Praeger 1959).

10 For discussion of the *Neer* case's role in modern investment arbitration, see, eg, Jan Paulsson and Georgios Petrochilos, '*Neer*-ly Misled?' (2007) 22 ICSID Review 242.

11 MAT decisions were typically in French, with some in English and Italian. Quotes from case law used in this chapter are in English; translations (where necessary) are by the author.

Noting this limited use of MAT case law to date, Section 3 identifies five constraints which may explain the limited use: differences in treaty text (including on the MATs' jurisdiction), practical limitations, the depth of MAT reasoning, the international law status of the MATs, and trends towards codification since the 1920s. Section 4 surveys the remainder of the available voluminous MAT case law, identifying other issues relevant to modern investment claims on which the MATs offered views. As with the issues discussed in Section 2, these issues largely relate to procedure. However, the MATs also broached at least some questions relevant to merits and damages in modern claims, as well as broader systemic questions about the nature of the national/international (or individual/state) dichotomy in international law. Section 4 suggests that it is on these issues that the nascent legacy of the MATs can emerge.

The contribution of this chapter, then, is partly to describe in some detail a previously understudied phenomenon, bringing the MATs to greater prominence amongst modern scholars. Beyond this descriptive contribution, it also offers an explanatory account of why MAT case law has not been prominent in modern adjudication, and a predictive account of the potential future use of MAT case law in investment arbitration, in the framework of public international law.

2. *Use of MAT Decisions in Existing Investment Treaty Cases*

Like other legal systems, international law draws a distinction between primary and secondary rules.[12] Primary rules of international law specify a state's substantive obligations. Primary rules encapsulate everything that a state must do, or not do, under some obligation found in custom or in a treaty. Secondary rules, by contrast, provide the surrounding 'machinery' that makes the primary rules effective. Secondary rules can be taken to include the rules of treaty interpretation, the rules establishing the consequences of breaching a primary rule, the rules governing how the primary rules are established and changed, and the rules governing procedure in international adjudication.[13]

12 See Eric David, 'Primary and Secondary Rules' in James Crawford, Alain Pellet and Simon Olleson (eds), *The Law of International Responsibility* (OUP 2010).

13 André Nollkaemper, 'The Power of Secondary Rules to Connect the International and National Legal Orders' in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 47. On procedure as a secondary rule, see David (n 12) 28.

To date, parties and tribunals in investment treaty cases have cited MAT decisions only in relation to the secondary rules of international law. In particular, MAT decisions have been cited on issues of *res judicata*, temporal jurisdiction, nationality of claims, estoppel and good faith, *lis pendens* and *electa una via*, revision of judgments, interim measures, treaty interpretation, and the status of oral agreements in international law. In most cases, these citations appear to be made in the course of reasoning about the existence or application of some purported rule of international procedural law. Section 2.1 reviews use of MAT case law by parties in investment arbitration, before Section 2.2 reviews use by tribunals.

2.1. Use by Parties

In some cases, one or both parties cited and discussed MAT decisions, but the tribunal did not engage with the decisions, and based its own reasoning on other grounds. Nevertheless, perhaps because of the long pedigree of MAT case law (compared to investment treaty cases), the parties in these cases appeared to consider that MAT citations would strengthen their argument.

2.1.1. Res Judicata

In the long and complex *Pey Casado v Chile* investment treaty case, the claimant sent a letter to the Tribunal in December 2013 criticising the nomination of the arbitrator appointed by Chile.[14] The letter came at the outset of the so-called 'resubmission' proceedings, commenced after an annulment committee at the International Centre for Settlement of Investment Disputes (ICSID) partially annulled the award issued in 2008 by the original tribunal in the case. Following this decision, the claimant decided to re-file the annulled parts of its claim before a second, 'resubmission' tribunal at ICSID. During the original proceedings, however, the arbitrator appointed by Chile was found to have engaged in improper conduct, and was removed from the case. ICSID itself then stepped in to appoint a new arbitrator on Chile's behalf, under ICSID Convention Article 56(3), Chile having lost the right to do so due to the misconduct of its previous

14 *Victor Pey Casado v Chile* (ICSID Case No ARB/98/2) Letter to the Tribunal from Juan Garcés (26 December 2013).

appointee. When the annulled parts of the claim were re-filed in 2013, a new tribunal needed to be composed, and Chile made its own nomination to the resubmission tribunal.

According to the claimant, however, the fact that Chile made its own nomination in the resubmission proceedings was in violation of the (un-annulled) finding made by the first tribunal that ICSID, not Chile, was required to appoint Chile's arbitrator due to the earlier misconduct. In the claimant's view, this finding of the first tribunal was *res judicata*, and was therefore binding on the resubmission tribunal. The claimant described *res judicata* as a 'universal principle of international law',[15] citing the 1923 decision of the France-Bulgaria MAT in *Przewlocki v Bulgaria*.

In that case, a Bulgarian court had rejected the claimant's claim of expropriation of a forest area in 1905, upheld on appeal in 1907. After the MAT was constituted, however, the claimant submitted the same dispute to the MAT. Declining the admissibility of the case, the MAT commented that *res judicata* was 'such a universal and absolute legal principle of positive international law that when the drafters of the [Treaty of Neuilly] intended to depart from it, in rare cases which have no connection to the present case, they announced this formally and explicitly.'[16] In the MAT's view, the case had been concluded in domestic courts 15 years earlier, and – in the absence of explicit authorisation in the treaty – the principle of *res judicata* prevented the MAT from hearing the claims again.

The *Pey Casado* claimant therefore saw the MAT case likely as confirming the existence of a general principle of international law. However, the claimant did not frame its criticisms as a formal request for disqualification of the Chilean nominee, and the tribunal ultimately determined that it did not need to address the issue.[17]

15 ibid, para 24.

16 *Przewlocki v Bulgaria* (20 February 1923) 2 Recueil TAM 932, 936 ('*l'autorité de la chose jugée est en effet un principe de droit positif et international tellement universel et absolu, que lorsque les rédacteurs du Traité du 27 novembre 1919 ont entendu y porter atteinte, dans des cas très rares et qui n'ont rien à voir avec l'espèce actuelle, ils n'ont pas manqué de l'énoncer d'une manière formelle et explicite*').

17 *Victor Pey Casado v Chile* (ICSID Case No ARB/98/2) Procedural Order No 1 (18 May 2014) para 2.2.

2.1.2. Lis Pendens

In *SGS v Pakistan*, a MAT decision was cited by the claimant to resist Pakistan's argument that the doctrine of *lis pendens* prevented the investment treaty tribunal from taking jurisdiction. Pakistan had observed that the claimant had also commenced proceedings in a Pakistani court in relation to the same dispute, and that the international tribunal should therefore decline to hear the case on grounds of *lis pendens*. SGS, however, alleged that *lis pendens* did not apply when the parallel proceedings were in international and domestic courts, since the two forums were required to be 'of equal status'.[18] SGS cited the MAT case *Socaciu v Austria* on this point, which (SGS said) held that, 'once international proceedings have begun, proceedings before the domestic courts had no object.'[19]

The *Socaciu* Tribunal, faced with a similar claim by Austria of *lis pendens* due to a pending parallel domestic proceeding,[20] was seemingly influenced in rejecting the claim by the 'fork-in-the-road' clause in Article 256 Treaty of St Germain (which established the Romania-Austria MAT hearing the case). Article 256, on the *Socaciu* Tribunal's interpretation, allowed claimants to choose exclusively between national courts or the MAT to bring a contractual claim.[21] As soon as Mr Socaciu chose to take his claim to the MAT, and the MAT upheld jurisdiction, the pending domestic proceedings on the same dispute 'no longer had any object' because the domestic court was bound by the *res judicata* effect of the MAT's decision to take jurisdiction.[22] In other words, the international tribunal had already decided the matter (or at least had upheld jurisdiction over the matter), meaning that the domestic court's jurisdiction was nullified. As a result, there was effectively no pending domestic claim, and *lis pendens* could not apply. Interestingly, the domestic proceedings had already been underway for around two years before the MAT was constituted. Although not clearly expressed in the judgment, the MAT appeared *not* to view itself as bound by the domestic court's earlier decision to take jurisdiction – which, one might think, was itself *res judicata* – because the MAT, and

18 *SGS Société Générale de Surveillance SA v Pakistan* (ICSID Case No ARB/01/13) Decision of the Tribunal on Objections to Jurisdiction (6 August 2003) para 114.

19 ibid. The tribunal incorrectly cited the case as '*Socaciu v Romania*'. The claimant's pleadings in the case are not publicly available; the quote is in fact the tribunal's summary of SGS's argument in the decision.

20 *Socaciu v Austria* (14 May 1927) 7 Recueil TAM 785, 789.

21 ibid, 791.

22 ibid ('*n'a plus d'objet*').

the treaty's fork-in-the-road clause, did not yet exist at that time. Only once the choice of forum had arisen for the claimant, and that choice had been successfully exercised, did the choice become *res judicata* and bind the non-chosen forum.

Socaciu thus does not appear to set out any general principle that *lis pendens* cannot apply as between international and domestic forums. Arguably, the MAT's reasoning envisages that *lis pendens* could indeed apply as a jurisdiction-regulating tool where both forums could potentially have jurisdiction – ie where there was no fork-in-the-road clause. Since there was no such clause in the Switzerland-Pakistan BIT underlying the *SGS v Pakistan* case,[23] the *SGS* claimant's reliance on *Socaciu* seems inapposite. In any event, the *SGS* tribunal did not rely on *Socaciu* either, disposing of Pakistan's *lis pendens* argument by reasoning that the treaty tribunal had jurisdiction only over treaty claims, not over the contract claim that was brought to a domestic court. Rather than any concern over whether the two forums were 'of equal status', *lis pendens* did not apply in *SGS* simply because the two claims were not identical.[24]

2.1.3. Provisional Measures

The rules of procedure of the MATs, and MAT decisions themselves, played some role in the early development of the concept of provisional measures in international adjudication.[25] Most MATs adopted rules of procedure that explicitly permitted the tribunals to order provisional measures, and, where this was not the case, MATs found an implied power to make such orders in any event.[26] One significant MAT decision on provisional measures was cited by the respondent in the investment treaty case *Merck v Ecuador*. Merck sought an order preventing Ecuador from seizing its assets to enforce a USD150 million domestic court judgment against it.[27] Ecuador objected, partly on the grounds that such an order would place a disproportionate burden on the state because it would require the Ecuadorian executive to interfere with the enforcement of a domestic judicial decision, in violation of the Ecuadorian Constitution and human

23 *SGS* (n 18) para 176.
24 ibid, para 182.
25 Miles (n 9) 47.
26 ibid, 49.
27 *Merck Sharp & Dohme (IA) Corp v Ecuador* (PCA Case No 2012–10) Claimant's Request for Interim Measures (12 June 2012).

rights law.[28] Importantly, the 1976 United Nations Commission on International Trade Law (UNCITRAL) rules governing the arbitration did not explicitly contain a requirement of proportionality in their provisions on interim measures. However, amongst other sources, Ecuador cited *Electricity Company of Sofia v Bulgaria*, a case of the Belgium-Bulgaria MAT (but connected to the well-known Permanent Court of International Justice (PCIJ) case),[29] to contend that the Tribunal was nevertheless required to consider proportionality.[30] As the MAT said, there was 'a principle which, even though not inscribed in the rules of procedure, is no less worthy of consideration' in decisions on interim measures – namely, that 'the harm caused by the interim measure must not be out of proportion with the advantage that the claimant might derive from it.'[31] In Ecuador's view, this test was not met. Ultimately, however, Merck withdrew its request for interim measures, and the tribunal was not called upon to decide the point.[32]

2.1.4. Jurisdiction by Estoppel

The question of whether an international court or tribunal can establish its jurisdiction by way of estoppel against the respondent has long been controversial.[33] Commentators have expressed concern that the fundamental requirement of state consent in international adjudication might be weakened or bypassed if a respondent were to be estopped from contesting jurisdiction due to its earlier conduct or statements.[34] Indeed, it is

28 *Merck Sharp & Dohme (IA) Corp v Ecuador* (PCA Case No 2012–10) Opposition of Respondent Republic of Ecuador to Claimant's Request for Interim Measures (24 July 2012) paras 181–88.

29 *Electricity Company of Sofia (Belgium v Bulgaria)* (Judgment of 4 April 1939) PCIJ Series A/B No 77.

30 *Merck* (n 28) para 177.

31 *Electricity Company of Sofia v Bulgaria* (6 January 1923) 2 Recueil TAM 924, 926–27 ('*un principe qui, pour n'être pas inscrit dans le règlement, n'en est pas moins digne de considération*'; '*le préjudice causé par la mesure conservatoire ne doit pas être hors de proportion avec le profit que peut en retirer le requérant*').

32 *Merck Sharp & Dohme (IA) Corp v Ecuador* (PCA Case No 2012–10), Tribunal's Letter re Request for Interim Measures (12 March 2013).

33 Jack Wass, 'Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals' (2016) 86 BYIL 155; Megan L Wagner, 'Jurisdiction by Estoppel in the International Court of Justice' (1986) 74 California Law Review 1777.

34 Wagner (n 33).

tempting to view a tribunal's jurisdiction as an objective matter, which cannot be established simply by one party's conduct but is necessarily for the tribunal's own determination. In *Kunkel v Poland*, however, the Germany-Poland MAT took a different view. The claimants in that case were previously German nationals who had been expropriated by Poland. After the War, the claimants acquired Polish nationality under the terms of the Treaty of Versailles. Despite now being officially Polish, they sought to claim against Poland before the Germany-Poland MAT. Citing its own case law as well as 'commentary and the practice of international arbitration',[35] the tribunal held that as Polish nationals they could not claim against Poland. However, the tribunal permitted them to reformulate their claims, this time as German nationals. According to the Tribunal, Poland would be required to treat the claimants in this reformulation as German nationals (and thereby eligible to claim), because the state had previously expropriated the claimants on the basis that they were German. There were 'evident reasons of equity' supporting this view: 'he who suffered injury in his quality as German should be permitted to enjoy the rights attached to this quality, notably that of seizing the [Germany-Poland] MAT.'[36]

Kunkel v Poland was cited in *Chevron v Ecuador I*. A central part of the claimants' case in *Chevron* was that various deficiencies in the Ecuadorian court system had prevented the claimants from achieving justice in those courts, thereby constituting a violation of the US-Ecuador Bilateral Investment Treaty (BIT). However, in earlier proceedings in New York courts, the same claimants had successfully resisted a massive environmental claim against them by contending that the Ecuadorian courts were the appropriate forum in which the claim should be decided. In the BIT case, Ecuador seized on these earlier arguments by the claimants, objecting to the BIT tribunal's jurisdiction on the grounds that the claimants were now estopped from contesting the fairness and competence of the Ecuadorian courts (since they had advocated in favour of those courts in the New York proceedings). In support of its contention that the principle of estoppel applied to questions of jurisdiction, Ecuador cited *Kunkel*.[37] While not

35 *Kunkel v Poland* (2 December 1925) 6 Recueil TAM 974, 979 ('*à la doctrine et à la pratique en matière d'arbitrages internationaux*').

36 ibid, 984 ('*des raisons d'équité évidentes*'; '*celui qui a subi un dommage en sa qualité d'Allemand doit pouvoir bénéficier des droits attachés à cette qualité, notamment de celui de saisir le T.A.M.*').

37 *Chevron Corporation v Ecuador* (UNCITRAL), Interim Award (1 December 2008) para 128 ('*Chevron I*'). Ecuador also cited *Kunkel* for similar reasons in *Chevron v Ecuador II*, contending that the claimants were estopped from claiming that

entirely clear,[38] the *Chevron* Tribunal appeared to accept the contention,[39] but did not discuss the reference to *Kunkel*. Instead, the tribunal held that no estoppel was made out on the facts.[40]

2.1.5. Continuous Nationality

Parties have also cited MAT decisions on nationality. A central – perhaps notorious – issue in the well-known *Loewen v USA* case was the customary international law rule of continuous nationality, which allegedly required claimants to maintain the correct nationality from the date of the impugned events until the date of the tribunal's decision. In the *Loewen* case, the Canadian corporate claimant transferred its operations to a new US-registered company as part of a bankruptcy reorganisation. According to the US, this amounted to a change in nationality, depriving the tribunal of jurisdiction. The claimant protested that the customary rule of continuous nationality applied only in diplomatic protection cases, where the formal claimant was a state, rather than in investment treaty cases, where the claimant was a national. However, in response, the US cited the MAT case *Lederer v Germany*, where the MAT rejected a claim because the British claimant had 'changed' nationality to German when his claim was transferred to his German heirs upon his death prior to the Tribunal's decision.[41] The US also disagreed (although without particular elaboration) with Loewen's suggestion that MAT cases were not relevant to investment treaty claims because 'they deal with the special circumstances that arise out of war'.[42] For the US, the citation to *Lederer* appeared to contribute to evidence of the scope of the customary rule, demonstrating that (con-

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the BIT tribunal had jurisdiction: *Chevron Corporation v Ecuador* (PCA Case No 2009–23), Memorial on Jurisdictional Objections of the Republic of Ecuador (26 July 2010) 74.

38 *Chevron I* (n 37) para 137.

39 ibid, paras 144, 148.

40 ibid, para 149.

41 *Lederer v Germany* (28 February 1923) 3 Recueil TAM 762. See *Loewen v USA* (ICSID Case No ARB(AF)/98/3), Memorial of the United States on Matters of Jurisdiction and Competence (1 March 2002) 23–24 and *Loewen v USA* (ICSID Case No ARB(AF)/98/3), Reply on Jurisdiction (26 April 2002) 34 ('*Loewen US Reply*').

42 *Loewen v USA* (ICSID Case No ARB(AF)/98/3), Counter-Memorial of the Loewen Group Inc on Matters of Jurisdiction and Competence (29 March 2002) para 150; *Loewen US Reply* (n 41) 61.

trary to Loewen's contention) the rule did apply in investor-state claims. Ultimately, the *Loewen* Tribunal controversially agreed with the US in substance, finding that Loewen's change of nationality prior to the decision prevented its claim from succeeding.[43] However, the Tribunal did not cite *Lederer*.

2.2. *Use by Tribunals*

In other investment treaty cases, tribunals have either engaged with parties' citations of MAT decisions or have themselves cited MAT decisions in their awards, apparently unprompted by the parties.

2.2.1. *Dual Nationality*

One issue commonly addressed by the MATs was nationality. Since each MAT had specific nationality requirements, permitting claims only between two given states and their nationals, the MATs were frequently called on to decide whether the claimant held the correct nationality. In some cases, the issue of dual nationality inevitably arose. In *de Montfort v Germany*, the French claimant had acquired German nationality under German law. Under French law, however, she remained solely French.[44] When she brought a claim before the France-Germany MAT, the Tribunal's jurisdiction naturally depended on the strength of her claim to French nationality and the effect of her acquisition of German nationality. The Tribunal drew on an 1888 resolution of the *Institut du droit international* to find that it should apply a principle of 'active nationality' (or what might today be termed 'dominant and effective nationality'). Given that the claimant had always lived in France and performed her 'civic duties' there, the Tribunal held that she was French, regardless of what any particular domestic legal system might conclude.[45] The *de Montfort* case was cited by the tribunal in *Manuel Garcia Armas v Venezuela*, a BIT

43 For criticism, see, eg, Maurice Mendelson, 'The Runaway Train: The "Continuous Nationality Rule" From the *Panevezys-Saldutiskis Railway Case* to *Loewen*' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May 2005).

44 *de Montfort v Germany* (10 July 1926) 6 Recueil TAM 806, 809.

45 ibid, 809 ('*nationalité active*'; '*devoirs civiques*').

claim where the investor held the nationality of both partner states to the BIT. Alongside other cases, the Tribunal used *de Montfort* as support for its decision to apply a dominant nationality test.[46]

2.2.2. *Jurisdiction by Estoppel*

In *Chevron v Ecuador II*, the Tribunal relied on the MAT case *Kunkel v Poland* to find that the principle of good faith applied to questions of jurisdiction as well as merits, albeit 'more cautiously'.[47] As discussed above, Ecuador had already relied on *Kunkel* in its submissions in *Chevron v Ecuador I*, contending that the principle of estoppel applied to questions of jurisdiction. In *Chevron II*, Ecuador again cited *Kunkel* in submissions on the same point, on one particular question of jurisdiction in the case. In the course of ruling on a different question of jurisdiction, the Tribunal picked up on Ecuador's citation of *Kunkel*, using the citation to defeat Ecuador's own argument. The Tribunal noted that the term 'estoppel' was not used in *Kunkel*,[48] and it therefore determined that the case was more relevant to the broader principle of good faith, rather than estoppel.[49] Ultimately, just as 'the *Kunkel* arbitration decided almost a century ago' that Poland could not both affirm and deny the claimants' German nationality,[50] the *Chevron II* tribunal held that Ecuador could not deny, in the arbitration proceedings, Chevron's standing under a concession agreement after affirming that standing in local court proceedings.[51]

2.2.3. *Treaty Interpretation*

When the MATs were operating in the 1920s, the tribunals did not have access to the standard provisions on treaty interpretation that are codified today in Articles 31–33 of the 1969 Vienna Convention on the Law of

46 See ILC, *Draft Articles on Diplomatic Protection, with commentaries* (UN Doc A/61/10) 26, 34 for other uses of MAT cases on dominant and effective nationality.
47 *Chevron Corporation v Ecuador* (PCA Case No 2009–23), Second Partial Award on Track II (30 August 2018) para 7.113 ('*Chevron II*').
48 ibid, para 7.94.
49 ibid, para 7.92.
50 ibid, para 7.113.
51 ibid, para 7.112.

Treaties (VCLT). Indeed, MAT decisions were discussed in reports of the ILC Special Rapporteurs that led to the VCLT's development.[52] Now that the VCLT exists, it might seem strange that adjudicators would continue to refer to materials underlying the VCLT, rather than simply referring to the VCLT itself (whether as a binding treaty or as a codification of custom). Nevertheless, modern investment tribunals in at least one and perhaps two cases have cited MAT decisions on the principles of treaty interpretation.

First, the *AAPL v Sri Lanka* tribunal noted that Article 31 VCLT now codified the rules of treaty interpretation,[53] but proceeded to set out a long list of rules (including some not codified in the VCLT, such as *effet utile*) by which it would interpret the UK-Sri Lanka BIT. Amongst other cases, the tribunal cited *Sarropoulos v Bulgaria*, a decision of the Greece-Bulgaria MAT, to confirm that it could consult 'the integral context of the Treaty', and the '*sens général*' and '*l'esprit du Traité*', if treaty wording was ambiguous.[54]

Second, the *Chevron II* Tribunal cited the MAT case *Kahane v Austria* in a general list of authorities relied on in its award.[55] The *Kahane* case related mostly to a complicated question of nationality, on whether the Jewish claimant could validly be considered Romanian. Questions of nationality did not feature in *Chevron II*, since there was no dispute that the two corporate claimants held the correct nationality to be entitled to claim. However, the reference to *Kahane* in *Chevron* may have been intended to recall another finding of the *Kahane* tribunal, which held that treaties must be interpreted according to the 'true intention' of the treaty parties, and according to 'law and equity'.[56] *Kahane* was not further discussed by the *Chevron II* Tribunal.

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52 See, eg, ILC, *Report on the Law of Treaties by Mr H Lauterpacht, Special Rapporteur* (UN Doc A/CN.4/63), (1952) II YBILC 90, 110, 159.

53 *Asian Agricultural Products Ltd v Sri Lanka* (ICSID Case No ARB/87/3), Final Award (27 June 1990) para 38.

54 ibid, para 39. See *Sarropoulos v Bulgaria* (14 February 1927) 7 Recueil TAM 47, 52.

55 *Chevron II* (n 47) xvii.

56 *Kahane v Austria* (19 March 1929) 8 Recueil TAM 943, 962 ('*la véritable intention*'; '*du droit et de l'équité*'). The MAT cited the Advisory Opinion of the PCIJ in *Polish Postal Service in Danzig* (16 May 1925) PCIJ Rep Series B No 11, 39 for this proposition.

2.2.4. Revision of Judgments

Tribunals have also drawn on MAT jurisprudence in relation to revision of judgments. In *Venezuela Holdings v Venezuela*, the respondent asked the Tribunal to revise its final award in light of a US court judgment that had been issued in a related case after the final award. The Tribunal noted that, under Article 51 ICSID Convention, revision was possible following the 'discovery of some fact … that when the award was rendered … was unknown to the tribunal and to the [party seeking revision].'[57] Article 51's wording did not clarify, however, whether the newly-discovered fact must have already existed at the time of the award, or could also be a fact that arose after the award was issued (such as the US court judgment in issue here). Analysing the text of Article 51, the Tribunal favoured the view that 'discovering' a fact that was 'unknown' implied the possibility that it could have been known at the time of the award.[58] The Tribunal then noted that this textual view conformed to the object and purpose of the ICSID Convention, and to the views of 'all international courts and tribunals which had the opportunity to consider the matter.'[59] One decision quoted by the Tribunal in this regard was *Battus v Bulgaria*, where the France-Bulgaria MAT ruled that 'the use of the word "discovery" [in the MAT's rules of procedure] unquestionably implies the pre-existence, at the time the Tribunal rendered the decision in question, of a fact which was unknown to it'.[60] In *Battus*, the Tribunal similarly rejected the contention that a domestic court judgment, coming after an earlier decision of the Tribunal, could constitute a newly-discovered fact that would activate the procedure for revision. The *Venezuela Holdings* Tribunal also cited three other MAT decisions in *Creange v Busch*, *Krichel v Germany* and *Otzenberger v Germany* to similar effect.[61]

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57 *Venezuela Holdings BV v Venezuela* (ICSID Case No ARB/07/27), Decision on Revision (12 June 2015) para 3.1.1.

58 ibid, para 3.1.11.

59 ibid, paras 3.1.12, 3.1.19.

60 ibid, para 3.1.18; see *Battus v Bulgaria* (6 June 1929) 9 Recueil TAM 284, 286 ('*l'emploi du mot "découverte" implique indiscutablement la préexistence, à l'époque où le Tribunal a rendu sa décision attaquée, du fait qui lui était inconnu*').

61 *Creange v Busch* (23 May 1924) 5 Recueil TAM 114; *Krichel v Germany* (20 December 1928) 8 Recueil TAM 764; *Otzenberger v Germany* (20 August 1929) 9 Recueil TAM 272.

2.2.5. Oral Agreements in International Law

A MAT decision on the status of oral agreements in international law was cited in *Salini v Jordan*. That case involved the alleged breach of an oral agreement between the claimant and respondent to arbitrate a particular contractual dispute. According to the claimant, the alleged breach of the oral agreement in turn breached various provisions of the Italy-Jordan BIT. However, the tribunal rejected the claim, finding that no legally binding agreement had been created because the oral discussions did not demonstrate an intention to create legal relations.[62] On this point, the tribunal cited the Romania-Hungary MAT's decision in *Kulin v Romania*. There, Romania argued that the Hungarian government had accepted, during bilateral meetings, that Romania's expropriations affecting Mr Kulin did not violate the Treaty of Trianon.[63] The MAT acknowledged that the report of the bilateral meetings recorded that 'the Hungarian representatives do not contest that the Treaty is not opposed to an expropriation of the goods of Hungarian nationals for reasons of public utility, including the social necessity of agrarian reform'.[64] However, the Tribunal observed that the report did not indicate which particular representatives made this statement, in contrast to other statements recorded in the report. For the Tribunal, this suggested some doubt over whether the statement was really a formal declaration from Hungary. Furthermore, the tribunal noted that Hungary had also raised the question of compensation for the expropriation in the bilateral meetings, indicating that Hungary did not assume that the expropriation would go uncompensated. Instead, Hungary was envisaging application of all the usual conditions for lawful expropriation, including 'immediate payment of an adequate indemnity'.[65] Lastly, the MAT held that Romania was trying to detach one isolated statement from the remainder of the meetings. Given that the meetings overall produced no agreement on the question of compensation – the central question before the MAT – Romania was wrong to place such emphasis on what was possibly a concession on one issue, floated during negotiations merely

62 *Salini Costruttori SpA v Jordan* (ICSID Case No ARB/02/13) Award (31 January 2006) para 78.

63 *Kulin v Romania* (10 January 1927) 7 Recueil TAM 138, 147.

64 ibid, 148 ('*les représentants hongrois ne le contestent pas, que le Traité ne s'oppose pas à une expropriation des biens des optants pour des raisons d'utilité publique, y compris les nécessités sociales d'une réforme agraire*').

65 ibid, 148 ('*le paiement immédiat d'une indemnité adéquate*').

to test the feasibility of a wider agreement.[66] Thus, the MAT concluded that the oral discussions did not intend to create a legally binding agreement. This precedent then played a direct role in establishing the legal test for oral agreements applied in *Salini v Jordan*, which the claimant there similarly failed to pass.

2.2.6. Forum Selection Clauses

Citation to a MAT case also featured in one of the early investment treaty cases on the issue of forum selection clauses. In the ICSID case *SGS v Philippines*, the parties had concluded a contract providing that all disputes in connection with it must be heard exclusively by Philippines domestic courts.[67] The ICSID Tribunal took the view that such a clause must generally be respected, 'unless overridden by another valid provision',[68] and that the 'balance of opinion' of international arbitral tribunals (citing cases from various United States-Latin American Claims Commissions) agreed with that position.[69] The Tribunal acknowledged that there were 'decisions apparently to the opposite effect', giving a decision of the Greece-Germany MAT, *Greece v Vulcan Werke*, as one example.[70] However, in the Tribunal's view, these contrary decisions were based on the existence of a provision that specifically overrode the contractual forum selection clause.[71] Since (according to the *SGS* tribunal) no such overriding clause was present here, the claimant's contractual claims were inadmissible before the ICSID Tribunal, and should be presented to the domestic courts instead.[72] Thus, the differing text of the Treaty of Versailles compared to the Switzerland-Philippines BIT prevented the tribunal from following the reasoning of the MAT.

The *SGS* Tribunal held (by majority) that the arbitration clause in a BIT did not override the contractual clause for three reasons.[73] First, the

66 ibid, 149.
67 *SGS Société Générale de Surveillance v Philippines* (ICSID Case No ARB/02/6), Decision of the Tribunal on Objections to Jurisdiction (29 January 2004) para 137.
68 ibid, para 138.
69 ibid, para 150.
70 ibid, para 152.
71 ibid.
72 ibid, para 155.
73 ibid, paras 141–42.

contractual clause was specific to the parties' relationship, and should prevail as *lex specialis* over the general grant of jurisdiction to all investment disputes in the BIT. Second, the Tribunal held that the BIT intended not to override or replace 'actually negotiated investment arrangements' but to 'support and supplement' those arrangements. Third, the Tribunal rejected a suggestion that the later-in-time instrument should override the earlier one, because that *lex posterior* principle applied only 'between instruments of the same legal character' (ie, not between a treaty and a contract).

The *Greece v Vulcan Werke* tribunal, by contrast, drew explicitly on the differing character of the two instruments to rule that the treaty's 'public character' overrode the privately-agreed provisions of the parties' contract (effectively excluding a *lex specialis* argument).[74] Other MAT cases took the same approach,[75] although potentially limiting it to contractual clauses agreed before the treaty's entry into force.[76] It is true, though, that MAT decisions on this point were 'variable', as the *SGS* Tribunal noted.[77] In another case, the Hungary-Yugoslavia MAT ruled that a contractual forum selection clause, 'inserted in a contract born in the conditions presented in this case', must be given effect, since it had the force of law in Yugoslavia, the respondent state.[78] The Tribunal did not clarify its reference to the 'conditions presented in this case', but it was potentially recalling the fact that the Hungarian company's contract was with the state, and that such state contracts were seemingly equivalent to legislation in the Yugoslavian legal system. Still, the relevant contract in *Vulcan Werke* was also a state contract, and the differing results[79] indeed highlight the variable nature of MAT rulings, with no system of precedent or centralised appeal mechanism (foreshadowing similar problems in investment treaty arbitration today).

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74 *Greece v Vulcan Werke* (12 August 1925) 5 Recueil TAM 887, 897 ('*d'ordre public*').

75 *Goulley v SA Bosphore* (16 March 1925) 5 Recueil TAM 410; *Ciocci Gaetano v Gesellschaft für den Bau von Eisenbahnen in der Türkei* (25 April 1925) 5 Recueil TAM 907.

76 *Spronson v Turkey* (29 March 1930) 9 Recueil TAM 764.

77 *SGS* (n 67) para 152.

78 *Compagnie pour le Construction du Chemin de Fer d'Ogulin à la Frontière SA v Yugoslavia* (14 May 1929) 9 Recueil TAM 177, 180 ('*insérée dans un contrat né dans les conditions qui se sont présentées en l'espèce*'). Although the MATs typically used the name 'Serbo-Croat-Slovene State', this chapter will use the (slightly anachronistic) name 'Yugoslavia'.

79 The cases might be reconcilable, though, if the Greek legal system did not accord state contracts the force of law, as Yugoslavia's apparently did.

2.2.7. Temporal Jurisdiction

MAT decisions have also contributed to BIT tribunal reasoning on temporal jurisdiction. In *Tecmed v Mexico*, the claimant contended that the relevant BIT applied to Mexican conduct prior to the treaty's entry into force.[80] The Tribunal clarified that it could not consider any alleged violations occurring prior to entry into force, but it could consider facts arising prior to entry into force which formed part of impugned conduct continuing after entry into force. Recalling Article 18 VCLT, the tribunal held that it would 'take into account' the principle of good faith applying to states' conduct after signing a treaty but prior to its entry into force, including even negligent or unintentional conduct 'in disregard of the provisions of a treaty'. Notably, the Tribunal observed that the principle inspiring Article 18 had been applied in the MAT case *Megalidis v Turkey*.[81] Subsequently, in *MCI Power v Ecuador*, the parties debated the *Tecmed* Tribunal's reference to *Megalidis*. In the *MCI Power* claimant's view, Turkey had argued in *Megalidis* that it was not required to restore expropriated property to the claimant in that case because the obligation to do so was in the Treaty of Lausanne, which Turkey had signed but was not yet in force for Turkey at the time of the expropriation. MCI Power contended that the *Megalidis* Tribunal rejected this argument from Turkey, instead confirming that treaty obligations already applied between signature and entry into force.[82] MCI Power then drew on this position to argue that, like Turkey, Ecuador had similarly breached the customary law rule (confirmed by *Megalidis*, and reflected in Article 18 VCLT) that signing a treaty created concrete obligations even prior to entry into force.[83]

As noted by the *MCI Power* Tribunal, the *Megalidis* Tribunal did indeed set out the principle that would later be enshrined in VCLT Article 18: that good faith prevents states from doing anything that might prejudice a treaty after its signing but prior to its commencement.[84] However, as also observed by the *MCI Power* Tribunal,[85] this principle was not the basis

80 *Tecnicas Medioambientales Tecmed SA v Mexico* (ICSID Case No ARB(AF)/00/2), Award (29 May 2003) para 53.
81 ibid, para 67.
82 *MCI Power Group LC v Ecuador* (ICSID Case No ARB/03/6), Award (31 July 2007) para 100.
83 ibid, para 98.
84 *Megalidis v Turkey* (26 July 1926) 8 Recueil TAM 386, 395. See *MCI Power* (n 82) para 114.
85 *MCI Power* (n 82) paras 112, 114.

on which the Treaty of Lausanne was retroactively applied in *Megalidis*. Instead, the *Megalidis* tribunal simply applied Article 65 of the treaty, which specified retroactive application in certain circumstances. Thus, *Megalidis* offered no direct lessons for cases under BITs such as *MCI Power v Ecuador*, where the treaty contained no equivalent clause on retroactive application.

3. *Constraints on Relevance of MAT Decisions for Investment Treaty Arbitration*

As Section 2 has demonstrated, parties and tribunals in investment treaty cases have sometimes found relevance in MAT decisions, adding jurisprudential support to their reasoning. However, these cases represent only a small fraction of the known investment treaty decisions to date.[86] Why have modern cases not drawn more frequently on MAT case-law? This Section suggests that there are five main constraints on relevance: differences in treaty text, practical limitations, the depth of MAT reasoning, the international law status of the MATs, and trends towards codification.

First, some of the cases discussed in Section 2 already demonstrate one obvious constraint on relevance: the differing wording of the peace treaties compared to modern investment treaties. In *SGS v Pakistan*, *SGS v Philippines* and *MCI Power v Ecuador*, MAT cases proved to be distinguishable due to differences in treaty text. More fundamentally, the primary rules of the peace treaties – the substantive protections offered to individuals – do not correspond particularly closely to those of investment treaties. Many MAT cases were brought against private parties, and thus did not involve state conduct, as in investment treaty claims. Instead, '[t]he decisions of the mixed arbitral tribunals turn, to a large extent, on points of private law and of interpretation of the treaties of peace.'[87] This goes some way to explaining why, as indicated in Section 2, use of MAT decisions to date has largely been in relation to secondary rules.

Of the MAT cases brought against states, the most relevant claim was that the respondent state had taken 'exceptional war measures' affecting property rights in enemy countries (under Article 297 Treaty of Versailles and equivalent provisions in the other treaties). Typically, these measures amounted to a requisition of allied private property for wartime use by the

86 According to UNCTAD, there were 983 known cases as of July 2019: <investment policy.unctad.org/investment-dispute-settlement> accessed 7 July 2020.

87 Simpson and Fox (n 9) 17.

enemy state. In contemporary terms, the claim would be characterised as one of direct expropriation, raising few conceptual difficulties for adjudicators. While there were debates over valuation of compensation for these claims, liability was usually relatively clear. The MATs even clarified that 'exceptional war measures' might capture measures that were otherwise internationally lawful,[88] thus highlighting the *lex specialis* nature of the clause.[89] Meanwhile, unlike investment treaties, the peace treaties did not contain substantive protections on 'fair and equitable treatment' (FET) or transfers of capital, nor a general guarantee of the customary international law minimum standard of treatment. While Articles 276 and 277 Treaty of Versailles contained guarantees arguably equivalent to modern clauses on national treatment and full protection and security, these clauses were not within the jurisdiction of the MATs, and do not appear to have been discussed in any reported MAT cases.[90]

The MATs thus spent little time debating the kinds of substantive issues that bedevil modern tribunals, such as the borderline between permissible regulation and impermissible indirect expropriation, or the questions of due process and arbitrary administrative conduct that are assessed under the FET standard. It is perhaps not surprising, then, that contemporary texts on FET, for instance – even those texts explicitly aiming to trace the historical customary pedigree of that standard[91] – make no reference at all to MAT case law.[92]

Certainly, one category of MAT claims bore some similarities to modern investment treaty claims for denial of justice. Under Article 302 Treaty of Versailles and equivalents, enemy states were responsible for injury to allied nationals stemming from judgments given in wartime by local courts in the enemy states, in proceedings where the allied nationals were unable to defend themselves. One example is *Burtin v Germany*, where the French claimants lived in rented premises in Germany but

88 *Mouron v Germany* (31 October 1923) 3 Recueil TAM 706, 709. See also *Kulin* (n 63) 138.

89 See also *Pisani v Turkey* (4 June 1928) 8 Recueil TAM 207, 210 and *Wielemans v Bavaria* (9 June 1922), 2 Recueil TAM 224, 228, where the MATs distinguished between ordinary expropriations for public interest and exceptional war measures.

90 See the analytical indexes provided in the ten volumes of the *Recueil*.

91 Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013).

92 Roland Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP 2011); Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP 2008).

had temporarily travelled to France in July 1914, and could not return to Germany after the war broke out.[93] The claimants' landlord, a bank, subsequently obtained a default judgment from German courts against its former tenants for unpaid rent, and liquidated the claimants' property in the premises to satisfy the judgment. Ruling in 1922, the MAT ordered compensation for the claimants under Article 302. Insofar as such cases involve due process failings in local court proceedings, they do broadly resemble claims for denial of justice under investment treaties today.[94] However, the very specific treaty clause – only covering situations where the allied claimant 'was not able to make his defence' in the enemy courts – limits the relevance of these cases. Moreover, the MATs themselves did not seek to place these cases in the context of customary law denial of justice, and later authors have also not viewed them under that lens.[95]

Second, there are practical constraints on relevance. The MATs issued somewhere around 70 000 decisions,[96] meaning that any study of their work will struggle to be comprehensive. While MAT decisions were published, including in the *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, the *Recueil* is not complete, containing only a selection of cases judged important by the editor.[97] Hudson concluded that 'so many of [the decisions of the MATs] … are unavailable for general purposes that it is still difficult to appraise the work of those tribunals'.[98] As seen in Section 4, MAT case law has been described as 'scattered and fragmented' and 'contradictory',[99] adding to the challenges of drawing authoritative lessons from it.

Third, and relatedly, given the huge volume of MAT cases, tribunals presumably had very little time to consider each case. It is thus unsurprising that most MAT decisions were relatively short, typically around five pages,[100] with comparatively little reasoning. This is particularly evident on questions of damages, where – foreshadowing the practice of the European Court of Human Rights today, with a similarly burdensome

93 *Burtin v Germany* (15 September 1922) 2 Recueil TAM 450.
94 Nevertheless, claims of denial of justice are by no means a contemporary phenomenon. The well-known *Fabiani* case, for instance, was decided in 1905: *Fabiani* (31 July 1905) 10 RIAA 83.
95 Jan Paulsson, *Denial of Justice in International Law* (CUP 2005) does not cite any MAT cases.
96 Requejo Isidro and Hess (n 7) 247.
97 ibid, 248.
98 Hudson (n 8) 119–120.
99 Requejo Isidro and Hess (n 7) 268, 273.
100 ibid, 254.

caseload[101] – the Tribunal frequently settled on a rough figure 'in equity' following a cursory assessment of the pleadings.[102] When tribunal reasoning is only thinly explained, subsequent jurists will find more difficulty in applying that reasoning to resolve contemporary problems.[103]

Fourth, some scholars took the view that the MATs were not international tribunals applying international law at all, but rather either an extension of domestic tribunals or a hybrid.[104] Hudson viewed the MATs as establishing a 'special system of law' designed particularly for claims by individuals against states, on the grounds that states were reluctant to permit international tribunals to apply their own domestic law, while international law was (then seen as being) reserved for inter-state cases.[105] Nevertheless, this does not appear to be the prevailing position, and (as shown in the cases examined in Sections 2 and 4), the MATs seemed to view themselves as international tribunals, recognising the peace treaties as international instruments and applying the developing rules of treaty interpretation (rather than domestic rules of statutory or contractual interpretation).[106] This potential constraint may thus be more theoretical than real.

Fifth, however, much has changed about the international legal system since the 1920s. Perhaps most notably, there has been a general trend towards codification and treatification, both of primary and secondary rules of international law. The number of treaties grew rapidly throughout the 20th century, and major codification projects – such as the VCLT in 1969, the ILC Articles on State Responsibility in 2001, and the ILC Articles on Diplomatic Protection in 2006 – have been completed. Scholars have investigated whether international investment law itself is now in a position

101 Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29 EJIL 1091, 1103.

102 For some examples, see *Pierre Coquard v Germany* (12 July 1922) 2 Recueil TAM 297; *Stoessel v Germany* (5 July 1924) 4 Recueil TAM 724; *Apostolidis v Bulgaria* (29 March 1923) 3 Recueil TAM 169; *Lheureux v Germany* (29 May 1925) 5 Recueil TAM 404.

103 See: Muslu (ch 2) and Guez (ch 11) reflecting the fact that the arbitrators sometimes had only limited legal training.

104 Requejo Isidro and Hess (n 7) 263–67, 296–74. See also *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (Judgment of 25 August 1925) PCIJ Rep Series A No 6, 20, where the PCIJ held that 'the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character'.

105 Hudson (n 8) 202–203.

106 See: Guez (ch 11).

to be codified.[107] One of the advantages of such codifications, of course, is that they decrease the need for adjudicators to make *ad hoc* inquiries into relevant rules of international law, for instance by searching through history to find principles and precedents from which to build a modern rule. Confronted with some issue of treaty interpretation or attribution of conduct, investment tribunals will now most likely reach first for the VCLT or the ILC Articles on State Responsibility.[108] Simply put, this suggests a generally decreasing need to draw on 1920s MAT case-law today.

4. Potential for Use in Future Investment Treaty Cases

Beyond the existing uses of MAT case law highlighted in Section 2, and in light of the constraints identified in Section 3, what relevance might MAT decisions have for future investment treaty claims?

Section 4 suggests that it is on questions of procedure that MAT decisions hold greatest relevance for investment arbitration. This is because questions of procedure are least affected by the five constraints identified in Section 3. Even if arbitrators today find answers on many issues in codifications such as the VCLT or the ILC Articles on State Responsibility (as noted in Section 3), there remain many other issues not codified, and thus not susceptible to problems of difference in treaty text. In particular, codifications have largely not appeared in relation to procedure in international law. While certain instruments – the ICSID Convention, the UNCITRAL Arbitration Rules, some investment treaties,[109] some recently-developed soft law instruments[110] – do regulate many aspects of adjudicatory procedure in investment claims, they also leave many issues unregulated, thereby granting significant discretion to arbitrators. In exercising this discretion, one can expect that contemporary arbitrators will

107 See, eg, Andrea K Bjorklund and August Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar 2012).

108 David D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 AJIL 857, 866.

109 See, eg, arts 8.32 – 8.33 Canada-EU Comprehensive Economic and Trade Agreement (CETA) on frivolous claims: <ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 7 July 2020.

110 See, eg, the IBA Rules on the Taking of Evidence in International Arbitration (2010): <www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> accessed 7 July 2020.

look for ways to justify and legitimate their decision-making.[111] Recourse to the solutions offered by earlier tribunals on the same issues is one prominent and frequently adopted way of doing this. Moreover, such recourse is justifiable as a method of identifying 'general principles of law' in the sense of Article 38(1)(c) Statute of the International Court of Justice.[112] Basic principles of judicial procedure have long been recognised as paradigm cases for such general principles.[113] Furthermore, debates over the status of the MATs (as international, domestic or hybrid tribunals) are least likely to affect questions of procedure; as long as the MATs were adjudicatory bodies in *some* sense, they were likely to encounter procedural questions similar to those encountered by investment tribunals today.

Indeed, other scholars have already consulted the MATs on procedural questions. Simpson and Fox, for instance, analysed various MAT decisions in the course of their study of international arbitral procedure, including on issues of joinder of parties,[114] compulsion of evidence via domestic courts,[115] *stare decisis*,[116] preliminary hearings,[117] prescription,[118] and revision of judgments.[119] Brown similarly drew on some MAT case law in contending that a 'common law of international adjudication' was emerging.[120] Questions of procedure, then, hold the greatest potential to build the legacy of the MATs, and are examined in Section 4.1. Nevertheless,

111 Hélène Ruiz Fabri and Joshua Paine, 'The Procedural Cross-Fertilization Pull' in Chiara Giorgetti and Mark Pollack (eds), *Beyond Fragmentation: Cross-Fertilization, Cooperation and Competition among International Courts and Tribunals* (CUP 2022).

112 Charles T Kotuby and Luke A Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes* (OUP 2017) 13–14, 28–29.

113 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 34; Andrea Gattini, Attila Tanzi and Filippo Fontanelli, 'Under the Hood of Investment Arbitration: General Principles of Law' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill 2018) 3–6.

114 Simpson and Fox (n 9) 190–91.

115 ibid, 203.

116 ibid, 237, citing *Gunn v Gunz* (25 July 1922) 2 Recueil TAM 202, 203–204, where the tribunal held that 'a decision given by [the tribunal] in a case cannot be deemed as unreservedly binding for future cases', but that parties should not question prior decisions 'without serious reasons'.

117 Simpson and Fox (n 9) 161–62.

118 ibid, 126, citing *Sarropoulos v Bulgaria*.

119 Simpson and Fox (n 9) 245, citing *Baron de Neuflize v Diskontogesellschaft*. See also Hudson (n 8) 122, citing *Tiedemann v Poland* and *Heim v Germany*.

120 Brown (n 9).

the MATs also offered views on some questions of merits and damages relevant to investment arbitration, as well as certain systemic questions that underpin the national/international (or individual/state) dichotomy in international law. Those questions are examined in Sections 4.2 and 4.3.

4.1. Specific Issues of Procedure and Jurisdiction

Section 4.1 examines certain specific issues of procedure and jurisdiction encountered by the MATs which could prove relevant for investment treaty claims today: forum-shopping, reflective loss, revision of judgments, provisional measures, prescription, burdens of proof, fork-in-the-road clauses, local litigation clauses, questions of incidental jurisdiction, and treaty interpretation.

4.1.1. Forum-Shopping by Corporate and Individual Claimants

One of the clearest examples of the often 'contradictory'[121] nature of MAT case law is in relation to corporate nationality. As with nationality of individuals, MATs were frequently required to determine the nationality of a claimant corporation in order to rule on jurisdiction. However, largely without textual guidance in the peace treaties,[122] the various MATs adopted different tests of corporate nationality. Indeed, the MATs sometimes explicitly acknowledged (and even lamented) the divergence between themselves on these tests.[123]

The three main competing theories determined nationality based on the place of incorporation, the place of the *siège social*, or the nationality of the company's controllers. One case supporting place of incorporation noted that, although specific clauses did suggest different tests, the treaties simply did not provide any general textual support for the other theories.[124] Cases supporting the *siège social* theory, however, also relied on textual silence, instead preferring to adopt a 'simpler criterion' than the proposed control

121 Requejo Isidro and Hess (n 7) 273.

122 But see *Ungarische Erdgas AG v Romania* (8 July 1929) 9 Recueil TAM 448, 454–55 for one instance of reasoning based on differing treaty wording.

123 *Oesterreichische Credit Anstalt v Yugoslavia* (8 September 1927) 7 Recueil TAM 794, 800.

124 *Société de Transports Fluviaux en Orient v Société Impériale Ottomane du Chemin de Fer de Bagdad* (10 December 1929) 9 Recueil TAM 664.

theory.[125] Some cases noted that the *siège social* theory was 'for a long time universally accepted both by writers and by judicial practice'.[126]

Cases supporting the control theory,[127] by contrast, sometimes noted that companies were abstract entities and did not have nationalities in themselves, thus requiring attribution of the nationality of the human controllers behind the company.[128] Other cases elaborated on the nature of the control required; in finding the individuals who exercised this control, it was not necessarily a simple matter of identifying the absolute majority shareholders, but instead identifying the group with 'decisive influence' over the company.[129] This might require examination of factors of 'financial, administrative or other character'.[130] Thus, a bank with substantial French ownership was nevertheless held to be Turkish due to its *siège social* in Turkey, its mandate to fulfil the functions of the Turkish State Bank, its directors nominated by the Turkish government, and its subjection to a Turkish government veto on all decisions.[131]

Some tribunals acknowledged the potential for abuse of corporate nationality. In *Ungarische Erdgas AG v Romania*, the Hungary-Romania MAT accepted that a definition based on *siège social* would permit a company with minimal Hungarian ownership to gain treaty protection. However, it saw no concern in this situation, since, as long as the company was 'undertaking its activities', Hungary would still obtain benefits from claiming such companies as nationals, via tax receipts and local employment.[132] In a similar vein, adopting the *siège social* theory, the Belgium-Germany MAT held that corporate nationality, 'in the eyes of the case-law and traditional

125 *Oesterreichische Credit Anstalt* (n 123) 802. See also *Chamberlain & Hookham v Solar Zahlerwerke* (12 December 1921) 1 Recueil TAM 722.

126 *Société Anonyme du Chemin de Fer Vicinal de Oraviczsa-Nemetbogsan-Resiczabanya v Romania* (27 July 1927) 7 Recueil TAM 839, 844 ('*universellement admise depuis longtemps tant par la doctrine que par la jurisprudence*').

127 See, eg, *Régie Générale de Chemins de Fer et Travaux Publics v Bulgaria* (12 November 1923) 3 Recueil TAM 954; *Filature et Tissage X Jourdain v Germany* (12 July 1926) 6 Recueil TAM 810; *Elmores Metall v Grunberg* (13 May 1924) 5 Recueil TAM 777.

128 *SA Charbonnage Frédéric Henri v Germany* (30 September 1921) 1 Recueil TAM 422.

129 *Société de Chemins de Fer Damas-Hamah v Compagnie du Chemin de Fer de Bagdad* (31 August 1921) 1 Recueil TAM 401.

130 *Baron de Neuflize v Germany and Deutsche Bank* (25 June 1928) 8 Recueil TAM 158, 160 ('les éléments administratifs, financiers, ou autres').

131 ibid.

132 *Ungarische Erdgas* (n 122) 453.

commentary of all countries, results from the place where the *siège social* is established, as long as this establishment is not purely nominal'.[133]

In contemporary investment treaties, the test for corporate nationality is typically clear, specifying that incorporation under the laws of the home state is sufficient.[134] Given this, modern investment tribunals are usually not in the same position as the MATs, needing to interpret silent treaty language to determine the appropriate corporate nationality test. However, questions of corporate control still arise today, particularly in relation to claims under Article 25(2)(b) of the ICSID Convention, where a locally-registered company is being treated as foreign due to its 'foreign control'.[135] As well, some treaties – such as the Luxembourg-Cameroon BIT at issue in *CFHL v Cameroon* – adopt the *siège social* theory, requiring not only incorporation but also a *siège social* in the home state.[136] When such issues arise, investment tribunals may turn to MAT jurisprudence for assistance in defining control or determining the location of the *siège*. Furthermore, the recognition from at least some MATs that corporate nationality might be abused, and that 'purely nominal' home state establishments with no accompanying business activities would not qualify for protection, looks decidedly modern in light of cases such as *Phoenix Action v Czech Republic* or *Pac Rim v El Salvador*,[137] where investor claims were dismissed on this basis. From this perspective, MAT case-law might serve to confirm the long-standing nature of international adjudication's concern for abuse of process.

MATs were also aware of the possibility of forum-shopping by prospective individual claimants. In *Hermann v Poland*, Poland complained that the claimant, a former German national who became Polish in 1920, had re-naturalised as German in 1923 and was improperly seeking to rely on that German nationality to claim against Poland. For the tribunal, though,

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133 *Compagnie Internationale des Wagons-Lits v Germany* (24 June 1922) 5 Recueil TAM 58, 68 ('*aux yeux de la jurisprudence et de la doctrine traditionnelle de tous les pays, résulte du lieu où est établi le siège social, du moment que cet établissement n'est pas purement nominal*').

134 *Hulley Enterprises Ltd v Russia* (UNCITRAL), Interim Award on Jurisdiction and Admissibility (30 November 2009) para 416.

135 The classic instance of this discussion is *Tokios Tokeles v Ukraine* (ICSID Case No ARB/02/18) Decision on Jurisdiction (29 April 2004).

136 See *Capital Financial Holdings Luxembourg SA v Cameroon* (ICSID Case No ARB/15/18) Award (22 June 2017).

137 *Phoenix Action Ltd v Czech Republic* (ICSID Case No ARB/06/5), Award, 15 April 2009; *Pac Rim Cayman LLC v El Salvador* (ICSID Case No ARB/09/12) Decision on the Respondent's Jurisdictional Objections (1 June 2012).

it was normal to gain the right to claim before the MATs when the correct nationality was acquired. This right would only be questioned where the change in nationality was 'not sincere, but was motivated solely by the desire to obtain the ability to bring oneself before the international tribunal'. The tribunal saw no evidence of that in the case, and therefore upheld jurisdiction.[138] Although not cited in modern cases such as *Philip Morris v Australia* or *Orascom v Algeria*,[139] *Hermann v Poland* could have served as authority for the principle of abuse of process developed in those cases.

4.1.2. Reflective Loss and Shareholder Claims

In domestic corporate law, shareholders are generally permitted to claim against third parties for injuries to their rights as shareholders in a company. However, they are not generally permitted to claim against third parties for injuries suffered by the company itself (claims of so-called 'reflective loss'); such claims should be made by the company. Under investment treaties, however, tribunals have routinely permitted claims of reflective loss, assisted by the typically broad definitions of investment to include shares.[140] Persistent arguments against this practice, most notably from Argentina, have been rejected by investment tribunals.[141] In at least one case at the MATs, by contrast, the tribunal sided with the traditional view and excluded a claim for reflective loss. The claimants in *Oesterreichische Credit Anstalt v Yugoslavia* were two Austrian banks, seeking to claim against Yugoslavia for expropriation of a sugar factory in Belgrade.[142] The factory was owned by a Germany company, Deutsche Industrie Gesellschaft AG (DIGAG), in which the two banks each held one-third of the shares. How-

138 *Hermann v Poland* (1 November 1926) 6 Recueil TAM 993, 996 ('*pas sincère, mais avait pour unique mobile le désir d'obtenir la faculté de s'adresser à la juridiction internationale*').

139 *Orascom TMT Investments sarl v Algeria* (ICSID Case No ARB/12/35) Award (31 May 2017).

140 David Gaukrodger, 'Investment Treaties and Shareholder Claims: Analysis of Treaty Practice' (OECD Working Papers on International Investment 2014/03) <doi.org/10.1787/18151957> accessed 7 July 2020.

141 See, eg, *Azurix Corporation v Argentina* (ICSID Case No ARB/01/12) Decision on Jurisdiction (8 December 2003) paras 67–70; *Continental Casualty Company v Argentina* (ICSID Case No ARB/03/9) Decision on Jurisdiction (22 February 2006) paras 76–77; *Eiser Infrastructure Ltd v Spain* (ICSID Case No ARB/13/36) Award (4 May 2017) para 234.

142 *Oesterreichische Credit Anstalt* (n 123).

ever, the tribunal recalled that, under German law, DIGAG was a separate entity from its shareholders, and that a claim by the shareholders for damage to DIGAG would be 'in obvious contradiction with the nature of the company'.[143] As a result, the claim was swiftly declared inadmissible.[144] Although the contemporary position on reflective loss under investment treaties is effectively now *jurisprudence constante*, the MAT case-law is a reminder of the contingency of that position.

4.1.3. Revision of Judgments

Section 2 examined an investment treaty case, *Venezuela Holdings BV v Venezuela*, which drew on MAT decisions relating to revision of judgments. Other MAT decisions not cited in that case also confirm some relevant principles underlying the concept of revision. Echoing modern cases such as *Tidewater v Venezuela*,[145] several MAT cases reiterated that the process of revision, authorised in the MAT rules of procedure, did not equate to an appeal. In *Baron de Neuflize v Diskontogesellschaft*, for instance, the tribunal noted that revision was not available purely for an alleged error of law or an error in the appreciation of an existing fact.[146] In *Battus v Bulgaria*, already discussed in Section 2, the Tribunal recalled the exceptional nature of revision proceedings, adding that the MATs must apply 'particularly great' caution in revision given that they were 'purely temporary' tribunals.[147] Since investment tribunals are also purely temporary in nature – indeed, they exist only for the duration of a single dispute – a similar sentiment might be thought to apply.

In *Heim and Chamant v Germany*, the Tribunal held that the notion of 'fact' itself should not be interpreted too restrictively, to avoid 'injuring the course of international justice' by removing the necessary guarantee of a revision procedure, but should also not be interpreted too widely, to avoid

143 ibid, 799 ('en contradiction évidente avec le nature même de la société anonyme').

144 DIGAG's attempt to substitute itself for the claimants and pursue the claim against Yugoslavia was also cut short by the tribunal's finding, discussed above, that DIGAG was not an Austrian company (despite its two-thirds control by Austrians), and so could not claim at the Austria-Yugoslavia MAT.

145 *Tidewater Investment SRL v Venezuela* (ICSID Case No ARB/10/5) Decision on Application for Revision (7 July 2015) para 38.

146 *Baron de Neuflize v Diskontogesellschaft* (29 July 1927) 7 Recueil TAM 629, 632.

147 *Battus* (n 60) 285–86 ('*d'autant plus grande*'; '*purement temporaires*').

removing certainty and stability for states in international adjudication.[148] The Tribunal went on to acknowledge that the border between fact and law was not always easy to determine. Indeed, it said, fact might well include law, 'when the *iura novit curia* principle is not applicable and when the burden of proof of law falls on the party invoking that law'.[149] Thus, the discovery of a new law 'which the judge is not presumed to know and the existence of which appears in the case as an element of fact to be proved by the party relying on it' could ground a request for revision.[150] In the case at hand, though, the Tribunal declined to view the alleged discovery by Germany of certain *travaux* of the Treaty of Versailles as a new fact that might have altered its decision.

Some recent investment treaties have also engaged with the fact/law distinction. Article 8.31(2) of the Comprehensive Economic and Trade Agreement (CETA), for instance, provides that, 'in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact'. Such an approach might raise the possibility that a new ruling from domestic courts on a domestic law issue relevant to an investment arbitration – perhaps on a question of nationality or ownership of property – could constitute a new fact to ground a revision request. In *Battus v Bulgaria* just discussed, though, this possibility was rejected. Bulgaria requested revision of an earlier MAT decision in the same case on the grounds that domestic courts had since ruled that the law granting the claimant's property right at issue in the original case was invalid. However, the tribunal declined to view the domestic court ruling as a previously-existing fact that was newly 'discovered'; instead, this fact arose only after the earlier MAT decision had been issued, and thus did not activate the revision procedure. While a plausible result, this may depend on whether an international tribunal views domestic court rulings as creating new legal situations or merely confirming the existence of previously-created legal situations. Future investment treaty decisions on revision may well engage further with *Heim and Chamant* and *Battus*.

148 *Heim and Chamant v Germany* (7 August 1922) 3 Recueil TAM 50, 55 ('*qui nuirait à la cause même de la justice internationale*').

149 ibid ('*lorsque le principe* iura novit curia *n'est pas applicable et que la preuve du droit incombe à la partie qui prétend pouvoir l'invoquer*').

150 ibid ('que le juge n'est pas présumé connaître et dont l'existence apparaît dans le litige comme un élément de fait à prouver par la partie qui s'en prévaut').

4.1.4. Provisional Measures

Beyond the discussion of *Electricity Company of Sofia v Bulgaria* in the investment treaty case *Merck v Ecuador*, discussed in Section 2, other MAT decisions provide illuminating instances of provisional measures orders relevant to contemporary cases.

In *Ungarische Erdgas AG v Romania*, for instance, the claimant sought a provisional measures order to prevent Romania from disposing of its property pending the tribunal's decision. Romania contested the request, arguing (as it did again 91 years later, in the investment treaty case *Nova Group Investments BV v Romania*)[151] that such an order would interfere with its sovereignty. Furthermore, the state said, the claimant had not proven any danger that the state was even planning to dispose of the property, making the requested measure unnecessary. While not adopting any formal framework, the Hungary-Romania MAT appeared to apply the tests of prima facie jurisdiction, necessity and proportionality. First, it held that Romania's protest that the claimant was actually German, not Hungarian, could not be addressed in an interim measures proceeding, and that the evidence filed to date was sufficient to proceed.[152] Second, the tribunal noted that the claimant had offered to drop the provisional measures request if Romania undertook itself not to dispose of the property, and that Romania had rejected this offer. This rejection added an 'element of uncertainty' to the situation, casting doubt on Romania's claim that it did not intend to dispose of the property. Thus, the request appeared justified.[153] Third, the tribunal considered that, even if Romania could restore the property to the claimant even after disposing of it to a third party, this would create delay and inconvenience for the claimant. Meanwhile, the measures sought imposed no prejudice on Romania, in the tribunal's view – suggesting (although the tribunal did not frame it in these terms) that the balance of hardship lay with the claimant, justifying the measures.[154] Lastly, as a general point, the tribunal observed that consenting to international adjudication was itself an exercise of state sovereignty, entailing rights and duties including the duty to abide by any provisional measures ordered by the tribunal. Indeed, the tribunal noted, if a final award against

151 *Nova Group Investments BV v Romania* (ICSID Case No ARB/16/19), Decision on Claimant's Request for Provisional Measures (29 March 2017) para 163.
152 *Ungarische Erdgas AG v Romania* (4 July 1925) 5 Recueil TAM 951, 954.
153 ibid ('*un élément d'incertitude*').
154 ibid, 955.

Romania was not taken to infringe the state's sovereignty, then a limited order of interim measures certainly could not do so.[155]

As discussed in Section 2, the *Electricity Company of Sofia v Bulgaria* MAT determined that it would consider a criterion of proportionality in determining provisional measures requests, regardless of whether the criterion was specified in the governing procedural rules. Another case, *SA de Charbonnage Frédéric Henri v Société Rheinische Stahlwerke*, arguably took a similar view, noting that provisional measures aimed to protect the rights of the claimant without harming the rights of the defendant – seemingly suggesting that a calculation of comparative burdens was inherent to a provisional measures analysis.[156] Finally, in *Hallyn v Basch*, the Tribunal permitted a claimant to file an interim measures request even 'before the filing of the request introducing the case', and determined that it could rule on the request *ex parte*.[157] In contemporary investment arbitration, decisions on interim measures have typically been issued at early stages in the full arbitral proceedings, following submissions from both parties. However, in some recent cases heard under the arbitration rules of the Stockholm Chamber of Commerce, an emergency arbitrator has issued provisional measures against states even prior to the investor lodging any formal notice of arbitration, and in the absence of any submissions from the respondent.[158] While these recent cases raised some controversies,[159] *Hallyn v Basch* demonstrates that issuing orders in such circumstances has a longer pedigree in international adjudication than current scholars might assume.

4.1.5. Prescription of Claims

Outside of claims under the North American Free Trade Agreement, questions of prescription of claims and time-bars have not featured frequently

155 ibid.

156 *SA Charbonnage Frédéric Henri v Société Rheinische Stahlwerke* (30 October 1920) 1 Recueil TAM 12, 15.

157 *Hallyn v Basch* (21 July 1920) 1 Recueil TAM 10, 11 ('*même avant le dépôt de la requête introductive de l'instance*').

158 See *JKX Oil & Gas plc v Ukraine*, Emergency Award (14 January 2015) and *TSIKInvest LLC v Moldova* (SCC EA 2014/053) Emergency Decision on Interim Measures (29 April 2014).

159 See, eg, Kyongwha Chung, 'Emergency Arbitrator Procedure in Investment Treaty Disputes: To Be or Not To Be' (2019) 20 JWIT 98, 136–41.

in contemporary investment treaty disputes. This is likely because, according to a 2012 Organisation for Economic Co-operation and Development (OECD) survey, only 7 % of investment treaties contain explicit time limitations periods.[160] Tribunals have therefore typically declined to place a specific time limit on claims.[161] However, in some cases it has been contended either that a general equitable rule of extinctive prescription in international law barred claims that were presented too late, or that a domestic law time-bar rule should apply. Tribunals and scholars have differed on these contentions,[162] although the prevailing view has been not to bar claims on the facts, and to reject the legal relevance of any domestic law time-bar.

MAT decisions have made small contributions to these debates. In *Sarropoulos v Bulgaria*, the Tribunal declined jurisdiction over a claim filed 15 years after the alleged breaches. The Tribunal commented that, while there was no specific timeline on prescription of claims, the rule existed in all legal systems, based on principles of 'security and stability of human affairs' and difficulties of evidence and proof.[163] The rule on prescription was therefore 'an integral and necessary part of any system of law', and 'deserved to be admitted in international law'.[164] The Tribunal also commented that some treaties had imposed a limit of 20 years.[165] Ultimately, though, the time delay was only one factor driving the tribunal's decision to decline jurisdiction.[166] In *Collac v Yugoslavia*, meanwhile, the Tribunal declined to apply a domestic law time-bar. For the tribunal, 'provisions of national laws on prescription of claims only apply in international cases to the extent that they are in conformity with the provisions of international law'. Article 250 Treaty of Trianon imposed no time-bar, and the tribunal had therefore adopted its own time provisions in its rules of procedure.

160 OECD, *Dispute settlement provisions in international investment agreements: A large sample survey* (2012, Paris), 18.

161 See, eg, *Salini Impregilo SpA v Argentina* (ICSID Case No ARB/15/39) Decision on Jurisdiction and Admissibility (28 February 2018) para 84.

162 Pedro J Martinez-Fraga and C Ryan Reetz, 'The Status of the Limitations Period Doctrine in Public International Law: Devising a Functional Analytical Framework for Investors and Host-States' (2017–18) 4 McGill Journal of Dispute Resolution 105; J Hepburn, 'Domestic Investment Statutes in International Law' (2018) 112 AJIL 658, 701–703; *Salini* (n 161) [85].

163 *Sarropoulos* (n 54) 51 ('*[l]a sécurité et la stabilité des affaires humaines*').

164 ibid ('*partie intégrante et nécessaire de tout système de droit*'; '*mérite en droit international d'être admise*').

165 ibid. The treaties in question were not identified.

166 ibid, 55.

For the tribunal, a 'contrary or divergent' time provision in national law could not override the rules of procedure.[167] For contemporary purposes, *Sarropoulos* appears to support arguments that a general international law rule of prescription exists, even if its specifics are unclear, while *Collac* supports the prevailing modern view that international tribunals should ignore domestic time-bar rules.

4.1.6. Burden of Proof

In *Banque d'Orient v Turkey*, the Greece-Turkey MAT held that it would be unfair to leave the burden of proof on the claimant in situations where it would be impossible or very difficult for the claimant to prove the point while being easy for the defendant to prove the contrary.[168] In those situations, the burden of proof should be reversed. This was particularly true, the tribunal said, when it was the respondent itself that had created the difficulties of proof suffered by the claimant.[169] The Tribunal noted that this general principle of law was reflected in French, German, Austrian and Swiss law. Investment tribunals have occasionally expressed similar views. For instance, in *ConocoPhillips v Venezuela*, the Tribunal held that 'the inability of a party to provide sufficient evidence may have the effect of shifting the burden of proof, in full or in part, to the other party'. This might arise 'when fairness and good faith require that a party not being able to provide full evidence of an assertion it makes should not stand alone when it can demonstrate that the opposing party has access to or control over the missing evidence'.[170] On such matters, MAT case law serves as useful evidence of a general principle of law, on which modern tribunals can draw.

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167 *Collac v Yugoslavia* (15 May 1929) 9 Recueil TAM 195, 197–98 ('*les dispositions des lois nationales touchant la prescription d'une action ne s'appliquent dans la jurisprudence internationale qu'en tant qu'elles sont en conformité avec les dispositions du droit international*'; '*contraires ou divergentes*').

168 *Banque d'Orient v Turkey* (9 February 1928) 7 Recueil TAM 967, 973.

169 In the case at hand, it was far easier for Turkey than the claimant to prove the current contents of certain lockboxes, since Turkey had seized the lockboxes from the claimant: ibid, 974.

170 *ConocoPhillips Petrozuata BV v Venezuela* (ICSID Case No ARB/07/30), Award (8 March 2019) para 275.

4.1.7. Fork-in-the-Road Clauses

Jurisdictional objections based on fork-in-the-road clauses have sometimes been raised by states in investment treaty arbitration, where the clauses exist in the relevant treaty. In ruling on these objections, the major issue for tribunals has been whether the 'domestic' fork has indeed been triggered, thereby excluding the BIT claim. Tribunals have most often applied the 'triple identity' test, dismissing the objection because the domestic claim did not involve the same cause of action (since it is usually a domestic law rather than international law claim) nor the same parties (since it is often between the investor's subsidiary or affiliate and the state or a state entity).[171] The MATs, by contrast, were usually not in this situation. The peace treaties did contain a fork-in-the-road clause, in Article 304(b) Treaty of Versailles and equivalent provisions in the other treaties. However, the MATs had jurisdiction to hear domestic law claims, for instance contractual claims between two private parties, and it was usually the same party pursuing claims in both forums. As a result, it was typically not open to the MATs to dismiss the objection for failing the 'same cause of action' or 'same parties' limbs of the triple identity test.

Most fork-in-the-road discussions in the MATs, therefore, were relatively straightforward: the Tribunal found that the claimant had already taken its claim to domestic courts, and thereby declined to hear the MAT claim.[172] The only complications arose when there was doubt over the claimant's active seisin of local courts or over the local courts' jurisdiction. For instance, in *de Vauzelles v Turkey*, the Tribunal held that the claimant had not triggered the fork by bringing a domestic claim before the MATs were constituted, and when the losing party in the domestic claim appealed the decision, forcing the claimant to continue the domestic proceedings even after the MATs were constituted.[173] Similarly, in *Meyer Wildermann v Héritiers Stinnes*, the Tribunal found no trigger of the domestic fork when the claimant raised an overlapping claim only at the appeal stage of other proceedings, and when the other party immediately challenged the admissibility of the new claim, on which the local court never ultimately

171 Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (OUP 2017) [4.101]-[4.108].

172 See, eg, *Banque Meyer v Weil* (19 July 1923) 3 Recueil TAM 640; *Arif Hikmet v Courcelles* (23 May 1928) 8 Recueil TAM 376; *Cappon v Vereinigte Gluehlampen-Und-Elektrizitaets AG* (17 July 1929) 9 Recueil TAM 460.

173 *de Vauzelles v Turkey* (May 1926) 6 Recueil TAM 969.

ruled.[174] These positions largely align with the view of the investment treaty tribunals in *Chevron v Ecuador II*, finding that raising a defence in a local court claim commenced by third parties did not trigger the fork,[175] and *MCI Power v Ecuador*, finding that the fork was not triggered by a domestic claim commenced before the treaty was in force.[176]

More interestingly, in *Deutsche Industrie Gesellschaft AG v Yugoslavia*, the MAT took a highly deferential approach to local courts on a fork-in-the-road issue. Following a protest from the claimant that the domestic courts would not have jurisdiction to hear its claim (thus leaving the MAT as the only option), the Tribunal held that it would need to suspend its proceedings and ask the Yugoslavian courts to rule on their jurisdiction. The Tribunal envisaged making its own determination of the local courts' jurisdiction, applying Yugoslavian law, but held that the potential for inconsistency (if the MAT upheld local court jurisdiction while the local courts declined jurisdiction) might result in *no* court having jurisdiction.[177] Since this could not have been the intention of the treaty drafters, the Tribunal said, it preferred to wait until local courts gave a definitive ruling on the matter.[178] The Tribunal added that it could not simply rely on Yugoslavia's own arguments in the MAT proceedings regarding local court jurisdiction (presumably since these arguments might be self-serving).[179] Although modern investment treaty tribunals have rarely suspended their own proceedings to await a domestic ruling on a relevant issue, the *SGS v Philippines* tribunal confirmed such tribunals' power to do so, and exercised that power.[180] Most other tribunals have instead proceeded to determine relevant questions of domestic law themselves, with varying

174 *Meyer Wildermann v Heritiers Stinnes* (8 June 1926) 6 Recueil TAM 485.

175 *Chevron Corporation v Ecuador* (PCA Case No 2009–23) Third Interim Award on Jurisdiction and Admissibility (27 February 2012) paras 4.79 – 4.82.

176 *MCI Power* (n 82) para 186.

177 The MAT in *Compagnie des Chemins de Fer du Nord v Germany* (8 April 1929) 9 Recueil TAM 67, 71 described – probably colloquially – somewhat similar circumstances as entailing a 'denial of justice'.

178 The tribunal did not appear to consider that the claimant could simply return to the MAT following a negative jurisdictional decision from the local courts if the MAT had already upheld the local court jurisdiction. However, this aligns with *Battus v Bulgaria* (discussed above), where the MAT held that a subsequent domestic court decision could not ground a request for revision of an earlier MAT decision.

179 *Deutsche Industrie Gesellschaft AG v Yugoslavia* (14 December 1928) 9 Recueil TAM 145.

180 *SGS* (n 67) para 177.

degrees of respect for the state government's arguments in the case and the decisions of local courts.[181]

4.1.8. Local Litigation Clauses

Some modern investment treaties contain 'local litigation' clauses, requiring claimants to pursue remedies in domestic courts for a specified period before commencing international arbitration. A recurring issue in cases considering these clauses has been whether their requirements are mandatory jurisdictional requirements, demanding strict compliance, or waivable questions of admissibility, allowing for flexibility. Tribunals such as *Daimler v Argentina* or *Kiliç v Turkmenistan* have taken the former approach, while tribunals such as *Hochtief v Argentina* have taken the latter approach.[182] The MATs confronted equivalent problems, in particular over Article 70 of the Treaty of Lausanne. Under Article 70, certain claims 'must be lodged with the competent [domestic] authorities within six months, and, in default of agreement, with the Mixed Arbitral Tribunal within twelve months, from the coming into force of the present Treaty'. In *Banque Nationale de Grèce v Turkey*, the respondent argued that the claim should be rejected because the claimant had failed to present a domestic claim before filing at the MAT.[183] In reasoning very similar to modern cases, the Tribunal held that a failure to comply with such procedural clauses did not entail the failure of the claim unless the treaty in question said so, or unless the procedural clauses were viewed as '*d'ordre public*'.[184] Here, unlike for other time-related provisions such as Article 78, the Treaty did not spell out any consequences of failing to fulfil Article 70. While the clause did state that domestic claims 'must' be lodged first, it was inappropriate to place so much emphasis on 'the usage of an isolated term, however categorical it might appear', to create a penalty that was not specified. In the tribunal's view, it was more likely that provisions *prohibiting* conduct carried an implied sanction than provisions *requiring*

181 See Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017).

182 *Daimler Financial Services AG v Argentina* (ICSID Case No ARB/05/1) Award (22 August 2012) para 194; *Kiliç v Turkmenistan* (ICSID Case No ARB/10/1) Award (2 July 2013) para 6.3.15; c.f. *Hochtief AG v Argentina* (ICSID Case No ARB/07/31) Decision on Jurisdiction (24 October 2011) para 54.

183 *Banque Nationale de Grèce v Turkey* (9 February 1928) 8 Recueil TAM 218, 219.

184 ibid, 221.

conduct.[185] Furthermore, according to the tribunal, the phrase 'in default of agreement' did not mean that the treaty drafters intended to restrain non-compliant claims; instead, the phrase expressed the idea that it was only when mutual agreement could not be reached that the parties would need to approach the MAT.[186]

In addition, the tribunal said, the 'spirit' of the Treaty of Lausanne did not suggest that its drafters intended to attach such importance to Article 70. More likely, they simply intended to provide a path to an amicable agreement; if something mandatory was intended, they would have specified this more clearly, even indicating the particular authorities that would conduct the negotiations.[187] Lastly, foreshadowing reasoning in *Plama v Bulgaria* 77 years later,[188] the MAT held that six months was too short a period in any event for Turkish authorities to examine every claim that would be presented – meaning that the clause did not even serve its apparent purpose of lightening the MAT's load and preventing states from suffering international claims.[189] As a result, the tribunal saw no reason to deny the claim, musing only that non-compliance might lead to a costs order against claimant.[190]

4.1.9. Statehood and Territory: Incidental Jurisdiction

The MATs were sometimes confronted with questions of statehood and territory. In *Peinitsch v Germany*, the MAT relied on a principle that, when certain territory changed sovereignty, citizens of the former sovereign who were not resident in the territory did not acquire the new sovereign's nationality.[191] In *Deutsche Continental Gas-Gesellschaft v Poland*, a question arose over the extent of Poland's territory to which the Treaty of Versailles was intended to apply. The Tribunal firstly recalled the view of 'the great majority of writers in international law' that recognition of a state was merely declaratory rather than constitutive of its statehood, and that states

185 ibid ('*l'usage d'un terme isolé, si catégorique qu'il puisse paraître*').
186 ibid, 222.
187 ibid.
188 *Plama Consortium Ltd v Bulgaria* (ICSID Case No ARB/03/24) Decision on Jurisdiction (8 February 2005) para 224.
189 *Banque Nationale de Grèce* (n 183) 222.
190 ibid, 223.
191 *Peinitsch v Germany* (18 September 1922) 2 Recueil TAM 610, 621.

therefore existed in themselves prior to recognition by other states.[192] The Tribunal then noted that Germany had accredited an ambassador to Poland in November 1918, and that in early 1919 several other Allied states recognised Poland as a newly-restored independent state (after its earlier partitions amongst other European powers), allowing it to sign the Treaty of Versailles in its own right. Thus, by 10 January 1920 (the entry-into-force of the Versailles treaty), Poland clearly existed already as a state in international law, the Tribunal reasoned.[193] Given that one essential characteristic of statehood was the possession of territory (alongside a population and a government), Poland must have had a territory – apart from the territory which was returned to it by the Treaty of Versailles itself – to which the treaty was intended to apply. It was true, the tribunal continued, that parts of Poland's territory were returned to it only later, and that its eastern borders were not yet set on 10 January 1920. However, statehood did not require completely fixed borders; it was clear that Argentina and Chile, or Colombia and Venezuela, were already states even before their mutual border disputes were resolved by international arbitration, the Tribunal held.[194] While an issue might have arisen if the measures in question in the case had been taken in disputed territory, the tribunal observed, in fact they were taken in central Warsaw, removing any doubt that they were taken in Poland.[195]

Thus, in *Deutsche Continental Gas-Gesellschaft*, the Germany-Poland MAT did not shy away from determining the extent of a state's territory to which the treaty was intended to apply. In *Ventense v Yugoslavia*, by contrast, the Germany-Yugoslavia MAT took a more cautious approach. The claimant's case depended on whether Yugoslavia was a 'new state' in the sense of Article 297(h)(2) Treaty of Versailles. The Tribunal agreed that Poland and Czechoslovakia were undoubtedly such 'new states', but noted that it was only arguable that Yugoslavia also qualified.[196] In the Tribunal's view, it was not sufficient to ground its jurisdiction that an answer to this question was necessary to proceed with the case. The question was 'above all political', and was of an 'absolutely different nature' to the economic

192 *Deutsche Continental Gas-Gesellschaft v Poland* (1 August 1929) 9 Recueil TAM 336, 344 ('*la grande majorité des auteurs en droit international*').

193 ibid.

194 ibid, 346. The reference is presumably to the 1902 arbitration by King Edward VII between Argentina and Chile, and the 1922 arbitration by the Swiss government between Colombia and Venezuela.

195 ibid, 347.

196 *Ventense v Yugoslavia* (19 April 1922) 7 Recueil TAM 72, 77.

questions within its jurisdiction.[197] It touched the 'very essence' of the state, and any ruling on it could have consequences for Yugoslavia going far beyond the economic matters of the treaty. Consequently, even while acknowledging that its formal decision 'would only have direct effect for the present case', the tribunal declined jurisdiction.[198]

The *Ventense* case raises an issue that is central to several recent investment arbitrations: how far do investment tribunals have jurisdiction to determine 'incidental issues' which are technically outside their jurisdiction but are simultaneously essential for resolving issues within jurisdiction?[199] A prominent example is the set of cases brought by Ukrainian investors against Russia in relation to investments in Crimea.[200] A central issue in these cases is whether the investments in Crimea are located in Russian territory, such that Ukrainian investors might be permitted to claim against Russia for interference with those investments. However, investment tribunals are not likely to accept that they have jurisdiction over questions of territorial sovereignty, to determine whether Crimea is part of Russia's territory. Instead, the tribunals in these Crimea cases have largely followed something similar to the pragmatic approach of the *Deutsche Continental Gas-Gesellschaft v Poland* Tribunal. Rather than simply declining jurisdiction as in the *Ventense* case, the Crimea tribunals have upheld jurisdiction on the grounds that Russia's effective control of Crimea was sufficient to render the treaty applicable to that territory.[201]

197 ibid, 78 ('surtout politique'; '*d'une nature absolument différente*').

198 ibid, cf *Schumacher v Yugoslavia* (1 October 1922) 2 Recueil TAM 605, 609, where the same tribunal members curiously determined six months later that Yugoslavia was not a 'new state', with no reference to their earlier *Ventense* decision.

199 See Peter Tzeng, 'The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction' (2018) 50 NYU JILP 447.

200 See, eg, *Everest Estate LLC v Russia* (PCA Case No 2015–36); *Aeroport Belbek LLC v Russia* (PCA Case No 2015–07).

201 The Crimea awards remain confidential. For discussion, see LE Peterson, 'In Jurisdiction Ruling, Arbitrators Rule that Russia is Obliged Under BIT to Protect Ukrainian Investors in Crimea Following Annexation' (*Investment Arbitration Reporter*, 9 March 2017) <bit.ly/2xlWZEL>; Jarrod Hepburn, 'INVESTIGATION: Full Jurisdictional Reasoning Comes to Light in Crimea-Related BIT Arbitration Vs. Russia' (*Investment Arbitration Reporter*, 9 November 2017) <bit.ly/3duDnPf> accessed 7 July 2020.

4.1.10. Treaty Interpretation: Third-Party Treaties

In many BIT cases, tribunals have drawn on the provisions of other investment treaties, and other cases interpreting those treaties, to inform their interpretation of the treaty underpinning the case in question. Arguably, however, this practice does not conform to the recognised rules of treaty interpretation as codified in the VCLT. Scholars have thus debated the extent to which such use of other treaties and cases can be justified.[202] A similar problem was raised by the set of peace treaties, signed between the allied powers on the one hand and the various enemy states on the other hand, and often containing very similar or identical language in certain provisions. In *Schumacher v Yugoslavia*, the Germany-Yugoslavia MAT consulted provisions in the other peace treaties to determine whether Yugoslavia was a 'new state' under Article 297(h)(2) Treaty of Versailles, seeing no justification to treat Yugoslavia differently under different treaties.[203] By contrast, in *Ungarische Erdgas AG v Romania*, the Hungary-Romania MAT held that it could not consider almost identical words in the Treaty of Versailles to interpret the Treaty of Trianon.[204] The Tribunal reasoned that other treaties were negotiated and signed at different times and in different circumstances, and should be interpreted according to their own text and *travaux préparatoires*. Furthermore, cases interpreting other treaties were also of no assistance, for the same reasons. In general, the tribunal concluded, it was not permissible to oppose to Hungary the provisions of a treaty in which it did not participate.[205] This line of reasoning from 1929 could provide further support for modern arguments that 'the use of third-party IIAs [for interpretive purposes] … reflects an erroneous application of the customary rules of treaty interpretation'.[206]

202 Paparinskis (n 91) chapter 5; Andrew D Mitchell and James Munro, 'Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements' (2017) 28 EJIL 669.
203 *Schumacher* (n 198) 608–609.
204 *Ungarische Erdgas* (n 122) 454.
205 ibid, 455.
206 Mitchell and Munro (n 202) 695.

4.2. Merits and Damages

Apart from procedure, the MATs also considered at least some questions of merits and damages which are relevant to investment treaty claims.

4.2.1. Full Protection and Security

As explained in Section 2, the MATs rarely engaged with the substantive standards of international law most commonly applied in contemporary investment disputes, such as expropriation or the customary law minimum standard of treatment of aliens. However, one case, *Sarropoulos v Bulgaria*, offers some views relevant to the standard of 'full protection and security' forming part of the customary law minimum standard. The Greek claimant had suffered damage to his property during riots in Bulgaria 'directed against Greek nationals'.[207] The riots were coordinated, but there was no evidence that the Bulgarian government had planned them. In the course of its decision, the Greece-Bulgaria MAT reviewed the state of international law on injuries to foreigners following riots, 'one of the most delicate problems of international law'.[208] According to the Tribunal, a suggested principle of *absolute* responsibility of states in such circumstances was strongly contested, and 'should not be adopted without reservations'.[209] However, there was agreement that the state was responsible where the riots 'were directed against foreigners considered as such' (as opposed, presumably, to riots incidentally injuring foreigners while pursuing some other target), or where the injuries were 'the result of negligence or fault of the local authorities'.[210] These statements largely accord with the prevailing modern-day conception of full protection and security as imposing a standard of due diligence, rather than absolute liability, upon states.[211] From that perspective, *Sarropoulos* provides no more than additional confirmation of the consistent case law on the question. One confusing point, nevertheless, is the Tribunal's apparent indication that riots directed against foreigners (rather than causing incidental injury to foreigners) would engage the state's responsibility, even regardless of

207 *Sarropoulos* (n 54) 49 ('*dirigés contre les ressortissants helléniques*').
208 ibid, 50 ('*l'un des problèmes les plus délicats du droit international public*').
209 ibid ('*ne paraît pas devoir être adopté sans réserve*').
210 ibid, 50–51 ('*ont été dirigés contre des étrangers considérés comme tels*'; '*le résultat d'une négligence ou d'une faute des autorités locales*').
211 McLachlan, Shore and Weiniger (n 171) [7.246].

any due diligence by the state to prevent them. This indication seems to tend towards the principle of absolute responsibility rejected by the *Sarropoulos* tribunal. Ultimately, the Tribunal did not rule on the merits, but held the case to be time-barred (as discussed in Section 4.1).

4.2.2. Damages and Valuation

As noted in Section 3, MAT cases rarely offered detailed analysis of damages questions, often simply ruling in equity. One counter-example, though, is *Merbes-le-Château v Germany*, where, in valuing an expropriated factory, the Tribunal took into account valuations made by domestic courts, evidence from a potential sale before the expropriation intervened, evidence that a neighbouring operator was keen to purchase the factory, and the fact that the expropriation occurred in an already-depressed context due to the war.[212] Another is *Worms v Germany*, where the Tribunal awarded compensation for lost profits following the seizure of a ship, based on the profits made over the same period by another ship owned by the claimant that was not seized.[213] These damages analyses would not look out of place in a contemporary investment treaty case.

4.3. Systemic Issues

Lastly, the MATs offered views on certain issues affecting the system of international law and adjudication: the role of domestic law, the degree of deference due by international adjudicators to states, dissents, and the nature of individual rights in international law.

4.3.1. Domestic Law in International Adjudication

The MATs often confirmed a role for domestic law in international adjudication,[214] for instance ruling in *Thirion v Barth* that the existence of a

212 *Merbes-le-Château v Germany* (20 July 1925) 5 Recueil TAM 704, 711.
213 *Worms v Germany* (10 July 1922) 2 Recueil TAM 287, 291.
214 For general discussion of this role, see Jarrod Hepburn, 'Domestic Law in International Adjudication', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2018).

'debt', for the purposes of the peace treaties, could be determined by reference to a *res judicata* decision of a competent domestic court.[215] The MATs also acknowledged that individual nationality would depend on domestic law.[216] More generally, paralleling the contemporaneous approach of the PCIJ,[217] the MATs considered that they should pay significant deference to relevant decisions of domestic courts, at least where they were properly issued and *res judicata*.[218] Nevertheless, such decisions were not binding, and could be disregarded where they were contradicted by other evidence.[219] However, in other cases, tribunals held that they had no jurisdiction to determine ownership of property under domestic law, and that the domestic courts would need to rule on this question before the peace treaties could apply.[220] While consistent with the *Ventense* approach discussed above, disclaiming the possibility of ruling on incidental questions, the approach contrasts with cases where the MATs determined nationality under domestic law.

4.3.2. Deference to Host States: 'Essential Security' and 'General Interest'

Many BITs contain so-called 'essential security' clauses. The most well-known example is Article XI of the US-Argentina BIT, which provides that the Treaty does not preclude either state from adopting 'measures necessary for … the protection of its own essential security interests'. One of the major interpretive issues in relation to this clause, which has been central to many cases against Argentina, is whether the clause is self-judging: in other words, whether each state may unilaterally determine which measures are 'necessary' for security reasons, or whether an investment tribunal plays some role in reviewing these determinations.[221] While an

215 *Thirion v Barth* (27 June 1922) 2 Recueil TAM 268, 270.

216 See, eg, *Grigoriou v Bulgaria* (28 January 1924) 3 Recueil TAM 977; *Apostolidis v Turkey* (23 May 1928) 8 Recueil TAM 373.

217 *Payment in Gold of Brazilian Federal Loans Contracted in France (France v Brazil)* (Judgment of 12 July 1929) PCIJ Rep Series A No 21, and the parallel *Serbian Loans* case.

218 See, eg, *Brun v Compagnie Générale d'Assurances Maritimes, Fluviales et Terrestres de Dresde* (23 July 1928) 8 Recueil TAM 312.

219 *Ruinart v Franzmann* (27 May 1927) 7 Recueil TAM 599.

220 *Hatiboglou v Bulgaria* (4 December 1925) 5 Recueil TAM 905, 907; *Société Dospat-Dag v Bulgaria* (22 March 1924) 4 Recueil TAM 477, 478.

221 See, eg, Michael D Nolan and Freddy G Sourgens, 'The Limits of Discretion? Self-Judging Emergency Clauses in International Investment Agreements' in

analysis according to the recognised rules of treaty interpretation must be favoured, investment tribunals could perhaps draw some guidance from MAT case-law on Article 299(b) Treaty of Versailles.

Article 299(a) contained a general provision dissolving contracts between enemies, while Article 299(b) provided that contracts 'of which the execution shall be required in the general interest … by the Allied or Associated Governments' were exempt from dissolution. In *Schmid v Chemische Werke Fürstenwalde*, the question arose as to whether the MATs played any role in second-guessing a state's determination of when a contract was required to be maintained in the 'general interest'. Beginning with a textual approach, the Tribunal noted that the clause did not specify that the Tribunal had any such role; instead, it appeared to be up to each government to 'decide sovereignly'.[222] The Tribunal added that an express permission for the Tribunal to decide would have been expected if this was the states' intention, since 'questions concerning the general interest are not ordinarily within the competence of tribunals, but instead belong to the governmental authorities having charge of these interests'.[223] The Tribunal then considered the treaty's *travaux* (in particular, discussions between Germany and the Allied powers just prior to signing the Treaty of Versailles), finding no evidence that the parties intended the MATs to control determinations of 'general interest'.[224] The wording and *travaux* of each treaty are likely to differ, meaning that the result reached in *Schmid* will not necessarily apply in any particular investment treaty claim today. Nevertheless, the case indicates that modern-day concerns over international adjudicators encroaching on domestic sovereign powers have historical precedents.

Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2010–2011* (OUP 2012).

222 *Schmid v Société Chemische Werke Fürstenwalde* (30 July 1921) 1 Recueil TAM 345, 346 ('*décider souverainement*').

223 ibid ('*les questions concernant les intérêts généraux ne sont point de la compétence ordinaire des tribunaux, mais qu'elles relèvent plutôt des autorités gouvernementales ayant charge de ces intérêts*').

224 ibid, 347.

4.3.3. Dissenting Opinions in International Adjudication

The role of dissents in contemporary investment arbitration continues to be the subject of some debate.[225] While Article 304(a) Treaty of Versailles provided that a majority tribunal decision was sufficient, dissenting opinions were relatively rare at the MATs. Nevertheless, the Tribunal in *Burns Philp v Norddeutscher Lloyd* observed that a decision signed by all three tribunal members did not necessarily indicate full agreement; a dissenting arbitrator may have simply hidden his disagreement and joined the majority out of comity.[226] While modern investment arbitrators rarely make this sentiment explicit, awards do sometimes nod to it, for instance by acknowledging the presence of dissent but without indicating the reasons for disagreement or the identity of the dissenter.[227]

4.3.4. Individual Rights in International Law

One of the central systemic issues in the modern investment treaty regime is how to characterise the nature of the rights granted by investment treaties to individuals: for instance, whether the rights are merely derivative of the individual's home state rights, or whether they exist in their own right as directly-granted rights.[228] On some occasions, the MATs also contemplated similar systemic issues, particularly as they affected the question of whether claimants could waive MAT rights. Tribunals took differing views on this. Nevertheless, the prevailing view seems to have been that the peace treaties were capable of granting, and did grant, rights

225 See, eg, Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill 2010) 821; Catharine Titi, 'Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion' (2018) 17 LAPICT 197.

226 *Burns Philp v Norddeutscher Lloyd* (21 October 1924) 4 Recueil TAM 631, 636.

227 See, eg, *Dawood Rawat v Mauritius* (PCA Case No 2016–20), Award on Jurisdiction, 6 April 2018 [194]; *Caratube Oil Company LLP v Kazakhstan* (ICSID Case No ARB/13/13), Award, 27 September 2017 [1088]-[1089].

228 See, eg, Anthea Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States' (2010) 104 AJIL 179, 184–85; Martins Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24 EJIL 617, 622–27.

directly to individuals,[229] who could waive those rights with sufficiently clear conduct.

In August 1924, the PCIJ issued its well-known pronouncement on diplomatic protection in the *Mavrommatis* case, holding that, '[b]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights', rather than the rights of its injured national.[230] Scholars have discussed the possibility that this pronouncement supported the view that claimants under BITs similarly did not assert their own rights but served as delegates of their home states, enforcing purely inter-state rights via the procedure of an individual-state claim.[231] One year after *Mavrommatis*, however, the Poland-Germany MAT in *Kunkel v Poland* made clear its own view that, under the peace treaties, MAT claimants were litigating their own interests, not those of their home state.[232] The France-Germany MAT took a similar view in *Sigwald v Germany*, holding that the right to seek reparation under the peace treaties was 'an individual right of each allied national, which he may exercise directly against Germany without the intervention of the French government'.[233]

One consequence of this view of MAT rights as direct individual rights, according to the MATs, was that individual claimants could waive their rights to bring MAT claims. In the modern context, views have differed on whether investors may waive their right to claim under BITs. On one view, BIT rights are analogised with human rights, and, since human rights regimes are established for the protection of individuals, it would be doubtful that individuals could waive those rights.[234] The MATs, however, did not appear to characterise MAT rights in the same way. The France-Germany MAT, for instance, assumed in *La Houve v Germany* and *Marqua v Germany* that claimants could waive MAT claims by prior contract with the respondent.[235] In *Kirschen v Germany*, the Romania-Germany MAT saw

229 Requejo Isidro and Hess (n 7) 252.

230 *Mavrommatis Palestine Concessions (Greece v Great Britain)* (Judgment of 30 August 1924) PCIJ Rep Series A No 2, 12.

231 See, eg, Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2003) 74 BYIL 151.

232 *Kunkel* (n 35) 983.

233 *Charles Sigwald v Germany* (27 August 1926) 6 Recueil TAM 888, 890 ('*un droit individuel de chaque ressortissant allié, droit que celui-ci peut exercer directement contre l'Etat allemand sans intervention du gouvernement français*').

234 See Paparinskis (n 228) 644.

235 *La Houve v Germany* (30 November 1927) 8 Recueil TAM 100, 103; *Marqua v Germany* (15 April 1921) 1 Recueil TAM 104, 107. In both cases, the claimants

no reason to treat the MAT jurisdictional provisions as 'absolute rules of a public character'.[236] Unlike in domestic systems, where rules establishing the competence of courts were supported by the 'general interest', the Tribunal said, the MATs had a different rationale. There was no overriding reason to force claimants to go to the MATs: indeed, they were 'often less well placed than the ordinary judge to appreciate local circumstances or to interpret the national law of the parties'.[237] The MATs were designed solely to prevent Allied claimants from being subjected to German courts to resolve their disputes, since such claimants would fear bias in those courts. Thus, MAT jurisdiction was merely a 'privilege' accorded to the foreign claimants, which they were free to renounce in favour of a claim in German courts if desired.[238]

The *Kirschen* Tribunal's description of the MATs arguably matches quite closely with the modern rationale for investment treaties, established as purely dispositive rights to resolve the problem of feared bias or incompetence in host state courts. On this view, an analogy between investor rights and human rights is inapt, and the position of the tribunal in *Aguas del Tunari v Bolivia*, permitting investors to waive rights to ICSID arbitration, would be preferred.[239] Notably, though, the *Kirschen* Tribunal did not seem to consider that Article 304(b) of the Treaty of Versailles might constitute a fork-in-the-road clause. In other cases,[240] the tribunals did view Article 304(b) as such, and thus did not need to examine the theoretical question of whether MAT claims could be waived, because Article 304(b) was seen as providing specifically that a MAT claim was effectively waived as soon as a claimant chose the domestic 'fork'.

Nevertheless, individuals remained subject to state sovereignty, and individual MAT rights continued only so long as states wanted them to. In *National Bank of Egypt v Austro-Hungarian Bank*, the UK-Austria MAT envisaged that the UK could unilaterally remove the individual rights granted under the Treaty of St Germain to nationals of British protectorates

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were found not to have done so on the facts, since the purported waiver of MAT rights came before those rights were created.

236 *Kirschen v Germany* (3 January 1925) 4 Recueil TAM 858, 863 (rules having the '*caractère absolu d'ordre public*').

237 ibid ('*souvent moins bien placés que le juge ordinaire, pour apprécier des circonstances locales ou interpréter le droit national des parties*').

238 ibid, 864 ('un avantage').

239 *Aguas del Tunari SA v Bolivia* (ICSID Case No ARB/02/3) Decision on Respondent's Objections to Jurisdiction (21 October 2005) para 118.

240 See n 172.

(there, Egypt), by terminating Egypt's status as a British protectorate. However, the MAT held that 'very clear language' would be needed to do so, and no such language was found in the British government's March 1922 statement recognising Egypt as an independent state.[241] Similarly, in *Sigwald v Germany*, the France-Germany MAT held that states could override the grant of individual rights in the peace treaties, if desired, by providing that the treaties were subject to an earlier settlement, such as one between France and Germany settling certain individual claims against Germany. Again, however, an 'express derogation' in the Treaty of Versailles would have been needed to achieve this, and no such derogation was present.[242] Such discussions may become increasingly relevant as states move to terminate investment treaties, leaving the question of any vested individual rights open for debate.[243]

Lastly, to add a further angle to the question of individuals in international law, the MATs also consistently held that states themselves qualified as 'nationals' under the peace treaties where the states were acting in a private capacity (*iure gestionis*).[244] Thus, commercial contracts concluded between Allied nationals and the German State qualified for MAT jurisdiction under Article 304 (covering contracts with 'German nationals'). This willingness to view state commercial conduct as private conduct accords with the general modern acceptance of state-owned investors as private investors under the ICSID Convention and investment treaties.[245]

5. Conclusion

The MATs of the 1920s were an important experiment in international adjudication. They established the concept of individual access to international tribunals, at the time a major innovation in the international legal system. They also contributed to the development of numerous rules of

241 *National Bank of Egypt v Austro-Hungarian Bank* (9 July 1923) 3 Recueil TAM 236, 241.

242 *Sigwald* (n 233) 891 ('une dérogation expresse').

243 Tania Voon, Andrew Mitchell and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29 ICSID Review 451.

244 See, eg, *Stuebben v Belgium* (7 February 1927) 6 Recueil TAM 771, 772; *Petit v Mines Fiscales de Westphalie* (7 October 1922) 2 Recueil TAM 544.

245 See, eg, Mark Feldman, 'State-Owned Enterprises as Claimants in International Investment Arbitration' (2016) 31 ICSID Review 24.

adjudicatory procedure, offering views on questions ranging from provisional measures and revision of judgments to prescription of claims and burdens of proof. As Section 2 demonstrated, modern parties and tribunals have already found some value in the decisions of the MATs.

But the legacy of the MATs has not yet been fully appreciated. The various constraints identified in Section 3 may have operated to prevent MAT decisions becoming a more regular part of contemporary international lawyers' toolboxes. This is unfortunate, since, as Section 4 established, the MATs engaged with numerous issues still relevant in investment treaty (and other international) cases today. In addition, the MATs were staffed and counselled by some of the finest international lawyers of the time.[246] This chapter suggests that it is particularly on questions of procedure that the nascent legacy of the MATs is most likely to emerge. Whether taken as authoritative evidence of general principles of law or merely as a non-binding source of analogies and interpretive ideas, the voluminous MAT case-law deserves wider acknowledgement, and it is hoped that this chapter will encourage scholars, practitioners and adjudicators to delve further into it.

246 Requejo Isidro and Hess (n 7) 250. See, eg, *Deutsche Continental Gas-Gesellschaft* (n 192) 338, in which the parties were represented by Gilbert Gidel and Nicolas Politis, both members of the *Institut de droit international*.

Chapter 13: Something Old, Something New: The 1930 Reform of the Trianon Mixed Arbitral Tribunals and the Contemporary Discussion of the Appeal Mechanism in Investment Arbitration

Maja Stanivuković[*] and Sanja Djajić[**]

1. Introduction

It is often stated that one of the advantages of international arbitration is that the parties concerned will obtain a final and enforceable award. The finality of the award means that the matter will be examined and decided by one instance – the arbitral tribunal chosen by the parties or appointed by the appointing authority of their own choosing. As famously stated by the US Supreme Court in *Commonwealth Coatings Corp v Continental Casualty Co,* arbitrators 'have completely free rein to decide the law as well as the facts and are not subject to appellate review'.[1] The finality of the arbitral award has been a long-standing rule of international arbitration: 'The award, duly pronounced and notified to the agents of the parties, settles the dispute definitively and without appeal.'[2]

But what if that one instance, the only instance, makes a fundamental mistake of procedure or substance? A straightforward response is provided by Aron Broches, the father of the International Convention on the Settlement of Investment Disputes (ICSID Convention): 'A mistake of law as well as a mistake of fact constitutes an inherent risk in judicial or arbitral decision for which appeal was not provided.'[3] Would it not be wise and compliant with the longstanding human experience, however, to confer on another body the authority to re-examine the matter, especially in cases of high value and importance?

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* Professor of Private International Law, Novi Sad University, Serbia.
** Professor of Public International Law, Novi Sad University, Serbia.

1 393 US 145 (1968) 149.

2 Art 81 Convention for the Pacific Settlement of International Disputes (adopted 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 233.

3 *History of the ICSID Convention*, vol II (2) 518.

The same question was troubling international lawyers at the turn of the 20th century, when arbitration was just beginning to attain the status of the predominant manner of resolution of international disputes. Prompted by the conflict between Hungary and the countries of the Little Entente (Czechoslovakia, Romania and the Kingdom of Serbs, Croats and Slovenes ['KSCS'], which was renamed Yugoslavia in 1929), the legal minds of that epoch developed an idea of an appeals procedure against arbitral awards that was used only three times, and was then shelved and has remained almost forgotten for a hundred years.

This innovation is inextricably linked to the Mixed Arbitral Tribunals (MATs) created by the post-World War I Peace Treaties, and notably the 1920 Trianon Peace Treaty between Hungary and the Allied and Associated Powers (Trianon Treaty).[4] The right of appeal against an arbitral award was first implemented in the Paris Agreements concluded between the Parties to the Trianon Peace Treaty on 28 April 1930, which reformed the Trianon MATs.[5] The appeal was to be submitted to the Permanent Court of International Justice (PCIJ), an international judicial institution inaugurated just eight years earlier.[6]

In this research paper we intend to explore the political and doctrinal origins of the ideas on the reform of the Trianon MATs, outline the main features of this reform, and discuss the relevance of the specific appeals procedure against MATs awards to the current debate on the appeals mechanism against investment arbitration awards. Although the whole story had a broader scope that included the Hungaro-Romanian and the Hungaro-Czechoslovak MATs, the research will focus on the jurisdictional decisions of the Hungaro-Yugoslav Mixed Arbitral Tribunal preceding and

4 Treaty of Peace between the Allied and Associated Powers and Hungary (signed 4 June 1920, entered into force 26 July 1921) (1923) 113 BSP 486.

5 Agreements (I to IV) relating to the Obligations Resulting from the Treaty of Trianon of 4 June 1920, with Annexes (signed 28 April 1930, entered into force 9 April 1931) 121 LNTS 69. There was an earlier agreement providing for the right of appeal from an arbitral award to the PCIJ (see Tenth Annual Report of the PCIJ, 52): Treaty of Commerce and Navigation between Denmark and Latvia (signed in Riga 3 November 1924) 122 BFSP 386. However, the right of appeal existing under this agreement was never activated.

6 On 15 February 1922. See, Christian J Tams, 'Peace Through International Adjudication: The Permanent Court of International Justice and the Post-War Order', in Michel Erpelding, Burkhard Hess, Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 219.

following the 1930 reform, the relevant PCIJ jurisprudence and interwar writings by Yugoslav and foreign authors on these topics.[7]

2. *Background*

In order to understand the background of these appeals, one must go back to the text of the Trianon Treaty. Like other peace treaties, the Trianon Treaty provided for the liquidation of all property, rights and interests, which, when that Treaty came into force, belonged to nationals of the former enemy – in this case the former Kingdom of Hungary – or companies controlled by them, and which were within the territories, colonies, possessions, and protectorates of the Allied and Associated Powers, including territories ceded to them by the Trianon Treaty. The liquidation was to be carried out in accordance with the laws of the Allied or Associated State concerned. The price or the amount of compensation was also to be fixed in accordance with the methods of sale or valuation adopted by those laws.[8]

The 'liquidation' mentioned in Article 232 of the Trianon Treaty was 'a species of compulsory expropriation of the property of nationals of the defeated States situated in the territory of the victorious States, which was instituted by the peace treaties of 1919–1920 with a view to the proceeds being carried to reparations account or with the object of economic

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7 Slavco Stoykovitch, *De l'autorité de la sentence arbitrale en droit international public* (E Sagot 1924); Dragoljub Aranđelović, 'Spor mađarskih optanata sa Rumunijom' (The dispute between Hungarian Optants and Romania) (1928) XIII Branič 81, 108; Fedor Nikić, 'Mađarsko-rumunski spor u pitanju mađarskih optanata iz Erdelja: pravni i politički osnovi spora' (The Hungaro-Romanian dispute concerning Hungarian Optants from Transylvania: legal and political basis of the dispute) (1928) 317(1) Letopis Matice srpske, 113; Slavko Stoykovitch, 'Les Tribunaux arbitraux mixtes et leur jurisprudence' (1931) 1 Annuaire de l'Association Yougoslave de Droit International 255; Ilija Pržić, 'Naša agrarna reforma pred Stalnim sudom međunarodne pravde' (Our Agrarian Reform before the Permanent Court of International Justice) (1937) 34(5) Arhiv za pravne i društvene nauke 458; Predrag Nikolić, 'Mađarska i Jugoslavija pred Haškim sudom povodom jugoslovenske agrarne reforme (parnica: Pajzs,Čaki, Esterhazi)' (Hungary and Yugoslavia before the Hague Court in relation to the Yugoslav Agrarian Reform (case Pajzs, Csáky, Esterházy)) (1937) 348(1) Letopis Matice srpske 75. See also: Rudolf Blühdorn,'Le fonctionnement et la jurisprudence des tribunaux arbitraux mixtes créés par les Traités de Paris' (1932) 41 Recueil des Cours 137.

8 Trianon Treaty (n 4), Part X, Economic Clauses, art 232.

elimination.'[9] However, the right to liquidate the property of the former enemy that was given in Article 232, was immediately taken away from the states of the Little Entente in Article 250. This Article was part of Section VIII Trianon Treaty entitled 'Special Provisions Relating to Transferred Territory' and provided, *inter alia* that:

> Notwithstanding the provisions of Article 232 and the Annex to Section IV the property, rights and interests of Hungarian nationals or companies controlled by them situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with these provisions.
> Such property, rights and interests shall be restored to their owners freed from any measure of this kind, or from any other measure of transfer, compulsory administration or sequestration, taken since November 3, 1918, until the coming into force of the present Treaty, in the condition in which they were before the application of the measures in question.
> Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239…

Article 250 thus prohibited the retention and liquidation of the property of Hungarian nationals dealt with in Article 232[10], if this property was situated in the territory of the former Kingdom of Hungary that was transferred to the Associated States, Czechoslovakia, Romania, and Yugoslavia. This provision was often invoked before the Trianon MATs by Hungarian claimants. Paradoxically, although the Peace Treaties established the MATs primarily to resolve post-war claims of citizens of Allied and Associated Powers,[11] the vast majority of some 761 cases before the Yugoslav-Hungari-

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9 *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (*The Peter Pázmány University v The State of Czechoslovakia*) (1933), PCIJ, Ser. A/B, No. 61, 240.

10 Also dealt with in Annex to Part X, Section IV of the Treaty.

11 Such understanding of the meaning and scope of Art 232 Trianon Treaty is evidenced in the legal opinion of three law professors (Slobodan Jovanović, Živojin Perić, Dragoljub Arandjelović) of the Belgrade Faculty of Law delivered in 1922: 'The agent … misunderstood the jurisdiction of the mixed tribunals. These tribunals were set up for disputes arising between nationals of Allied and Associated Powers, on one side, and nationals of Hungary, an enemy state, on the other side. The Allied and Associated Powers were concerned that Hungarian courts would not be impartial with respect to their nationals, so they established, in lieu of Hungarian courts, a mixed tribunal for an Allied and Associated Power and Hungary as opposing parties.' Dušan Peleš, U obranu svojine: prilog tu-

an MAT were initiated by Hungarian citizens against the Yugoslav State.[12] It could be said that the Hungaro-Yugoslav MAT replaced the competent courts of Yugoslavia.[13]

The Hungaro-Serbo-Croato-Slovenian MAT was established on 3 October 1924. Its seat was in the Hague, but it sometimes sat for hearings in other places such as Interlaken, Lucerne and Paris.[14]

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mačenju mirovnih ugovora, stručno mišljenje gg univerzitetskih prof Slobodana Jovanovića, Živojina M. Perića i dr D. Arangjelovića (Defending Property: A Contribution to Interpretation of Peace Treaties, Expert Opinion of Messrs. University Professors Slobodan Jovanović, Živojin Perić and Dr D Arangjelović) (Tipografije Zagreb 1922) 1, 14.

12 *Application des traités de paix. Traité de Trianon (4 juin 1920): Archives du tribunal arbitral mixte roumano-hongrois et autres tribunaux arbitraux mixtes (1919–1943), établi par Liberto Valls et Bernard Vuillet (1975), revu et augmenté par Michèle Conchon* (1st electronic edn, Archives nationales Pierrefitte-sur-Seine 2018) 47. <https://www.siv.archives-nationales.culture.gouv.fr/siv/rechercheconsultation/consultation/ir/pdfIR.action?irId=FRAN_IR_057371>. The MAT declared its lack of jurisdiction *ratione materiae* to decide on damage caused to property, rights and interests of Yugoslav citizens found in the Serbian territory that was provisionally occupied by former enemies. According to its opinion based on the text of the Peace Treaty, it was on the basis of provisions on reparations that the harm suffered as a result of those measures was to be remedied. Stoykovitch, 'Les Tribunaux arbitraux mixtes' (n 7), 260.

13 Marta Requejo Isidro and Burkhard Hess, 'International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922' in Michel Erpelding, Burkhard Hess, Hélène Ruiz Fabri (eds) *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 239, 259.

14 Pursuant to art 3 of the Rules of Procedure, the President of the Tribunal had power to determine the place of the hearing in each particular case.

Among the cases lodged by Hungarian claimants against the Little Entente States there was a group classified as 'agrarian reform cases'.[15] The *Elisabeth Schmidt* case discussed below was one of them.[16]

Agrarian reform cases raised a legal issue of great political importance. In short, what was at stake were the agrarian reforms undertaken in all three victorious States after the Great War which entailed expropriation of agricultural property in their territories recently acquired from Hungary. The Little Entente States, carried out agrarian reform for political, economic and social reasons demanding democratisation of the land ownership.[17] All three Little Entente States were predominantly agrarian and faced social and political problems arising out of the fact that a large part of their agrarian population owned no land – 38.3 % of population in the transferred territories in Yugoslavia consisted of landless farmworkers.[18] Agrarian reform in Yugoslavia was announced in January 1919 by the Manifesto of the Regent Aleksandar Karađorđević addressed to the people.[19] This was followed by preliminary Provisions for Implementation of the Agrarian Reform adopted by the government and published in Febru-

15 This group of cases was also often called the 'Hungarian optants cases' because many (but not all) of the owners affected by the agrarian reform were formerly residents of ceded territories that opted for the Hungarian citizenship and therefore had to move to the Republic of Hungary pursuant to art 63 para. 3 Treaty of Trianon. The Hungarian agent Ladislas Gajzago stated in one of his pleadings to the PCIJ, that only one third of the agrarian reform claimants were Hungarian optants, whereas the remaining two thirds were originally citizens of Hungary. This is probably why Hungary/Hungarian citizens relied on art 250 rather than art 63 of the Treaty of Trianon before the MATs and the PCIJ. See: *Appeals From Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Applications Eventually Withdrawn)*, Documents of the Written Proceedings, PCIJ Rep Series C No 68 214.

16 In the written proceedings before the Court, Hungary submitted 57 applications filed with the Hungaro-Yugoslav MAT by Hungarian nationals regarding the agrarian reform. 'Annexes à la Réplique hongroise: Annexe XX', in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 292–312.

17 *Elisabeth Schmidt c État serbe-croate-slovène* (14 May 1929) 9 Recueil TAM 172.

18 Marko Vilić, O agrarnoj reformi (On the agrarian reform) (Učiteljsko društvo Natošević 1920); Teofan Ristić, Borba za zemlju i naša agrarna reforma (Struggle for the land and our agrarian reform) (Ekonomsko-finansijski život 1938), 40.

19 Manifest Regenta Aleksandra narodu od 6. januara 1919. Službene novine Kraljevstva Srba, Hrvata i Slovenaca, br. 2 od 28. januara 1919. (The Manifesto of the Regent Alexander to the People of 6 January 1919, Official Journal of the Kingdom of Serbs, Croats and Slovenes, no. 2, 6 January 1919).

ary 1919.[20] This government decree sought to determine the basic principles of agrarian reform. It provided that large landed estates would eventually be expropriated but would be provisionally distributed and leased to the peasantry.[21] The decree announced that the landowners would eventually receive compensation for their expropriated land in the amount and in the manner that would be determined once the law on agrarian reform was passed. The same principles on expropriation of large estates against compensation for the purpose of the agrarian reform became part of the 1921 Constitution.[22] Fast redistribution of land was required to prevent the anticipated social unrest and possibly a revolution by the agrarian proletariat.[23] By the end of 1923, 210,912 families had received land through the agrarian reform.[24] Expropriation was applied indiscriminately and on the same terms to both domestic and Hungarian citizens. Approximately 19 % of the large estates in the transferred territories of today's Vojvodina (Serbia) were owned by individuals of predominantly Hungarian ethnicity.[25] Hungarian claimants, backed by the Hungarian state, initiated numerous proceedings before the MATs, claiming that their land was subjected

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20 Službene novine Kraljevstva Srba, Hrvata i Slovenaca, br. 11 od 27. februara 1919. (Official Journal of the Kingdom of Serbs, Croats and Slovenes, no. 11, 27 February 1919).

21 ibid.

22 Art 43 of the 1921 Constitution of the Kingdom of Serbs, Croats and Slovenes (Vidovdan Constitution).

23 Gordana Drakić, 'Sprovođenje agrarne reforme u Kraljevini Srba, Hrvata i Slovenaca na primeru velikog poseda stranog državljanina' (Agrarian reform in the Kingdom of Serbs, Croats and Slovenes with reference to large estates of foreign citizens) (2014) 62 Anali Pravnog fakulteta u Beogradu 146, 148.

24 Distribution of land to families was as follows: in Slovenia, 24 332 acres were distributed to 17 225 families; in Croatia, 169 531 acres to 98 335 families; in Vojvodina, 335 780 acres to 89 702 families; in Macedonia, 47 735 hectares to 5650 families. Milorad Nedelkovitch, 'La réforme agraire en Yougoslavie' (1924) 38 Revue d'économie politique 1, 10–11.

25 Large estates in Vojvodina which included Bačka, Banat and Srem (in today's Serbia) were approximately 907 111 kadastral jugars out of which 175 802, or 19,38 %, belonged to Hungarians. Nikola Gaćeša, 'Prilog proučavanju agrarnoposedovne strukture i agrarnih prilika u Vojvodini u vreme stvaranja Jugoslavije' (Contribution to the study of structure of agrarian ownership and agrarian factors in Vojvodina at the time of creation of Yugoslavia), in Radovi iz agrarne istorije i demografije (Matica srpska 1995) 114–124, 115. The Hungarian government claimed compensation for around 150 000 jugars subject to agrarian reform (Ivan Ribar, 'Pariske konvencije' ('The Paris Conventions') (1931) 16(6) Branič 275) out of which around 80 000 jugars of expropriated land was located in today's Croatia and Slovenia, which also belonged to 'transferred territories'.

to a measure equivalent to liquidation contrary to Article 250 of the Trianon Treaty, and requested full restitution, as well as compensation for damage that occurred during the term that the prohibited measure was in force. The Little Entente States, on the other hand, asserted that the agrarian reform was a measure of social and economic reform applied indiscriminately and that it could not be classified as 'liquidation' pursuant to Articles 232 and 250 of the Trianon Treaty, because it was not enacted as a bellicose measure for war purposes.[26]

The dispute over this matter was initiated by Hungary on 16 August 1922, shortly after the entry into force of the Trianon Treaty. The Hungarian government appealed to the Conference of Ambassadors[27] on behalf of the Hungarian optants from Transylvania, imploring it to declare that the Romanian Act on Agrarian Reform had no basis in international law and was illegal, and to order Romania to return all expropriated estates to Hungarian optants.[28] The Conference of Ambassadors rejected the appeal considering that it belonged to the jurisdiction of the League of Nations. On 15 March 1923, the Hungarian government submitted the same appeal to the Council of the League of Nations.[29] Initially, the matter was conferred to Adachi Mineichirō (in contemporary documents Mineitciro Adatci), the representative of Japan.[30] On 23 April 1923, he proposed a draft of an agreement which would have referred the question of whether such expropriations constituted a violation of Article 63 para. 4 Trianon Treaty,[31] as claimed by Hungary, to the PCIJ. His proposal was

26 Paul De Auer, 'The Competency of Mixed Arbitral Tribunals' (1927) 13 Transactions of the Grotius Society xvii, xxv.

27 The Conference of Ambassadors of the Principal Allied and Associated Powers was an organization of the Allies of World War I in the period following the end of the war. The Conference consisted of ambassadors of Great Britain, Italy and Japan accredited in Paris and the French Minister of Foreign Affairs.

28 Ilija Pržić, 'Mađarski optanti i rumunska agrarna reforma' (Hungarian Optants and the Romanian Agrarian Reform) (1928) Narodna misao 174.

29 ibid. See also Manley O Hudson, *The Permanent Court of International Justice and the Question of American Participation, with a Collection of Documents,* (Harvard University Press 1925) 77. Hudson mentions another date: 20 April 1923.

30 Adachi was a member of the Advisory Committee of Jurists that prepared the Draft Statute of the PCIJ in 1920. He was also a judge at the PCIJ from 1930 to 1934.

31 Art 63 Trianon Treaty (n 4) provided that the optants would be entitled to retain their immovable property in the territory of the other State where they had their place of residence before exercising their right to opt.

accepted by Hungary but rejected by Romania.[32] The Council then invited the parties to find an amicable solution in direct negotiations between Hungary and Romania.[33] The negotiations, presided by Adachi, were conducted in Brussels and led to the signing of a protocol in which the Hungarian delegates acknowledged that the Romanian agrarian laws were in conformity with the provisions of the Trianon Treaty.[34] The protocol was signed on 26 May 1923. However, on 12 June 1923, the Hungarian government retracted their signature, stating that the agreement recorded in the protocol represented a total renunciation of the Hungarian thesis, and that its representative, Count Csáky had not been authorized to sign the Protocol. Adachi protested and Hungary requested that he renew the proposal for resort to the PCIJ.[35] After a lively debate before the Council on 5 July 1923, the Council unanimously adopted the Adachi report and the Brussels Accords, with the Hungarian delegate, Count Apponyi abstaining.[36] The Council decided that under the special circumstances no request to the Court should be made, and this phase of the dispute was closed.

Soon after, in December 1923, the Hungarian Government submitted a number of requests by Hungarian optants to the Hungaro-Romanian MAT, asking the MAT to decide that all measures taken pursuant to the Romanian agrarian laws were contrary to Article 250 Trianon Treaty, and that Romania should be ordered to restitute the expropriated estates to their rightful owners.[37] Romania objected to the MAT's jurisdiction. On 10 January 1927, the MAT, presided by Conrad Cedercrantz with Constantin Antoniade and Aladár Székács as members, rendered 21 uniform judgments in the chosen typical cases, in which it accepted jurisdiction under Article 250(3) of the Trianon Treaty, and invited the Respondent (Romania) to submit its answer relating to the merits of the dispute within two months.[38] The Romanian judge refused to sign the award and submit-

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32 Hudson (n 29) 77. For the text of the proposed draft, see: 'Expropriation by the Romanian Government of the Property of Hungarian Optants: Draft Agreement Between Hungary and Romania' (23 April 1923) 4 League of Nations Official Journal 703.

33 Pržić (n 28) 174.

34 ibid, 175.

35 Hudson (n 29) 78.

36 League of Nations, Council, 25th session, 8th meeting (public) (5 July 1923) 4 League of Nations Official Journal 904, 908.

37 Pržić (n 28) 175.

38 The one that was published was cited as: *Emeric Kulin (père) c État roumain* 7 Recueil TAM 138 (also: 4 International Law Reports 88, 471, 489). See in more

ted a dissenting opinion.[39] On 24 February 1927, Romania communicated its opinion to the MAT to the effect that the tribunal had exceeded the limits of its jurisdiction as envisaged in Article 250 of the Trianon Treaty, and for that reason its decisions were invalid and had no legal effect.[40] Therefore, Romania was unable to submit its answer with regard to the merits of the dispute and recalled its judge, who would no longer sit in disputes initiated by Hungarian citizens in relation to the agrarian issues.[41] At the same time, Romania submitted a request to the Council of the League of Nations pursuant to Article 11(2) of the Covenant of the League of Nations, requesting leave to inform the Council of its views. The Hungarian Government for its part addressed the Council, calling on it to reject Romania's request and to act pursuant to Article 239 of the Trianon Treaty, that is, to select one substitute judge in place of the recalled Romanian judge, and thus enable the court (MAT) to conclude its work.[42] The reference to Article 11 (2) of the Covenant of the League

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detail: 'Annexes à la requête hongroise: Annexe 7: Opinion dissidente de l'arbitre national hongrois A Székács', in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79, 36–64.

39 Pržić (n 28) 176. In this article, the Serbian author Ilija Pržić uses the term judge for the members of the MAT, and court for the MAT itself. The Treaty of Trianon, Article 239 does not call them 'arbitrators', but rather 'members of the tribunal' ('*membres du Tribunal*'). The products of their work are termed 'decisions' ('*les décisions du Tribunal arbitral mixte*') rather than awards ('*sentences*'). Later, they were often referred to as 'judgments' ('*jugements*') by the PCIJ, and are also called judgments in Agreements I and II (n 7). All this was the result of the currents of thought predominant at the time that looked at arbitration and adjudication as two stages in the development of the ways of resolving international conflicts in a civilized society. International courts were viewed as a more advanced form of international arbitration, and the move from arbitration to a proper, permanent court was accomplished with the establishment of the PCIJ. Tams (n 6) 220, 223. The MATs were probably envisaged as a transitory form. See also: Djura Popović, 'Sudska funkcija u državi i u međunarodnim odnosima' (Judicial Function within a State and in International Relations) (1932) XVII(5) Branič 223.

40 ibid. At the time it was generally accepted in the doctrine that *l'excès de pouvoir* was one of the causes of nullity of an arbitral award and that in the absence of a superior authority, it was upon the parties to the arbitration to assess the causes of nullity. Stoykovitch, *De l'autorité* (n 7) 181, 192.

41 This was not the first time that the MAT members withdrew from the Tribunal siding with the strong political interests of their countries. A similar thing happened in 1922–23 when the German members of the Belgian and French MATs refused to participate after the occupation of the Ruhr by French and Belgian troops. Requejo Isidro and Hess (n 13) 250.

42 Pržić (n 28) 176.

of Nations meant that Romania considered this dispute to be political rather than legal, and thus invoked the jurisdiction of the Council to settle the conflict. As stated by Ilija Pržić, professor of international law at the University of Belgrade, Romania believed that the Hungarians initiated this dispute before the MAT, in order to prove the unfair character of the provisions of the Treaty of Trianon and to prompt discussions on the revision of the Treaty.[43]

It should be pointed out here that the Peace Treaty left no doubt about the binding force of the MAT's decisions. The final clause of Article 239 of the Trianon Treaty, which set forth the provisions on the MATs, stipulated:

> (g) The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive, and to render them binding upon their nationals.

Nevertheless, Romania was adamant on its position that it was not bound by the ruling of the MAT on jurisdiction. Whereas the position of the Romanian Government was that Article 250 of the Trianon Treaty prohibited only differential expropriation of Hungarian property, the Hungarian Government claimed that under that article all property of Hungarian citizens was exempt from any measure of expropriation without payment of compensation equal to the value of the expropriated property expressed in gold. The Hungaro-Romanian MAT accepted jurisdiction not just for deciding whether the agrarian expropriations were differential measures but also whether, more generally, those measures were in conformity with 'common international law'.[44] According to Blühdorn, the way in which the MAT had interpreted Article 250 of the Trianon Treaty meant that activities of the States to which parts of the Hungarian territory were transferred were eternally placed under the control of the MATs with regard to their land regime, and Hungarian citizens were provided with rights that even the citizens of the allied countries did not possess.[45] If the Hungaro-Romanian MAT's interpretation of Article 250 is compared to its initial position in the Treaty as an exception from post-war economic liqui-

43 ibid, 182. András Jakab, 'Trianon Peace Treaty (1920)', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2015) para 22: 'between the two World Wars … Hungarian foreign policy was determined by an attempt at a revision of the Trianon Peace Treaty.'

44 Blühdorn (n 7) 224.

45 ibid, 225.

dation of enemy property allowed under Article 232, one can hardly fail to observe how the whole post-war landscape had changed dramatically.

Admittedly, the amount at stake was high. During the debates before the Council, the Romanian representative claimed that the special cases to which the Hungarians referred reached a figure of 400 million gold francs. He also emphasized that the Romanians made a 'friendly gesture' towards the Hungarians in putting off the payment of their reparations for twenty years, but as a result 'they could not find 400 million gold francs' to compensate the Hungarian owners of landed properties.[46]

The same 'friendly gesture', ie deferral of the payment of Hungarian reparations, was made by Yugoslavia and Czechoslovakia, due to the disastrous state of the Hungarian economy immediately following the Great War. Those countries, suffering from economic crises themselves, were left without Hungarian reparations and were now being asked by the Hungarian State to pay the full value for the land taken from the Hungarian proprietors in the course of the agrarian reform, while the domestic nationals and other foreigners whose land was also taken were entitled to only a fraction of its value. The meagreness of the compensation paid out to domestic nationals was aggravated by the post-war downfall of the domestic currencies.[47]

Having been unable to find a solution that satisfied both sides, the Council appointed a board of three members presided by the British delegate, Sir Austen Chamberlain, conferring upon it the task of examining the dispute and submitting a report.[48] Despite their efforts from May to September 1927, no agreement between the parties was found.

Ultimately, the 'Board of Three' submitted its report in which it proposed three principles that would be the basis of an agreement between the parties in dispute: (1) the provisions of peace treaties regulating peace after the 1914–1918 war by no means excluded the application to Hungarian citizens (including those that opted for Hungarian citizenship) of a general plan of agrarian reforms; (2) no inequality could exist between Hungarians and Romanians, either in the terms of the agrarian law, or

46 League of Nations, Council, 47th session, 2nd meeting (public) (17 September 1927) 8 League of Nations Official Journal 1390, 1401.

47 ibid. The Romanian Minister Titulesco: 'What do Hungarian representatives in concrete statements made before the MAT say? They say: We cannot be content with the compensation you are giving us. You Romanians can receive 20 francs in place of 1000 francs, because money has depreciated considerably since 1917. We Hungarians are privileged.'

48 Pržić (n 28) 177.

in the manner in which it is applied; (3) the words 'seizure and liquidation' ('*saisie et liquidation*'), mentioned in Article 250, that related only to territories transferred to Little Entente states by Hungary, were applicable solely to measures taken against the property of a Hungarian because that owner was a Hungarian citizen (the so-called 'differential measures').[49]

At the September 1927 session, the Council adopted those three principles and invited the parties to accept them. Romania should then return its member to the MAT. The Romanian representative was willing to comply with the principles, but the Hungarian representative rejected them. The decision was adjourned, and in the meantime, a broad public discussion was initiated.[50] The opinions of legal experts were sharply divided, and many English lawyers and politicians criticized Chamberlain for the position he had taken in the report.[51]

The Council dealt with this matter again in March 1928 when Chamberlain proposed, with the unanimous support of the Council, the adoption of the following recommendation: the Council would designate two judges amongst citizens of the States that were neutral during the war to sit in the MAT, and the Romanian judge would take his place there again. That Tribunal, from that moment composed of five members, would examine and decide upon the question of application of the Treaty of Trianon Article 250 to Romanian expropriations. No directive (such as the aforementioned principles) would be prescribed to the Tribunal.[52] This time, the recommendation of the Council was accepted by Hungary but Romania rejected it. After such an outcome, the Council found that it

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49 'Rapport de Sir Austin Chamberlain au Conseil de la Société des Nations' (Document C.489.1927.VII <https://biblio-archive.unog.ch/Dateien/CouncilDocs/C-489-1927-VII_EN.pdf> accessed 20 September 2021), reproduced and discussed in 'First Meeting (Private, Then Public)' (1927) 8 League of Nations OJ 1378.

50 According to Stoykovitch, 'Les Tribunaux arbitraux mixtes' (n 7) 260, about 90 legal authors from all over Europe had publicly expressed their opinion on this issue. The diverging opinions of experts were published in two books, the first consisting of two volumes, siding with the views of Romania and the other siding with the views of Hungary. For the first book, see: Alejandro Álvarez et al, *La réforme agraire en Roumanie et les Optants hongrois de Transylvanie devant la Société des Nations* (vol 1, Imprimerie du Palais 1927), the second volume of which was published in 1928. For the second book, see: *La réforme agraire Roumaine en Transylvanie devant la justice internationale et le Conseil de la Société des Nations: Autres opinions*, (Éditions Internationales 1928).

51 See, eg: House of Lords, Monday, 5 June 1928 (Extract from Official Report) Hungarian Claim against Rumania, 468–511, in *La réforme agraire* (n 50) 1928.

52 Frede Castberg, 'L'excès de pouvoir dans la justice internationale' (1931) 35 Recueil des Cours 353, 460.

must abstain from resolving the dispute. It did not act upon the request of Hungary to designate the substitute judges. When the conflict between Hungary and Romania was resolved two years later, it was resolved without the mediation of the Council.[53]

But the first seeds of compromise were sown there when the Romanian delegate suggested that Hungarian proprietors should be compensated out of Hungarian reparation payments. The idea was initially unacceptable to Hungary, since the small amount of reparations it was paying pursuant to a provisional arrangement made in 1924 represented only a fraction of what Hungary demanded as compensation for the expropriated property of its nationals.[54]

In September 1928, Finland's Foreign Minister during his speech at the ninth Assembly of the League of Nations alluded to the dispute when he mentioned that 'experience has shown' that it may be 'necessary to consider the possibility of appeal' against arbitral awards, because 'one of the other of the parties may be unwilling to recognize an award as final and binding, on grounds of some alleged flaw in the proceedings'.

> In May 1929, Finland formally submitted the proposal to the Assembly of the League of Nations to 'examine the question whether, and to what extent, there might be conferred upon the Permanent Court of International Justice jurisdiction as a court of review in respect of arbitral tribunals established by States ...'.[55]

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53 ibid.

54 Royall Tyler, 'The Eastern Reparations Settlement' (1930) 9(1) Foreign Affairs 106, 113. 'So far as the war reparations proper were concerned, you had treaties of peace signed soon after the War – St Germain, which theoretically imposed a certain liability on Austria; Trianon, which theoretically imposed a burden on Hungary; and Neuilly, on Bulgaria. It was quite impossible at that time to define the liability of any of those countries, and it was clearly preposterous to expect any sort of payment then. In fact, in most cases the payment had to go the other way, in order to prevent an immediate collapse. There was not only not a final settlement, but not even any sort of settlement at all in the peace treaties. Then the next phase was that the League of Nations (and Sir William Goode) rescued Austria and then Hungary from immediate ruin. Nothing further happened, except that Hungary, in 1924, undertook to pay a certain small amount of reparation for a limited period up to 1943 – a provisional arrangement, it being understood that when that year arrived another agreement might be made. Beyond that there was not much money passing at all.' George Glasgow, 'The Hague Conference and Non-German Reparations' (1930) 9(2) Journal of the Royal Institute of International Affairs 232, 233.

55 Proposal of the Government of Finland to confer on the Permanent Court of International Justice Jurisdiction as a Tribunal of Appeal in respect of Arbitral

> As remarked by Garner:
> The Finnish proposal was doubtless the outgrowth of the controversy between Hungary and Rumania over a decision of January 10, 1927, by the Mixed Arbitral Tribunal ... a decision the validity of which the Government of Rumania refused to recognize on the ground that it was in excess of the jurisdiction of the arbitral tribunal.[56]

The Finnish proposal was adopted by the Assembly, which requested the Council to submit this question to examination.[57] A five-member Committee of Jurists was appointed and drafted a report.[58] The Institut de Droit International referred to these developments in its 1929 resolution and expressed the view that the State parties to arbitral agreements should confer jurisdiction on the PCIJ to decide on disputes over jurisdiction of arbitral tribunals or *ultra vires* acts of arbitrators.[59] In parallel to this initiative there was another which pleaded for opening the PCIJ for appellate

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Tribunals established by States (13 May 1929), (1929) 76 League of Nations Official Journal, Special Supplement 57, 82. See the explanation of this proposal by the Finnish representative: Rafael Erich, 'Le projet de conférer à la Cour Permanente de justice internationale des fonctions d'une instance de recours' (1931) 12(2) Revue de droit international et de législation comparée 268. Also, Jan Hendrik Willem Verzijl, *The Jurisprudence of the World Court: A Case by Case Commentary* (Sijthoff 1965) vol 1, 352.

56 James W Garner, 'Appeal in Cases of Alleged Invalid Arbitral Awards' (1932) 26 American Journal of International Law 126.

57 'The Assembly invites the Council to submit to examination the question. "What would be the most appropriate procedure to be followed by States desiring to enable the Permanent Court of International Justice to assume, in a general manner, as between them, the functions of a tribunal of appeal from international arbitral tribunals in all cases where it is contended that the arbitral tribunal was without jurisdiction or exceeded its jurisdiction?"' – Resolution adopted by the Assembly on September 25th, 1929, (1930) 11 League of Nations Official Journal 77, 86. On reasons for and against introducing the right of appeal against an arbitral award in Yugoslav literature *see*, Ilija Pržić, 'Stalni sud međunarodne pravde kao drugostepena instancija u medjunarodnom pravosudju' ('The Permanent Court of Justice as a court of second instance in international judiciary') (1932) 42 Arhiv za pravne i društvene nauke 460.

58 Report of the Committee Appointed by the Council, League of Nations, 7th June 1930, C.338.M.138.1930.V. (1930) 85 League of Nations Official Journal, Special Supplement 100, 135. See in more detail, Arnold Raestad, 'Le Recours à la Cour Permanente de Justice Internationale contre les Sentences des Tribunaux d'Arbitrage Internationaux pour Cause d'Incompétence ou d'Excès de Pouvoir' (1932) 13 Revue de Droit International et de Législation Comparée 302.

59 Resolution 'Extension de l'arbitrage obligatoire', (Rapporteurs: MM. Eugène Borel et Nicolas Politis), L'Institut de Droit international, New York 1929,

jurisdiction over arbitral awards. In 1929 Professor Rundstein[60] submitted a Memorandum to another Committee of Jurists, which was entrusted with amending the PCIJ Statute and the Rules, arguing that the existing structure of the PCIJ could respond to potential special agreements of states to submit appeals against arbitral awards.[61] The Memorandum was attached to the Committee's Report.[62] Obviously, the dispute between Romania and Hungary over the authority of the MATs rekindled the debate over the appealability of arbitral awards that took place during the drafting of the Hague arbitration conventions.[63]

Slavco Stoykovitch, a young Serbian lawyer, in his doctoral dissertation published in Paris in 1924, wrote:

> Finally, we believe that the institution of the Permanent Court of Justice in The Hague offers a new way for the parties to free themselves from an invalid award... States which have signed the Convention on Compulsory Arbitration of the Court provided for in Article 36 of the Statute may still invoke paragraph C of that Article... Consequently, a State which refuses to enforce an award may be summoned to appear before the Court, which would be competent to examine the reality of the grounds of invalidity invoked and their influence on the validity of the award.[64]

Within no time Stoykovitch was going to defend an appeal against an arbitral award before that same court.

<https://www.idi-iil.org/en/publications-par-categorie/resolutions/page/14/> accessed 28 September 2021.

60 Simon Rundstein was also a member of the five-member Committee of Jurists that drafted the proposal to the Council of May 1930. See his work: Simon Rundstein, 'La Cour permanente de justice internationale comme instance de recours' (1933) 43 Recueil des Cours 1.

61 Committee of Jurists on the Statute of the PCIJ (Appeal) (2nd April 1929) C.142.M.52.1929 V.

62 See in more detail, Shabtai Rosenne, *Interpretation, Revision and Other Recourse from International Judgments and Awards* (Martinus Nijhoff 2007) 70.

63 Garner (n 56) 126.

64 *Enfin, nous croyons que l'institution de la Cour permanente de justice de La Haye offre aux parties un moyen nouveau de se libérer d'une sentence nulle… les Etats qui ont signé la Convention sur l'arbitrage obligatoire de la Cour prévu par l'article 36 du statut peuvent toujours invoquer le paragraphe C de cet article… Par conséquent, un Etat qui refuse d'exécuter une sentence pourra être cité devant la Cour qui serait compétente pour examiner la réalité des causes de nullités invoquées et leur influence sur la validité de la sentence.* Stoykovich, *De l'autorité de la sentence* (n 7), 188–189.

3. The Elisabeth Schmidt Case

Following the failure to strike a deal in the Council, the Hungaro-Czechoslovak MAT and the Hungaro-Yugoslav MAT took their cue from the *Kulin* judgment against Romania[65] and declared themselves competent to decide whether or not the agrarian reform was a measure of disguised liquidation prohibited by Article 250 of the Trianon Treaty.[66] *Elisabeth Schmidt v Serb-Croat-Slovene State* (case no 226) was decided on 14 May 1929. Identical judgments were also rendered on the same date in three other similar cases initiated against Yugoslavia: *de Bödy* (case no 244), *de Benyovsky* (case no 342) and *Mészáros* (case no 605).[67]

The facts of the Schmidt case were fairly simple: Mrs Elisabeth Schmidt, widow of Dr Ladislas Lelbach, a Hungarian citizen, resident in Baja, was an '*usufruitière*' of certain rural estates, whereas her minor daughter whose legal representative she was, was a '*nue-propriétaire*' (an owner having no right of usufruct).[68] She claimed that the defendant State, contrary to Article 250 of the Trianon Treaty, took a whole system of measures which had the effect to deprive the owners of the right of disposal and which affected the right of ownership itself, by transferring all or part of these estates to another person without the consent of the owners and without compensation. She requested that the Tribunal order: the restitution of the immovables mentioned in her request from the defendant State free of all restrictive measures of property law that have the character of confiscation or of spoliation in the condition that they were found before the application of those measures; the re-establishment of the previous

65 *Emeric Kulin (père) c État roumain* (10 January 1927) 7 Recueil TAM 138. See also: 4 International Law Reports 88, 471, 489.

66 *Pallavicini et al v Czechoslovak State* (31 January 1929) 5 International Law Reports 440; *Elisabeth Schmidt c État serbe-croate-slovène* (n 17).

67 *Elisabeth Schmidt* (n 17) 169. A summary of the arguments made in this case can be found in: Albert de Lapradelle, 'La réforme agraire yougoslave devant la juridiction arbitrale mixte: L'arrêt du 14 Mai 1929' (1929) 3 Revue de droit international 432. Lapradelle was counsel to Hungary in the case of agrarian reform in Transylvania and was an advocate of the Hungarian views.

68 *Elisabeth Schmidt* (n 17) 171. It appears from the French National Archive (*Archives Nationales*), which contains data on this case, that the area of land in question was 2,651 jugars and was estimated by the Claimant to have the value of 5 million golden crowns: <https://www.siv.archives-nationales.culture.gouv.fr/siv/rechercheconsultation/consultation/ir/consultationIR.action?irId=FRAN_IR_057371&udId=c-1x98uwey1--q5o7pl75b2uh&details=true&gotoArchivesNums=false&auSeinIR=true> accessed 5 July 2020.

position in the land books; to order the defendant State to restitute to the Applicant all things from the inventory intended for the use of the rural immovables in question and enumerated in the annex; to order the defendant State to pay a full indemnity for the deterioration and the deprivation of enjoyment, and also for the costs and expenses incurred following the measures unduly applied; subsidiarily, in case that it was definitely proven in the process that the property or some parts of it or some of its accessories could not be returned, to order the defendant State to pay indemnification for those things; to fix in each and every case the amount of indemnification *ex aequo et bono*, taking into consideration all the circumstances of the case. In addition the Applicant requested that the Tribunal order the defendant State to bear all costs and expenditures of the proceedings and those other costs and expenditures imposed on the applicant on the basis of the measures in question. The defendant, the KSCS submitted through its agent that the Tribunal should declare itself incompetent to decide on the request, find that the request was not admissible, reject it as ill-founded and order the applicant to bear all costs. The position of the parties remained unchanged following the second round of pleadings.

The importance of the case was underlined by the presence of several attorneys on the side of the Claimant at the hearing held on 6, 7 and 9 of May 1929 in Lucerne. Counsels for the Applicant were: Erwin Loowenfeld, attorney in Berlin, René Brunet and Joseph Barthélémy, professors and attorneys in Paris, and Gilbert Gidel, professor at the Faculty of Law, University of Paris.

The Tribunal considered that the facts as expounded by the Applicant 'furnished the necessary elements for establishing in a general manner, the competence (jurisdiction) of the seized Tribunal'. The objection to jurisdiction which was raised by the defendant State relied on the fact that 'what was at stake in this particular case was the Yugoslav agrarian reform, a measure that does not enter into the category of seizures, liquidations, et cetera, over which the Tribunal is invited to decide.'[69]

However, the Tribunal:

> is competent (has jurisdiction) to decide on the issue whether a measure enters into the category of seizures or liquidations prohibited by Article 250 [of the Trianon Treaty], even if that measure is announced

69 *Elisabeth Schmidt* (n 17) 172.

> as agrarian reform. This results primarily from Article 250 itself because it attributes competence to the Tribunal without restrictions.[70]

The Government of the KSCS asserted that the special set of laws and regulations that concerned the agrarian reform had nothing in common with the seizure and liquidation envisaged in Articles 232 and 250 of the Trianon Treaty. The agrarian legislation, which was being applied to citizens of the Kingdom and foreigners alike, was needed imperatively and was justified by political, economic and social reasons demanding democratization of land ownership. The Claimant, on the other hand, made something of an indirect expropriation argument. Recognizing that it was for the sovereign KSCS to choose the principles according to which it wished to organize the system of land ownership in its territory, the Claimant submitted that, in as much as the legal measures in question applied to Hungarian property in the transferred territory, they were contrary to the engagements taken by the respondent State when signing the Peace Treaty. More precisely, the biased application of those dispositions by the authorities of the KSCS, which led to spoliation without indemnity, constituted an indirect means by which the KSCS Government on the pretext of agrarian reform, effected a liquidation prohibited by Article 250 of the Trianon Treaty.[71]

Unlike the Hungaro-Romanian MAT, the Tribunal was careful not to prejudge the decision on the merits in the decision on jurisdiction.[72] It stated that the dispute as outlined by the parties concerned the merits, and thus, should be decided in the judgment on the merits.[73] The Tribunal then developed what looks very much like a '*prima facie*' or 'manifestly unfounded' argument that is used in present-day ICSID investment arbitration:

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70 ibid.

71 *Elisabeth Schmidt* (n 17) 172–73.

72 Nevertheless, the Yugoslav side understood it as a prejudgment of the merits: the Yugoslav agent wrote that the MAT had declared itself competent 'considering the agrarian reform ... as a measure of seizure and liquidation in disguise, prohibited by the Article 250 Trianon Treaty.' Stoykovitch, 'Les Tribunaux arbitraux mixtes' (n 7) 260.

73 The judgment on the merits in the Elisabeth Schmidt case was rendered on 22 July 1932, and the restitution of land was recorded on 29 November 1932. See the record of the case in <https://www.siv.archives-nationales.culture.gouv.fr/siv/rechercheconsultation/consultation/ir/consultationIR.action?irId=FRAN_IR_057371&udId=c-1x98uwey1--q5o7pl75b2uh&details=true&gotoArchivesNums=false&auSeinIR=true> accessed 5 July 2020.

> It is correct to say that the Tribunal should declare that it lacks jurisdiction if a preliminary examination of the allegations of the parties would show that the claims of the claimant are manifestly wrong – those of her claims that wish to establish the existence of a legal relationship between the measures that are the subject matter of the process and the articles of the Treaty the interpretation of which was conferred on the Tribunal. But this is not the case in this particular instance. Without prejudice to the merits, it must be noted summarily, that the parties are unanimous in recognizing that the questions raised by the request must find their solution in Articles 232 and 250 of the Treaty, the provisions the legal scope of which belongs to the Tribunal to determine.[74]

The appointee of the KSCS in the Tribunal, Professor Dragoljub Arandjelovitch, submitted a dissenting opinion.[75] In short, his arguments were that the MAT was an exceptional adjudicatory body which could have jurisdiction only if such jurisdiction resulted from the formal text of the Treaty. Article 250 of the Trianon Treaty conferred jurisdiction on the Tribunal to decide on matters that concern the Hungarian property affected by exceptional war measures or measures which applied to the property of an enemy. The agrarian reform in Yugoslavia had no relationship with the war nor with the nationality of the owners, because it was applied without distinction to property of all large proprietors in Yugoslavia, including Yugoslav citizens. It was not contested in this proceeding that the property of the Applicant was not affected by an exceptional measure which applied solely to the property of Hungarian citizens. It resulted from all this that pursuant to Article 250(1) of the Trianon Treaty, the MAT did not have jurisdiction.[76]

Thus, the decision of the MAT was a majority decision. Article 239(a) of the Trianon Treaty clearly provided for this possibility:

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74 *Elisabeth Schmidt* (n 17) 173. Parallels between MATs and investment arbitration are sketched in Requejo Isidro and Hess (n 13) 267.

75 According to Blühdorn (n 7) 179, only the Rules of Procedure of the Hungaro-Yugoslav MAT expressly provided for dissenting opinions. Nevertheless, the Romanian arbitrator, in the *Emeric Kulin (père) v Etat roumain* and other typical cases before the Roumano-Hungarian MAT, refused to sign the award and joined a dissenting opinion which was published together with the award. The example was later followed by other MATs.

76 *Elisabeth Schmidt* (n 17) 173–74.

> The decision of the majority of the members will be the decision of the Tribunal ('*La décision de la majorité des membres sera celle du Tribunal*').

It could not be reasonably expected that the judges would remain fully impartial in cases involving the strong interests of their countries.[77] Considering that the two members of the Tribunal were nationals of the Appointing States, it was inevitable that the decision on such important political issues, such as the applicability or non-applicability of the Peace Treaty to measures of agrarian reform, practically fell upon one man, in this case, Goike Van Slooten, the Dutch President of the Hungarian-Serbo-Croato-Slovenian Tribunal (1875–1932).[78]

Since the unsuccessful debates in the Council in 1927–28, the work of the Trianon MATs had been at a standstill. Under the influence of the Hungaro-Romanian MAT, the two other MATs also suspended their work on the agrarian cases, but only after accepting jurisdiction in the selected typical cases.[79] The problem raised by the MATs' willingness to establish jurisdiction over agrarian cases was aggravated by the pending problem of war reparations due by Hungary to Romania, Yugoslavia and other so-called Eastern Creditor countries.

4. The 1930 Paris Agreements

As a follow-up to the Second Hague Conference held in January 1930, which adopted the Young plan for settlement of German reparations,[80] four agreements for the settlement of the so-called Eastern reparations

77 Requejo Isidro and Hess (n 13) 257.

78 See Blühdorn (n 7) 29.

79 'Opinion dissidente de l'arbitre national hongrois A Székács' (n 38) 36, 41.

80 Final act of the Hague Conference on Reparations ('*Acte final de la Conférence de La Haye concernant le règlement des questions nées de la guerre*'), done at The Hague on 20 January 1930 (1930) 24 AJIL 259. The Conference adopted inter alia an 'Agreement relating to Hungarian obligations under the Treaty of Trianon' ('*Protocole relatif aux obligations hongroises telles qu'elles découlent du Traité de Trianon*'). This Agreement had four Annexes which defined 'the bases of the agreements which now and henceforth constitute an undertaking on the part of the signatory Governments'. A Committee was designated to sit in Paris and draft the final texts. See: Art 1 Annex I Agreement Relating to Hungarian Obligations under the Treaty, in *Agreements Concluded at the Hague Conference, January, 1930* (HMSO London 1930) 158. See also: *The Pajzs, Csáky, Esterházy Case* (Judgment of 16 December 1936) PCIJ Series A/B No 68, 46.

were negotiated from 5 February 1930 to 28 April 1930 and signed in Paris by 17 governments.[81] Agreement I dealt with the question of reparations. Agreements II and III, which were closely connected, dealt with the agrarian reform disputes and the MATs. Agreement III provided for the settlement of agrarian claims from a special Agrarian Fund, entitled Fund A. Agreement IV (not signed by Hungary) provided for the establishment of a special Fund B for indemnification of Hungarian applicants in other (non-agrarian) cases. The Paris Agreements entered into force on 9 April 1931.

What was settled were claims to war reparations for damage inflicted by Hungary on the neighbouring countries and their citizens during the Great War which were imposed on Hungary as a defeated enemy under the Trianon Treaty on the one hand, and the losses incurred to Hungary and its citizens because of the transfer of the territories that went to Czechoslovakia, Romania and Yugoslavia on the other hand.[82]

Hungary was deemed to be financially unfit to provide reparations while at the same time the Eastern Creditor countries' economic stability was menaced by the peril of paying substantial sums of money in compensation for the lands taken in the agrarian reforms.

The obligations of the Little Entente States towards proprietors affected by agrarian reform under Article 250 were still uncertain and undetermined at the time. The Hungaro-Yugoslav MAT, for instance, although it had declared itself competent to arbitrate, had not yet at the time of negotiation of the Paris Agreements rendered a single judgment ordering the Yugoslav State to pay indemnities.[83] The solution was to be found in a settlement to be recorded in the form of treaties. In the words of the Hungarian agent, Ladislas Gajzago:

> The Paris Agreements, better said, their primitive form: the Hague Agreements, came into being in an atmosphere that still weighed on Hungary, as well as on Romania, Czechoslovakia and Yugoslavia, at the Second Hague Conference in 1930, when the League of Nations, after a struggle that had already lasted three years, since the beginning

81 Agreements I to IV of 28 April 1930 (n 7). See also: Tyler (n 54).

82 For a succinct account of the settlement, see: Glasgow (n 54) 233.

83 'Contre-mémoire du gouvernement yougoslave', in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 141, 147.

of 1927, had not found a solution to the dispute that had arisen between Hungary and Romania.[84]

The elaborate way in which the mutual claims were met would require explanations that would go far beyond this chapter. It is enough to note that the claims of the Hungarian citizens for compensation arising under the agrarian laws which were examined by an MAT and confirmed in its judgments were to be settled by the Agrarian Fund set up in Agreement III. The idea to set-up the fund originated from Italian representatives at the Hague Conference and was to the considerable advantage of the Hungarian claimants. The Fund's capital was fixed at 219.5 million golden crowns[85] and was to be collected from four different sources: payments made by the Little Entente States on account of claims recognized in the agrarian reform (34 %); contributions of certain Allied and Associated Powers of their entire claims under the reparations settlement with Hungary (up to 1943) and the entire amount of payment of reparations of Hungary to all Allied and Associated Powers from 1943 to 1967 (31 %);[86] and additional contributions from France, Italy and Great Britain (35 %). Yugoslavia was to pay an annuity of one million golden crowns into the Fund starting from 1931 until 1 January 1944, and an annuity of 1,672,672 gold-

84 'Observations hongroises (Article X de l'Accord II)', in *Appeals From Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Applications Eventually Withdrawn)*, Documents of the Written Proceedings, PCIJ Rep Series C No 68 209, 212. French original: '*Les Accords de Paris, mieux dit, leur forme primitive: les Accords de La Haye, ont pris naissance dans une atmosphère qui pesait encore sur la Hongrie, de même que sur la Roumanie, la Tchécoslovaquie et la Yougoslavie, à la Deuxième Conférence de La Haye, en 1930, quand la Société des Nations, après une lutte qui durait alors déjà trois ans, depuis le début de 1927, n'avait pas trouvé une issue au différend surgi entre la Hongrie et la Roumanie…*'.

85 The value of a golden crown was equivalent to 0.304878 grams of pure gold. Ribar (n 25) 277.

86 According to the Hungarian Prime Minister Étienne (István) Bethlen: '*On assurait par-là que les paiements en réparation déjà imposée à la Hongrie retourneraient en des main hongroises*.' 'Exposé des motifs du projet de loi portant insertion entre les lois des accords relatifs aux obligations résultant du Traité de Trianon', in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 272, 280. Following the Conference in Lausanne in June 1932, however, Hungary declared a moratorium of payments and stopped paying its contributions to the Agrarian Fund. After the moratorium was extended several times, theYugoslav Government asked the Hungarian Government to either resume its payments or to consent to suspension of work of the MAT during the moratorium. 'Duplique du gouvernement Yougoslave' (9 August 1936) ibid, 345, 350.

en crowns starting from 1944 until 1 January 1967. For each cadastral jugar that would be left to the Hungarian proprietors, or for which the MAT would declare the lack of jurisdiction, or reject the claims, there would be a reduction of the Yugoslav contribution.[87]

The second fund, Fund B, was set up under Agreement IV in order to meet other categories of claims (non-agrarian claims) against the Little Entente States, arising under Articles 63, 191 and 250 of the Trianon Treaty.[88] The nominal capital of this fund was 100 million golden crowns.

The provisions of the settlement that related to the MATs were set forth in Agreement II. Fund A was designated as the defendant instead of the three Little Entente States in 'all legal proceedings brought prior to 20 January 1930 by Hungarian nationals before the Mixed Arbitral Tribunals, against Czechoslovakia, Yugoslavia and Roumania, in regard to the agrarian reforms'.[89] The same rule, pursuant to paras 1–3 of Article I, applied to 'any legal proceedings which Hungarian nationals may later institute before the Mixed Arbitral Tribunals, in regard to the agrarian reform, against those countries.' A special rule was provided in Article I(2) for Yugoslavia:

> in which the agrarian reform has not yet formed the subject of a definitive law, on account of properties which, by virtue of the laws and decrees in force, are already subject to the agrarian reform and in regard to which the owner's right of free disposal has been limited prior to 20th January 1930 by the effective application to his property of the provisions of those laws and decrees.

It was agreed that Yugoslavia was bound to promulgate the definitive law on agrarian reform before 20 July 1931, and to make sure that the new legislative provisions were applied to the properties referred to in the Agreement as rapidly as possible, and in any case before 31 December 1933. Any proceedings to be instituted in respect of properties referred to

87 See: Ribar (n 25) 277. According to Hungary, the claims that were already pending against Yugoslavia before the Hungaro-Yugoslav MAT amounted to 150 000 expropriated cadastral jugars. Until the date of the Paris Agreement II, 66 000 cadastral jugars were either exempted from expropriation or returned to the proprietors. On such a basis Yugoslavia was entitled to of a reduction 8 316 000 golden crowns.

88 ibid, 280.

89 Art I introductory sentence of the Agreement II of 28 April 1930 (n 5): Settlement of questions relating to the agrarian reforms and Mixed Arbitral Tribunals. Also reproduced in: PCIJ Series C No 68, 192 and 10 Recueil TAM 176.

in Article I as a result of the application of the new Yugoslav law were to be instituted against the Agrarian Fund, 'Yugoslavia being relieved of all responsibility', pursuant to Article I(2). The Fund was to have legal personality, to be financially autonomous and to have legal capacity to be sued before the MAT. It would 'entirely take the place of the three States in the legal proceedings referred to in Article I' as provided in Article II. In the legal proceedings referred to in Article I, the three States had the option of either maintaining their national judge on the MAT, or having a judge appointed by the Agrarian Fund. In such legal proceedings, it was stipulated in Article XII that the Agrarian Fund, as the defendant, was to be represented by its own Agent, but the Agents of the governments of the three States could also intervene whenever they wished, for the purpose of furnishing information.

In order to speed up the distribution of the amounts from the Fund, the MATs instituted an accelerated programme of work in order to provide for sufficiently frequent sessions to enable all the proceedings to be terminated by final judgments within approximately two years. The Presidents of the Tribunals were called upon to elaborate and apply the most expeditious procedure possible. The special Rules of Procedure applicable only to the 'agrarian' cases, adopted by the Hungaro-Yugoslav MAT in August 1931, provided in Article 16: 'when a judgment was rendered by adoption of the reasons set forth in the earlier judgments, only the dispositif (the operative part) was to be notified to the parties.'

Additionally, according to Article IV of Agreement II, the regular time limits for the written procedure provided for in the Rules of Procedure were to be reduced by half in the agrarian reform proceedings referred to in Article I. In those proceedings, the Tribunals had limited jurisdiction: they would not be competent to pronounce upon the differences on questions of principle set forth in the Preamble to the Agreement, nor to interpret Article 250 of the Trianon Treaty. Pursuant to Article VII, the sole basis for delivering and framing their judgments was Agreement II. If they found for the Claimant, the Tribunals would have to award him or her compensation to be charged against the Fund. Article VIII specified the issues that the Tribunals could decide upon if the proceedings referred to in Article I were concerned: whether the claimant was a Hungarian national qualified by virtue of the Trianon Treaty, whether his or her property was expropriated in application of the agrarian legislation, and if those points were established, the amount of the compensation, if any, to be allotted. This amount was to be established in a summary procedure drawn up in advance. As stated by Istvan Bethlen, '[t]hese cases can now be

regarded as having been won in advance in principle' ('*[c]es procès peuvent être regardés désormais comme gagnés d'avance en principe*.')[90]

Pursuant to Article XIII of Agreement II, the time limits for filing claims fixed by the rules of procedure of each MAT functioning between the Creditor Powers and Hungary were declared to be final and could no longer be extended.[91] All claims filed after 20 January 1930 were declared inadmissible. Since the definitive Agrarian Law was not yet promulgated in Yugoslavia, it was stipulated in Article XVI that after the promulgation of the definitive law, the Governments of Hungary and Yugoslavia would reach an agreement to determine from which act laid down in that law the period of limitation of six months was to begin to run. Failing agreement, the general provisions of Article XIII would be applied.

As was once proposed by Sir Austin Chamberlain's Committee, Article IX provided for the addition of two members to each of the MATs functioning under the Trianon Treaty, for all cases, whether agrarian or otherwise. The new members were to be chosen by the PCIJ from the nationals of neutral countries during the Great War, and who possessed the necessary qualifications to act as arbitrators. Accordingly, the composition of the MATs established under the Trianon Treaty went from three to five members.

The right of appeal against MATs judgments was provided in Article X (echoing the Finish proposal in 1928), but not for all questions. It covered 'all judgments on questions of jurisdiction or merits which may be given henceforth by the Mixed Arbitral Tribunals in all proceedings other than those referred to in Article I of the Agreement [II].' Therefore, agrarian cases where the whole dispute concerned agrarian matters, were excluded from the appealable matters. The right of appeal was to be exercised by written application to the PCIJ by either of the two Governments between which the MAT was constituted, within three months from the notification of the judgment to the Agent of that Government.

The essence of the 1930 Paris compromise was that Czechoslovakia, Yugoslavia and Romania consented to the continuance of the Trianon MATs[92] while most other MATs were being dismantled after adoption

90 'Exposé des motifs' (n 86) 282.

91 The claims before all MATs had to be filed within certain deadlines, generally one year after the establishment of the tribunal. Requejo Isidro and Hess (n 13) 255.

92 Tyler (n 54) 116. Royall Tyler was the League of Nations Financial Committee's financial advisor to the Hungarian Government in Budapest (1931–38).

of the Young Plan.[93] The Little Entente finally also consented to their broader mandate, ie to the MATs jurisdiction over agrarian reform cases. Continuance of the MATs was one of Hungary's negotiating points.[94] Furthermore, not only were they continued, but they were also reinforced by two neutrals 'in order to appease fears and to create ... bilateral institutions which would provide guarantees to all Parties'.[95] Acting upon such a request by the Hungarian Government, on 31 May 1930, and upon receipt of the notification from the French Government that the Paris Agreements had been ratified, on 15 May 1931 the PCIJ made the required appointments. It selected the following persons for the Hungaro-Yugoslav Mixed Arbitral Tribunal: Joost Adriaan van Hamel (Netherlands), former High Commissioner at Danzig, and Didrik Nyholm (Denmark), former judge at the PCIJ.[96]

Hard bargaining and political negotiations, which involved working day and night[97] when so much was at stake for all countries involved, resulted in reformed arbitral tribunals and a right of appeal. The right of appeal against MAT judgments was offered as a safety net for States which had lost trust in MATs and their interpretative techniques:

> As can be seen, its introduction in the Paris Agreements was inspired by an excess of precaution; it is, so to speak, an institution of pure excess, a safety valve against serious dangers, if even the confidence in the mixed arbitral tribunals strengthened by two neutral judges, appointed by the High Court, were to be shaken.[98]

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93 The activities of most of the MATs between Germany and other countries were terminated in 1930. Requejo Isidro and Hess (n 13) 252.

94 Tyler (n 54) 117. '… In order to cut short [agrarian reform] disputes, the three countries requested the abolition of the MATs functioning between them and Hungary, but Hungary could not consent to that.' 'Observations hongroises' (n 84) 212.

95 ibid.

96 PCIJ (1930–31) Seventh Annual Report, 189.

97 Tyler (n 54) 114–15.

98 *Comme on le voit, son introduction dans les Accords de Paris fut inspiré par un excès de précaution; elle est, pour ainsi dire, une institution de pur surcroît, une soupape de sûreté contre des dangers graves, si même la confiance dans les tribunaux arbitraux mixtes renforcés de deux juges neutres, nommés par la haute Cour, venait à être ébranlée.* Explanation of the Agent of Hungary on reasons for introducing the right of appeal in Agreement II. This was a written explanation dated 31 December 1932 provided upon the request of the PCIJ in the case of *Appeals From Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*: 'Observations hongroises' (n 84) 213.

The Hungarian Government, aware of the extraordinary character of the remedy, had strong motives to support the right of appeal:

> This is perhaps the first example in international law where an international court has been systematically set up as an appeal instance above another international court. Hungary may have both advantages and disadvantages; however, this provision significantly strengthens the position of mixed arbitral tribunals and with it the rights of Hungarian nationals under Article 250 of the Trianon Treaty.[99]

It might be that Hungary, by insisting on the preservation of the Trianon MATs and on the introduction of the right of appeal, hoped that eventually some expropriation cases would be actionable under Article 250 of the Trianon Treaty and would fall under the appeals jurisdiction of the PCIJ.

The Little Entente, on the other hand, reluctantly accepted the right of appeal tempered by the carve-out of the most important group of cases mentioned in Article I.[100] Although the jurisdiction for Article I cases was conferred on the reformed MATs, they were divested of the power to interpret Article 250 or to pronounce upon any other question of principle in those proceedings. It is arguable that the Little Entente felt adequately safeguarded by the Paris Agreement from future responsibility for an un-assessable amount of damages arising from expropriation of large land estates. It was the Agrarian Fund that took over the duty to compensate the landowners while the contributions of the Little Entente to the Agrarian Fund were fixed as a lump-sum (*forfaitaire*).[101] Given that

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99 '*C'est en droit international, peut-être le premier exemple ou une juridiction internationale a été érigée systématiquement en instance d'appel au-dessus d'une autre juridiction internationale. La Hongrie pourra en retirer des avantages et aussi des inconvénients; quoi qu'il en soit, cette disposition renforce singulièrement la position des tribunaux arbitraux mixtes et avec cela aussi les droits que les ressortissants hongrois tiennent de l'article 250 du Traité de Trianon.*' Exposé des motifs (n 88) 286.

100 The reasons for which Hungary proposed appeal to the PCIJ and the reasons why Romania rejected it are expounded in Blühdorn (n 7) 184. In short, Blühdorn opines that the arguments of the Hungarian applicants requesting restitution of large properties or full indemnity in gold, even if they were legally sound, threatened the very existence of the Romanian State. Romania knew that the PCIJ could not take into account political and economic arguments but had to decide solely on the basis of law.

101 Art III para 2 Agreement II and art X para 8 Agreement III. Pursuant to art VI Agreement II, the Agrarian Fund was supposed to disburse the compensation to Hungarian owners in instalments starting at the latest before 31 December 1932, and continuing until 1967. However, when the Agrarian Fund was dissolved on 31 December 1949, only three instalments had been paid: '*Lorsque le Fonds*

the Little Entente believed that all agrarian cases were excluded from the appeal, the potential risk of being taken to the Court by an appeal was perceived as minimal. Otherwise, considering the earlier MATs judgments on jurisdiction, failure to accede to the Paris arrangement could lead to further judgments granting compensation for the expropriated properties that would impose unlimited liability on the Little Entente States.

In a paper published in 1931, the Yugoslav Agent before the MATs wrote:

> For covering all the sums that were already awarded or that were to be awarded in the future to Hungarian citizens by MATs judgments in the disputes between Hungary and the powers of the Little Entente, it was necessary to establish two funds with a capital of approximately 320 million golden crowns. And still, serious doubts persist on the question whether all the requests of the Hungarian citizens have been covered by the funds in questions.[102]

5. The Pajzs, Csáky and Esterházy Cases Before the MAT

After the Paris Agreements came into force in 1931, the Trianon MATs resumed their work in their new composition of five members. Most of the issues raised before them, including jurisdiction for agrarian reform, had been decided earlier in similar cases by some of the three MATs in their original composition.[103]

The Yugoslav Law on Liquidation of the Agrarian Reform on Large Estates was promulgated on 19 June 1931, in accordance with the obligation set forth in Article I (2) of Agreement II. The law definitely expropriated large estates, but as far as Hungarian owners were concerned, the compensation was to be paid by Yugoslavia to Fund A, set up under Agreement III.

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agraire cesse son activité le 31 décembre 1949, seuls trois faibles acomptes proportionnels aux sommes indiquées dans les jugements des tribunaux arbitraux mixtes sont distribués aux optants hongrois.' Application des traités de paix. Accords de La Haye (20 janvier 1930): Archives du Fonds agraire et du Fonds spécial (1928–1950) Répertoire numérique détaillé de la sous-série AJ/23 (AJ/23/1-AJ/23/55) établi par Philippe du Verdier et M. Renault (1971), revu et complété par Olivier Maugé et Céline Parcé (2017) et Michèle Conchon (2018) <https://www.siv.archives-nationales.culture.gouv.fr/siv/rechercheconsultation/consultation/ir/consultationIR.action?irId=FRAN_IR_055761>.

102 Stoykovitch, 'Les Tribunaux arbitraux mixtes' (n 7) 255.

103 'Observations hongroises' (n 84) 213.

The recipients of the land had to pay to the State the amounts fixed as purchase money for the land.[104] The Law instructed expropriated Hungarian landowners to address the Agrarian Fund for compensation.

It should be remembered that 20 January 1930 was the deadline for filing the claims but that there was a possibility to extend the period of limitation after the promulgation of the definitive law in Yugoslavia, for six months.[105]

In December 1931 three cases were registered with the Yugoslav-Hungarian MAT against the Agrarian Fund: cases nos. 733 (*Pajzs*), 734 (*Esterházy*) and 735 (*Csáky*). All three applicants were large estate proprietors whose estates had already been seized in 1922, 1928, and 1921 respectively on the basis of governmental decrees, but the expropriation was now definitively confirmed by the Law on Liquidation of the Agrarian Reform of 19 June 1931.

On 21 April 1933, the Yugoslav-Hungarian MAT sitting in the Hague rendered judgments[106] dismissing the *Pajzs*, *Csáky* and *Esterházy* cases against the Agrarian Fund as inadmissible because they did not respect the deadline.[107]

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104 Pursuant to Article 11 of the Act. See Pržić 'Naša agrarna reforma' (n 7) 459. Nikolić (n 7) 78.

105 On 20 January 1930, more than five hundred 'agrarian' proceedings were already pending before the three Trianon MATs. *The Pajzs, Csáky, Esterházy Case* (Separate Opinion of Mr Hudson) PCIJ Series A/B No 68 81–82. Forty-six of those were before the Hungaro-Yugoslav Mixed Arbitral Tribunal (n 18) 292–95.

106 For the decisions of the MAT, see 'Annexes à la requête hongroise: Annexes IV/I-III', in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 19–23. The decision in the Pajzs case (19–21) is fully reasoned, while the other two decisions note: '*Attendu que pour la présente affaire le Tribunal confirme la jurisprudence qu'il a admise en date de ce jour dans l'affaire Pajzs contre Fonds agraire, no 733*' (22–23). This statement is followed by the operative part.

107 The agreement reached between Hungary and Yugoslavia by exchange of notes provided for a time limit of six months that ran from the receipt of the service of the decree on expropriation by the applicant. The applicants believed that their applications were timely since they were filed within this six-month time limit. However, the MAT interpreted the time limit to refer only to filings based on new seizures that took place after the definitive Law on Agrarian Reform entered into force, whereas the seizures that took place earlier (like those in the cases in question) were time-barred. The MAT at the same time acknowledged that the provisions of Article XVI Paris Agreement II were equivocal and the agreement reached between Hungary and Yugoslavia did not dispel the doubts on their interpretation. It should be noted that part of Esterházy's claim regarding 348 ju-

Two months later, on 15 June 1933, fresh proceedings numbered 747 (*Esterházy*) were instituted with the MAT, this time against Yugoslavia. On 18 October of the same year, cases number 749 (*Pajzs*) and 750 (*Csáky*) were also registered against Yugoslavia. All three claims sought indemnity for the expropriated estates on the basis of Trianon Treaty Article 250.[108] In two of the applications, this indemnity was described as the 'local indemnity' which Yugoslavia pays to her own nationals proprietors of large estates expropriated under the agrarian reform.[109] The reason for these claims might have been the fact that the compensation promised to be effected through the Agrarian Fund did not prove to be effective enough.[110]

The hearing in all three cases was held the following year on 3 November, less than a month after assassinations of King Alexander of Yugoslavia and the French Minister of Foreign Affairs Louis Barthou in Marseilles.[111]

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gars of land was declared admissible since this was a new expropriation ordered pursuant to the Yugoslav Act of 19 June 1931.

108 In Case *Eva Thalheimer c État serbe-croate-slovène*, the MAT decided as a general rule that Hungarian citizens are entitled to seize the MAT on the basis of Article 250, without obligation to exhaust the local remedies. The possibility of regulating their case by an administrative procedure did not prevent them, according to the MAT from addressing the MAT directly. See, 'Décisions du Tribunal Arbitral Mixte Hungaro-Serbe-Croate-Slovène Relatives à l'interprétation de l'Art. 250 du Traité de Trianon' (1929) 20 Bulletin de l'Institut Intermédiaire International 1.

109 'Judgment of December 16th 1936 the Pajzs, Csáky, Esterházy Case' (summary), PCIJ Series E No 13 Thirteenth Annual Report, 129, 130. According to the dissenting opinion of the Hungarian arbitrator Aladár Székács, the compensation to be received from the Agrarian Fund was supposed to amount to between 20 and 33 % of the assessed value of the expropriated property whereas the local compensation in Yugoslavia reached only 6 % of its value. Opinion dissidente de l'arbitre hongrois A Székács (n 38) 45.

110 The mechanism instituted by the Paris Treaties apparently did not start out well. The moratorium on the payment of reparations by Hungary in 1932 severely affected the Fund's ability to raise its planned capital. Other Parties to the Paris agreement accepted the moratorium on the condition that their payments were also stayed. Of all the Parties only Yugoslavia and Romania continued to pay their dues. In 1933, the Fund barely had enough assets to cover the costs of its management. The owners that had obtained MAT awards were said to have had only a worthless piece of paper in their hands. Their position was exacerbated by the Stavisky affair that was shaking France at the time. Stavisky had incorporated a company that purchased the claims of the disappointed Hungarian owners for a fraction of their value and sold them as bonds to the French public. Marthe Hanau, 'Le coup de bons Hongrois'. *Écoutez-moi* (Paris, 24 Mars 1934) 13; Duplique du gouvernement Yougoslave, (n 86) 350.

111 On 22 November 1934, Yugoslavia submitted a formal appeal against Hungary at the League of Nations accusing it of complicity in the assassination. See in

None of the claimants appeared before the MAT. They were all represented by the Hungarian agent.[112]

The judgments in the second *Pajzs*, *Csáky* and *Esterházy* cases were rendered in Interlaken on 22 July 1935.[113] The MAT accepted the first objection of the Respondent State and declared the cases against Yugoslavia inadmissible as they were agrarian cases. The third objection of the Respondent State, ie that the MAT had no jurisdiction, was not entertained.[114] One of the neutral arbitrators (van Hamel) dissented, on the ground that the claim should have been declared inadmissible due to belatedness.[115] The Hungarian arbitrator (Aladár Székács) wrote an unusually long, 28-page dissent,[116] expounding on why the MAT should have declared the claim admissible.[117]

The winning argument of the Yugoslav State, accepted by the MAT, was that the three applications were initiated 'in regard to the agrarian reform'

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more detail about the diplomatic consequences of the assassination, Michael D Callahan, 'Preventing a Repetition of the Great War: Responding to International Terrorism in the 1930s', in Michel Erpelding, Burkhard Hess, Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019), 85.

112 Government agents were entitled and even obliged to intervene on behalf of their citizens. Every decisive act of the citizen, such as default, withdrawal or settlement, pursuant to most rules of procedure, had to be approved by those agents. Rules of the Hungaro-Yugoslav MAT (1931) 4 Recueil TAM 547, section 47 para 3 and section 56 para 2. See also Blühdorn (n 7) 8; Stoykovitch, 'Les Tribunaux arbitraux mixtes' (n 7) 257.

113 See decisions of the MAT published 'Annexes à la requête hongroise: Annexes V/I-III', in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 23–32. This time all three decisions were reasoned, but with almost identical reasoning.

114 Yugoslavia argued that the Tribunal had no jurisdiction to hear the actions instituted against the Yugoslavian State, because it only had jurisdiction to hear agrarian cases that were instituted against the Agrarian Fund.

115 See decisions of the MAT published in 'Annexes à la requête hongroise: Annexes VI/I-III', in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 32–36. All three dissenting opinions had an almost identical reasoning.

116 See decisions of the MAT published in 'Annexes à la requête hongroise: Annexe VII', in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 36–64. The decisions of the MAT, including those against which the dissent was written, were customarily brief. Requejo Isidro and Hess (n 13) 254.

117 The archivists note that there were altogether twelve dissenting opinions of arbitrators before the Hungaro-Yugoslav MAT in the period from 5 October 1929 to 22 July 1935. *Application des traites de paix* (n 12) 47.

(‘*à propos de la réforme agraire*’); consequently, the application of Article 250 of the Treaty of Trianon to matters of agrarian reform was excluded by Agreement II. The MAT declared that:

> [the settlement articulated in Agreement II] would not be effective unless it comprised all actions that were initiated or that were to be initiated by Hungarian citizens against Romania, Czechoslovakia and Yugoslavia, in regard to the agrarian reform. The first article of the Paris Agreement covers them all, and no such action can be based on Article 250 of the Treaty of Trianon, because that would mean reviving the conflict that precisely the Paris Agreements were aimed at disposing of.[118]

6. *The Pajzs, Csáky and Esterházy Cases Before the PCIJ*

Before the MAT judgments were delivered, Hungary had already successfully defended itself against an appeal before the PCIJ in the *Peter Pázmány University* case initiated by Czechoslovakia[119], and brought about an early withdrawal of Czechoslovakia’s earlier applications of a similar nature.[120] The stage was now set for filing its own appeal against the MAT’s decisions issued in favour of Yugoslavia.

On 6 December 1935, the Hungarian Government instituted appeal proceedings against the Yugoslav Government concerning three judgments rendered on 22 July 1935 in which the MAT dismissed as inadmissible the cases brought before it against the Yugoslav Government by Pajzs, Csáky and Esterházy.

The three-month time limit for filing the appeal that started to run from the notification of the MAT judgment to the appellant state was

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118 *L'intention des Parties est évidente: Tout en maintenant leur point de vue de principe par les réserves inscrites dans le préambule, elles en ont fait abstraction en pratique pour arriver à l'entente articulée dans l'Accord. Cette entente n'est effective que si elle comprend tous les procès intentés ou pouvant être intentés par des ressortissants hongrois à la Roumanie, la Tchécoslovaquie et la Yougoslavie à propos de la réforme agraire. L'article premier de l'Accord les comprend tous, et aucun de ces procès ne peut plus être basé sur l'article 250 du Traité de Trianon'; ce serait faire renaître le conflit que précisément l'Accord avait pour but d'écarter.* ‘Annexes à la requête hongroise: Annexes V/I-III’ (n 115) [translation from French original by the authors].

119 *Peter Pázmány University* (n 9).

120 *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (Order of 12 May 1933) PCIJ Series A/B No 56.

observed by Hungary.[121] In accordance with the Court's Statute (Article 40) and the Rules (Article 36), other states were entitled to appear before the Court. In this case, the Romanian and Czech Governments asked for the documents of the written proceedings.[122] The Hungarian and the Yugoslav Governments availed themselves of their right to nominate a judge (Guillaume Paul de Tomcsányi and Milovan Zoričić).[123] The same agents that represented the Hungarian and Yugoslav Governments before the MAT, Ladislas Gajzago and Slavco Stoykovitch, represented them before the PCIJ.

Hungary's Application was founded firstly on the Paris Agreement II Article X, which provided for the right of appeal to the Court from all judgments on questions of jurisdiction or merits handed down by the MATs 'other than those referred to in Article I of [Agreement II].' Hungary requested the Court to admit the appeal and reverse the judgments complained of by adjudging that the MAT was competent. In subsequent pleadings, Hungary also requested a decision on the merits.[124] Secondly, the Application was also founded on alternative grounds: Article XVII of Agreement II and Article 22 of Agreement III, which constituted a compromissory clause entitling signatories to have recourse to the Court by unilateral application in the event of any difference as to the interpretation or application of Agreements II and III. In so far as the Application was founded on those articles, Hungary in the alternative asked the Court to interpret all Paris Agreements to the effect that 'the attitude ... the Kingdom of Yugoslavia has seen fit to adopt' towards all Hungarian citizens who were in a similar situation to the three claimants was not in conformity with the provisions of Agreements II and III. According to Hungary, Yugoslavia was under an obligation to accord the benefits of national treatment to all Hungarian nationals affected by the agrarian reform who had no claim upon the Agrarian Fund and to afford them compensation

121 Art X Agreement II (n 5).

122 *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 83) 32.

123 De Tomcsányi had also been the national arbitrator of the Hungaro-Yugoslav MAT in cases 733, 734 and 735 originally initiated by the same claimants against the Agrarian Fund.

124 In its Reply, Hungary rephrased its plea for relief, requesting from the Court in item II (2)(b) 'to decide on appeal all the questions, whether those of a preliminary character indicated above or those *on the merits*; preferably it will do this by way of *revising the judgments appealed from*, in conformity with the relevant customary or treaty law, applying in particular Article 250 of the Treaty of Trianon, and the provisions of Agreements II and III ...' (emphasis added), 'Observations hongroises' (n 84) 36–37.

pursuant to Article 250 of the Trianon Treaty, which would be equivalent to local indemnities received by Yugoslav nationals for expropriated land.

The Kingdom of Yugoslavia in turn, in its Counter-Memorial, lodged preliminary objections and also made a general statement on the merits.[125] The first objection challenged the admissibility of the appeal under Article X of Agreement II, because it related to the agrarian reform that was expressly excluded by the said provision. The other objection challenged the alternative course of action relied upon by Hungary because essential conditions set forth in Article XVII of Agreement II and Article 22 of Agreement III had not been met.

Article X of Agreement II was thus the cornerstone for assessing the admissibility of the appeal against the three judgments. The issue was whether all three cases were the proceedings referred to in Article I of the same Agreement. Hungary argued that the term 'proceedings ... in regard to the agrarian reforms' found in Article I should be understood narrowly to refer only to proceedings like those that were pending before the MATs in 1930, in which the Hungarian applicants contested the application of the agrarian reform in general and sought to obtain either the restitution or, failing restitution, payment of the full value of the expropriated properties. On the other hand, this term should not be understood to encompass cases where the applicants did not contest the agrarian reform in itself and sought to obtain only indemnities granted to Yugoslav nationals under their national laws (allegedly like Pajzs and Csáky in the cases at hand).[126]

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125 Initially, Yugoslavia submitted preliminary objections, which were joined to the merits by the Order of the Court issued on 23 May 1936. *The Pajzs, Csáky, Esterházy Case (Preliminary Objection)* (Order of 23 May 1936) PCIJ Series A/B No 66.

126 This distinction was unpersuasive, as pointed out by the Yugoslav agent and the Court: 'Contre-mémoire du gouvernement yougoslave' (29 February 1936), in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 141, 163; *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80) 55–56. The Hungarian applicants whose case was before the Court had originally initiated claims regarding the same expropriations in which they requested full compensation, and only after their failure before the MAT, had reduced their claims to the level of local compensation, hoping that by this change, they could acquire a new legal basis to direct their claims against Yugoslavia.

The hearings in this case were held for three weeks in October and November 1936.[127] In the judgment issued on 16 December 1936,[128] the Court, by majority of eight votes to six, rejected the narrow interpretation on grounds that no such restriction of the scope of the Paris Agreements figures in the general text of Article I of Agreement II.[129] Having found that all characteristics of the legal proceedings set forth in Article I paragraph 2 were met (cases were brought (a) by Hungarian nationals; (b) after 20 January 1930; (c) in regard to the agrarian reform in Yugoslavia; (d) before the MATs; (e) in respect of properties which had already been, by virtue of the laws and decrees then in force, subject to the agrarian reform and in regard to which the owner's right of free disposal had been limited by the effective application of these laws and decrees to his property prior to 20 January 1930), the Court concluded that the appeals against the MAT's judgments were inadmissible ('cannot be entertained').[130] The last characteristic, or restrictive condition, was decisive, because had it been proven otherwise, ie had it been shown that the properties were expropriated after the promulgation of the new Yugoslav Law on Liquidation of the Agrarian Reform, the claims would not have fallen under the definition of the agrarian claims that were settled by the Paris Agreements.[131] However, in the cases of Pajzs, Csáky and Esterhazy, 'this law simply said amen to what was already realised'[132] prior to the Hague and Paris Agreements, ie prior to 20 January 1930.[133]

The Court sided with the MAT's view that the Agreements provided for the settlement of all the agrarian claims.[134] Consequently, the right of appeal was excluded for all agrarian matters. The view adopted by

127 *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80) 40. See also: Pržić 'Naša agrarna reforma' (n 7) 460.

128 *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80). A summary of the judgment was published in 'Arrêts, Ordonnances et Avis Consultatifs de la Cour Permanente de Justice International' (1937) 36 Bulletin de l'Institut Juridique International 74. See also PCIJ Series E (n 111).

129 *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80) 56–58.

130 ibid, 65.

131 ibid, 59.

132 'Réplique du gouvernement hongrois' (1st July 1936), in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 190, 216.

133 Except for some 348 jugars of land expropriated from Esterházy, for which the MAT awarded compensation against the Agrarian Fund in case no 734, since this was a new expropriation ordered pursuant to the Yugoslav Act of 19 June 1931. See above (n 107).

134 *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80) 59–60.

the Court was not surprising. Article 1 of the Paris Agreement had been construed in this way before the dispute between Hungary and Yugoslavia arose. A distinguished Finnish lawyer wrote in 1931:

> It should also be noted that in the agreement concluded in 1930 between Hungary and the "successor states" on the subject of Hungarian reparations, Article 10 stipulates that appeals to the Court against judgments on jurisdiction or the merits of the mixed tribunals, *insofar as they do not concern agrarian lawsuits*, will be admitted without the need for a special compromise.[135]

The Court's construction was probably based on contemporary recollection. The 1930 Hague Agreement stated the terms of the settlement more clearly than the Paris Agreement:

> The responsibility in connection with all lawsuits now proceeding and which may be begun in regard to Agrarian Legislation, including the Reform to be carried out in Jugo-Slavia which has not yet formed the subject of a final law, shall henceforth be borne by a common fund hereinafter called the "Agrarian Fund" in so far this fund is available.[136]

Nevertheless, six of the judges were persuaded by the restrictive interpretation proffered by Hungary, and five separate opinions were lodged, which showed that part of the Court was inclined to broaden its appeals jurisdiction to agrarian cases.

Yugoslavia's second objection, relating to the admissibility of the alternative action based on Article VII of Agreement II and Article 22 of Agreement III, was dismissed as unfounded. However, the Court dismissed

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135 *Notons aussi que dans l'accord conclu en 1930, entre la Hongrie et les "Etats successeurs" au sujet des réparations hongroises, l'article 10 dispose que contre les arrêts de compétence ou de fond des tribunaux mixtes,* pour autant qu'il ne s'agira pas de procès agraires*, l'appel à la Cour sera admis, sans qu'il soit besoin de compromis spécial.* Erich (n 56) 272. Emphasis added.

136 Agreements Concluded at the Hague Conference, January 1930, Agreement Relating to Hungarian Obligations under the Treaty (n 82), Article 1 of Annex I 158. The Agreements concluded at the Hague are the only preparatory materials that are available. Pursuant to a decision of the Paris Conference and upon the proposal of Italy, the *travaux préparatoires* of the Paris Agreements were destroyed in order not to mislead the interpretations of the final texts. 'Duplique de M Gajzago (agent du gouvernement hongrois) aux séances publiques des 5 et 6 mai 1936', in *The Pajzs, Cháky, Esterházy Case*, Pleadings, Oral Statements and Documents, PCIJ Series C No 649–50.

the Hungarian claim on the merits: Hungarian nationals were covered by the Paris Agreements which, *inter alia*, sought to limit the liability of the Little Entente states for expropriation.

The Court dismissed Hungary's argument according to which Hungarian nationals were entitled to national treatment, ie that they were entitled to so-called local indemnities '...if, for any reason, which might be due to a mistake or lack of diligence on the part of the Hungarian national himself, the Agrarian Fund was relieved of liability.'[137]

> The Court opined:
> If the scope of the Paris Agreements is restricted in the manner contended by the Hungarian Government, the Agreements would scarcely appear to give effect to the principle of lump-sum payments which they were intended to establish.[138]

After having analysed the considerations regarding the scope of the Paris Agreements, the Court concluded that the attitude of Yugoslavia towards Hungarian citizens affected by the measures of agrarian reform was in conformity with the provisions of those Agreements.

> The Yugoslav newspapers reported the judgment in the following way: According to the judgment of the international court in the Hague, our State has no obligation to pay Hungarians 40 million dinars for landed estates that were affected by the agrarian reform after the Paris Agreements. ... Our state pays a lump-sum amount into the fund, which approximately represents the sum of indemnities that would have been paid under our national legislation to the affected Hungarian nationals.[139]

After this judgment, the Hungaro-Yugoslav MAT continued to work for a while, but there were no more appeals to the PCIJ.[140]

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137 *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80) 59.
138 ibid.
139 (1936) *Vreme* (31 December).
140 The tribunal was wound-up between December 1941 and April 1943. Valls, Vuillet and Conchon (n 12) 47.

7. *The Nature of the Court's Appeals Jurisdiction*

The most important characteristic of MATs as international arbitral bodies was that private individuals could appear before them as parties.[141] The whole architecture of MATs revolutionized the standing of private individuals in international proceedings and empowered them to claim against a State for alleged breaches of a treaty.[142] The fact that MAT judgments were issued in an arbitration where one of the Parties was a private individual posed a problem for the PCIJ, which had limited jurisdiction confined to disputes between sovereign states.[143] One of the dilemmas that puzzled lawyers at that time was whether the appeals procedure was a new case or continuation of the case which was decided by the decision that was appealed.[144] Already in the case of *Appeals from certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*, in which the first appeals were addressed by the PCIJ,[145] the Court requested the Parties (Czechoslovakia and Hungary) to express their points of view regarding the relationship of Article X of Agreement II, that provided for jurisdiction of the PCIJ as an appeals instance, and the provisions of the Court's Statute, including the Covenant of the League of Nations Article 14, which determined the jurisdiction and functioning of the Court. The views that the Parties had expressed in their submissions addressing the inquiry of the Court, that

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141 De Auer (n 28) xvii, Stoykovitch, 'Les Tribunaux arbitraux mixtes' (n 7) 257; Requejo Isidro and Hess (n 13) 245.

142 For the historical development of access of individuals to international judicial bodies, see 'Rapport de M St P Sériadès: Le problème de l'accès des particuliers à des juridictions internationales' (1929) 35 Annuaire de l'Institut de droit international 505, 530–33; Stoykovitch, *De l'autorité de la sentence* (n 9) 35–41; Requejo Isidro and Hess (n 13) 246.

143 See also: Rosenne (n 62) 70, who thinks that this was one of the main reasons why the Finnish/Rundstein initiative to introduce a general provision on appeals had failed.

144 See 'Observations hongroises' (n 84) 216.

145 In the case of *Appeals from certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (n 124) Czechoslovakia submitted two applications: the first on 7 July 1932 (registered on 11 July 1932) appealing judgments of the Hungaro-Czechoslovakia MAT concerning question of jurisdiction in cases no. 321 and no. 752, and the second on 20 July 1932 (registered on 25 July 1932) appealing the judgment upon merits in case no. 127. Following the preliminary objections submitted by Hungary against both applications, the PCIJ joined the two cases by Order of 26 October 1932. The case was concluded on 12 May 1933 by an Order of the PCIJ terminating the proceedings and removing the cases from the courts list after Czechoslovakia withdrew its appeals.

were later referred to in the *Peter Pázmány University* case,[146] shed some light on the scope of the Court's newly obtained appeals jurisdiction.

The Hungarian agent, Ladislas Gajzago, stated that Article X was an agreement providing for arbitration ('*le compromis en vue de l'arbitrage*'), which was to be exercised by the Court between two respective states if one of them seized the Court by a request.[147] In his view Article X expressed two underlying ideas. First, after termination of the procedure before the MAT, where most of the proceedings are conducted by individuals against the opposing State, a new dispute arises before the Court on the basis of the arbitration agreement. This dispute, initiated by means of a request, is exclusively between the States. Second, the arbitration agreement gives jurisdiction to the Court to re-examine the awards of the MATs, either on jurisdiction or on the merits, as an appeals instance. He also suggested there is also a third underlying idea behind this Article that is implied in the text because it goes without saying: the Rules of the Court, as well as Article 14 of the Covenant of the League of Nations, remain intact.[148] A second arbitration to be exercised by the Court in the form of re-examination of another arbitral award did not seem to the Hungarian agent to be in contradiction with provisions of the Statute and Rules of the Court.[149] Only the States were parties to the disputes before the Court as they acted in their own name in the appeals proceedings, rather than as representatives of their citizens. The judgments rendered after an appeals procedure solely concerned the states, and it was at their discretion to invoke those judgments, or to comply with them, without their citizens' involvement.[150]

In the *Peter Pázmány University* case, the PCIJ did not pronounce its opinion on the nature of the jurisdiction conferred upon it by Article X of Agreement II. It did not expressly confirm that the appeals procedure was a second arbitration but simply accepted jurisdiction on the basis of 'a special agreement of submission inserted in a convention between the States', and added that 'The fact that a judgment was given in a litigation to which one of the Parties is a private individual does not prevent this judgment from forming the subject of a dispute between two States

146 'Observations hongroises' (n 84) 209.
147 ibid, 211.
148 ibid.
149 ibid, 215 and 216.
150 ibid, 218–19.

capable of being submitted to the Court, in virtue of a special or general agreement between them'.[151]

It seems safe to conclude that the PCIJ regarded its appellate jurisdiction as one of public international law in character although the underlying disputes leading to appeals had been of a private nature. This follows from the PCIJ's frequent references to the Paris Agreement as grounds of its jurisdiction. This conclusion is corroborated by the commentaries of the time.[152]

When the new Rules of the PCIJ were being drafted in 1936, a Co-ordination Committee proposed several principles, amongst which a principle that any instance of appeal before the Court based on application or special agreement should be deemed to institute a new case before the Court even if the object of the case was a judgment rendered by another jurisdiction on the same facts. The Committee proposed a new Article 67 which was entitled 'Appeals to the Court'.[153]

In the *Pajzs, Csáky, Esterházy* case, which was instituted before the new 1936 Rules entered into force, the PCIJ outlined the conditions that had to be met before it could entertain the Hungarian Government's appeal. All three conditions were set forth in Article X of Agreement II: (1) the MAT judgment must be rendered subsequently to the Paris Agreements; (2) the judgment must be on a question of jurisdiction or merits; and (3) the judgment must be rendered in a case other than those referred to in Article I of Agreement II.[154] Since the first condition was undoubtedly fulfilled, the Court briefly addressed the issue of whether a distinction must be drawn between the admissibility of a claim and the lack of jurisdiction

151 *Peter Pázmány University* (n 9) 221.

152 'Likewise, public international law was taken into consideration in the case concerning an appeal from a judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Series A/B, No. 61); for, by instituting the Permanent Court as a court of appeal against the judgments of the Mixed Arbitral Tribunals with respect to questions of jurisdiction or merits – Art. X of the Paris Agreement, April 28, 1930 – the contracting Powers created public international law, notwithstanding the fact that the judgment of the Mixed Arbitral Tribunal was given in a litigation to which one of the parties was a private individual.' Sidney B Jacoby, 'Some Aspects of the Jurisdiction of the Permanent Court of International Justice'(1936) 30 American Journal of International Law 233, 238 fn 26.

153 The same rule was later reinserted as Article 72 in the ICJ Rules of 6 May 1946 and 10 May 1972. Article 72 was replaced with Article 87 (Special Reference to the Court) in the revision of the ICJ Rules in 1978. See Rosenne (n 64) 71.

154 *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80) 51.

as grounds for rendering the challenged decisions. In the opinion of the Court such distinction was irrelevant for the case at hand, because in the three suits in question, the MAT's judgments that the claims were inadmissible were passed upon the merits rather than jurisdiction.[155] The Court then turned to the question of whether the three suits in which the challenged judgments were rendered were or were not proceedings referred to in Article I of Agreement II.

Another issue regarding the nature of the Court's jurisdiction is the scope of its appellate review. The Court's jurisdiction is based on consent. Therefore, the scope of its appellate review depends on the compromissory clause which is in this case Article X of Agreement II. This provision seems to be broadly tailored as it covers both decisions on jurisdiction and merits without setting any limits[156] – save for the one set forth in Article I. This raises the question on what grounds were these decisions appealable and what remedies were at the Court's disposal. Unlike some other similar instances of the PCIJ's limited jurisdiction in relation to other courts and tribunals,[157] here 'the Court is, in general, not limited in the scope of its considerations, but is, coinciding with the Mixed Arbitral Tribunals, competent to consider the question of jurisdiction as well as the merits, thus repeating the considerations of the first proceeding.'[158] Therefore, in the absence of any precise limitations it seems that the scope of the Court's appellate jurisdiction was broad – the Court had the full power of review.

Nevertheless, it was uncertain whether the Court, if it had decided to quash the MAT's decision, had jurisdiction to decide the merits of the case itself, as suggested by Hungary in its Reply Memorial. For instance, one of the dissenting judges, Hammarskjöld, opined that the three impeached MAT's judgments in the *Pajzs, Csáky, Esterházy* case were ill-founded and should have been reviewed. However, he would have referred the

155 ibid, 57. See also the Separate Opinions of Judges Hudson (ibid, 176) and Hammarskjöld (ibid, 85–86).

156 The Court noted that its appellate jurisdiction did not extend to MATs' procedural issues: 'According to the terms of Article X of the Paris Agreement No II, the Parties agree to submit to the Court 'questions of jurisdiction or merits'. In view of the fact that its jurisdiction is limited by the clear terms of this provision, the Court has no power to control the way in which the Mixed Arbitral Tribunal has exercised its functions as regards procedure.' *Peter Pázmány University* (n 9) 222.

157 Sidney B Jacoby, 'The Permanent Court of International Justice as a Court of Appeals' (1936) 22(4) Virginia Law Review 404. When speaking of the PCIJ's limited jurisdiction, the author refers, for example, to jurisdiction of the PCIJ for revision of arbitral awards (408–10) or for preliminary questions (405–406).

158 ibid, 412.

questions on the merits raised by the applicants back to the MAT for decision.[159] This, of course, would have been an issue had the Court upheld the appeals, but it is still relevant for any discussion on the Court's role as an appellate body. Hungary's position in the case *Appeals from certain Judgments of the Hungaro/Czechoslovak Mixed Arbitral Tribunal* was that the Court had the power to modify the challenged judgments and to annul them with or without remanding the case to the MAT.[160]

The Committee of Jurists, in its June 1930 *Report and Draft Resolution on PCIJ Acting as a Tribunal of Appeal from International Arbitral Awards*, suggested that the PCIJ should be vested only with the jurisdiction to annul. It could not find a general rule of international law that would provide the PCIJ with the competence to revise arbitral awards.[161] The position was that the eventual revision of the appealed award would belong to the competence of the international arbitral tribunal, except where the signatory parties conferred on the PCIJ jurisdiction as a tribunal for the revision of the merits of the principal case.[162]

Pursuant to the MAT Rules, section 58, the appeal suspended the execution of the MAT judgment whereas the effect of the PCIJ's judgment on appeal was not expressly regulated. However, one dissenting judge submitted that the judgment on appeal would acquire a *res judicata* effect both for the Parties and for the MAT. The MAT would have to enforce the remedies ordered by the PCIJ.[163]

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159 *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80). See also the Separate Opinion by Judge Hammarskjöld, ibid, 87.

160 'Observations hongroises' (n 84) 217.

161 'The function of the Court will consist in declaring the arbitral award to be null if it recognises that the claim of nullity is well founded. The Committee has considered whether in such case the Court should have the task of giving judgment upon the merits. It has not thought that a general rule could be established which would thus transfer the dispute from the field of arbitration to that of international jurisdiction by a permanent tribunal; a provision of this kind could, however, be inserted in a particular treaty dealing with a single dispute or a well-determined class of dispute. In a provision of a general character, it is impossible to go beyond the conception that, if the Court pronounces an arbitral award to be null, the parties will be replaced in the legal position in which they found themselves before the commencement of the proceedings which have led to the award.' Report of the Committee Appointed by the Council, League of Nations, 7 June 1930, C.338.M.138.1930.V, (1930) 85 League of Nations Official Journal, Special Supplement 135, 137.

162 See also: Rundstein (n 60) 14.

163 *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80). See also the Separate Opinion of Judge Hammarskjöld (ibid, 87).

There was a strong potential for unification of MATs' jurisprudence, especially after the appeals jurisdiction had been introduced. The Treaty of Trianon had created three different MATs which all had to interpret and apply the same provisions.[164] The PCIJ as an appeals instance was in a good position to correct any discrepancies in the reading of those provisions and to bring about consistency. It is interesting to note that Hungary and Czechoslovakia had previously (*Appeals from certain judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal*) brainstormed the issue of precedential value of the Court's judgments. Hungary's position was that no State could, by filing an appeal, request the Court to decide in advance, in a particular case, a series of other cases that would eventually arise before the MATs. A decision rendered in one particular case could provoke such an effect only by its persuasive power, by its intrinsic justice, and not by any mandatory force. The appeal was not introduced in Article X of the Paris Agreement II to give a quasi-legislative power to the Court.[165] On the other hand, according to Czechoslovakia the intentions were different. It was envisaged in the discussions that went on at the Paris Conference that a judgment of the Court would produce its effects even in relation to other judgments that were still to be issued by the MATs in other procedures of a similar nature. However, the issue remained open.[166] A provision extending the effect of the MATs' judgments to similar cases was already found in the previously cited Article 16 Rules of Procedure of the Hungaro-Yugoslav MAT applicable to 'agrarian cases': 'when a judgment was rendered by adoption of the reasons set forth in the earlier judgments, only the dispositif (the operative part) was to be notified to the parties.' Arguably, this provision could have had a ripple effect on the precedential value of the Court's judgments rendered in the appeals procedure. In that connection, it is important to note that *Pajzs*, *Csáky* and *Esterházy* were not the only cases where Hungarian citizens who lost the possibility to address the Agrarian Fund, had instituted or could consider instituting fresh

164 See: Blühdorn (n 7) 184 with reference to the Treaties of Paris.

165 'Observations hongroises' (n 84) 219.

166 *Appeals from certain judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (n 122) 'Exposé du gouvernement de la République Tchécoslovaque (Art X de l'Accord II)' (17 February 1933), in *Appeals From Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Applications Eventually Withdrawn)*, Documents of the Written Proceedings, PCIJ Rep Series C No 68 221, 224.

proceedings against Yugoslavia.[167] After the PCIJ rendered the judgment in the *Pajzs, Csáky, Esterházy* case, the Belgrade professor Ilija Pržić wrote:

> The Judgment of the PCIJ of 16 December 1936, which accepts our thesis, is important because it will serve as a precedent for a number of disputes of the Little Entente States with Hungarian citizens affected by the agrarian reform.[168]

8. *Conclusion: The Relevance of the Appeals Procedure Against the MAT Awards for the Current Debate on the Appeals Mechanism Against Investment Arbitration Awards*

What happened in 1927–30 bears some resemblance to what is currently happening in investment arbitration. Like today, the respondent States were dissatisfied with some of the MATs' judgments and wished to obtain more guarantees on the way the disputes would be resolved. Some of them even wanted the MATs to be abolished. One of the issues was the consistency of the MATs' judgments, but no agreement could be reached to confer jurisdiction on the PCIJ to set binding precedents. Like today, one of the pertinent issues was also the neutrality of judges and how to enhance that neutrality. In the *Peter Pázmány University* case before the MAT, the issue of challenge of a judge and the consequences of the challenged judge's resignation in the midst of the procedure were examined.[169] The States at the Paris conference discussed the ways in which the PCIJ judgments rendered upon appeal could be enforced, which is also one of the recurring topics nowadays in the context of reform of the investment arbitration and introduction of an appeals mechanism.[170]

The concept and rationale of the restructured Trianon MATs also have similarities with contemporary investment arbitral tribunals set up under

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167 See: 'Annexes au Mémoire Hongrois: Annexe XIV', in *The Pajzs, Cháky, Esterházy Case*, Application and Documents of the Written Proceedings, PCIJ Series C No 79 140, listing 19 additional large estate owners of Hungarian citizenship that could be affected by the Court's decision in this case.

168 Pržić 'Naša agrarna reforma' (n 7) 463 (translated from Serbian by the authors).

169 *Peter Pázmány University* (n 9) 218–19.

170 Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (Springer 2018) 1630–65; Łukasz Ku⨽aga, 'A Brave, New, International Investment Court in Context: Towards a Paradigm Shift of the ISDS' (2018) 37 Polish Yearbook of International Law 135.

international investment agreements. MATs were also based on international agreements and provided individuals with direct access to international jurisdiction. The claims were based on the very same international agreements which constituted and gave jurisdiction to mixed arbitral tribunals. Moreover, causes of actions based on these international agreements resemble their counterparts in contemporary IIAs as the former were genuine expropriation claims. Resistance of the respondent State to some of the decisions of the Trianon MATs echo the dissatisfaction of some countries today with trends and tendencies of contemporary international investment arbitration.

The solution to the problem in the case of MATs was found in restructuring them so that their composition was more 'neutral', and in providing for the right of appeal to the PCIJ.[171] This appeals body was not 'a superstructure on rotting foundations'[172] but a self-standing, generally recognized, superior judicial institution that had no connection to the MATs.[173] It did not have the same type of arbitrators, but rather elected, independent judges representative of the principal legal systems of the world. At the same time, each of the parties in dispute was entitled to appoint a judge, and to thereby participate in decision-making and retain some influence.[174] The composition of the PCIJ afforded sufficient guarantees that it would perform its appellate function fairly, impartially and

171 The question of review of arbitral awards by the ICJ was the subject of extensive discussions during the drafting of ICSID Convention Article 64. However, the opinion prevailed that the decisions and awards of ICSID tribunals should not be subject to an appeal to the ICJ. The International Law Commission's 1958 Model Rules on Arbitral Procedure provide for ICJ's jurisdiction to decide on the nullity or revision of an arbitral award between States. Christoph H Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) 1259, 1261.

172 See: Muthucumaraswamy Sornarajah, 'Evolution or revolution in international investment arbitration? The descent into Normlessness' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 649.

173 Rundstein (n 60) 10.

174 As was observed, 'the important thing for ensuring the success and acceptability of third-party judicial settlement of international disputes is not that national arbitrators or judges should disappear, but that neutral judges should hold the balance in the tribunal.' Serena Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body* (Springer 2014) 35, citing Shabtai Rosenne, *The law and practice of the International Court of Justice* (Nijhoff 2006), 1080–81.

in accordance with the mandate conferred upon it.[175] There were no additional costs, or political or technical difficulty, in establishing the 'central appellate facility'[176] as the PCIJ was already in place in the *Palais de la Paix*. No modification of the Statute or the Rules of the PCIJ was required.[177] The Court's authority ensured the enforceability and binding force of the appeal decisions.[178] The whole transition from private arbitration to the public Court of Appeals, from a mixed tribunal to an international court, seemed to have worked smoothly and seamlessly.

Undoubtedly, the envisaged appellate procedure also had some flaws. One of them was the lack of express empowerment for the PCIJ to decide the case on the merits if the MAT judgment was annulled. This solution was not very efficient because once the appeal was granted, another arbitration would have to be instituted. This did not materialize in the three appeals procedures that were initiated before the Court pursuant to Article X of Agreement II.[179] Nevertheless, on the basis of Judge Åke Hammarskjöld's dissenting opinion in the *Pajzs, Csáky, Esterházy* case, it seems that a successful appeals procedure would inevitably result in a new arbitration before the MAT.

Lessons learned from the interwar political crisis stemming from the work of international arbitral tribunals, and international agreements underlying their work, could be useful for the current debate on the future of international investment arbitration. One prong of the proposals for reform of the ISDS is that the system could be amended by setting up an appeal mechanism against international investment awards. Indeed, the concept of appeal was crucial back in 1930 when it contributed to the con-

175 Gabrielle Kaufmann-Kohler, Michaele Potestà, The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, CIDS Supplemental Report, 15 November 2017, 4.

176 Kate Miles, 'Sustainable Development, National treatment and Like Circumstances in Investment Law', in Marie-Claire Cordonier Segger, Markus W Gehring and Andrew Paul Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law & Business 2011) 278.

177 Although a new Article 67 was introduced to the PCIJ Rules in 1936, all three appeals proceedings were conducted on the basis of the then existing Rules of the Court.

178 Tams (n 6) 230: 'While many of the PCIJ's judgments were declaratory in nature, it is worth noting that in "no case' did states 'refus[e] … to comply with a PCIJ judgment"' (citing Shulte).

179 The first appeals case, ie *Appeals from certain Judgments of the Hungaro/Czechoslovak Mixed Arbitral Tribunal* (n 122) was withdrawn, and the remaining two, ie *Peter Pázmány University* (n 11) and *The Pajzs, Csáky, Esterházy Case* (Judgment) (n 80) were rejected.

tinuance of the Trianon MATs. One could argue that an appeal procedure would be a suitable solution for the current crisis for both proponents and opponents of the investment arbitration as it exists today.

Chapter 14: The Mixed Arbitral Tribunals and the Law of Air Warfare: The Tragic Impact of the Awards in *Coenca Brothers* and *Kiriadolou*

Mateusz Piątkowski[*]

In 1927 and 1930, the Greco-German Mixed Arbitral Tribunal (MAT) dealt with two compensation claims by Greek nationals who in 1916 had suffered personal and material damages during German air raids on Salonica and Bucharest.[1] In both cases, the arbitrators held that the conduct of German air forces had violated Article 26 Regulations Concerning the Laws and Customs of War on Land annexed to the 1907 Fourth Hague Convention ('Hague Regulations'). Under this provision, commanders had the obligation to give an advance warning before shelling land objectives, 'except in cases of assault'.[2] In the first case, *Coenca Brothers v Germany*, the MAT decided that while this provision only covered land warfare, its underlying rule applied to air warfare as well. According to its award, Article 26 Hague Regulations 'must be considered as the expression of the *communis opinio* on this matter, and … there is no reason whatsoever why rules adopted for bombardment in land warfare should not be applied to aerial attacks as well'.[3] In its second award, handed down in *Kiriadolou v Germany*, the MAT similarly refused to distinguish between the rules applicable to bombardment from the air and those already covering bom-

* Mateusz Piątkowski (PhD), Assistant Professor at University of Lodz, Faculty of Law and Administration, Attorney-at-law.

1 *Coenca Brothers v Germany* (1 December 1927) 7 Recueil TAM 683; *C Kiriadolou v Germany* (10 May 1930) 10 Recueil TAM 100.

2 Convention respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 277.

3 French original: '… *cette disposition doit être considérée comme exprimant la* communis opinio *sur la présente matière, et … il n'y a aucune raison pour laquelle les règles adoptées pour le bombardement dans la guerre sur terre ne seraient pas également appliquées aux attaques aériennes*.' *Coenca v Germany* (n 1) 687.

bardment by land and naval forces.[4] Based on this reasoning, both awards accepted the applicants' claims for compensation.[5]

While international lawyers by and large accepted this line of reasoning, which was based on the general premise that belligerents ought to respect the lives and property of civilians as much as possible,[6] the awards nevertheless had potentially unexpected long-term consequences. By developing a flawed approach to the new dimension of war, bypassing the logical and practical paradoxes that involve the applicability of the law of land warfare to the phenomenon of air bombardment, the arbitrators eventually jeopardized their purported main objective, namely the protection of civilian lives and property. In *Kiriadolou*, the Greco-German MAT not only missed an opportunity to correct the insufficiencies of *Coenca Brothers*; rather bizarrely, it also mixed the regimes of bombardment applying to naval and land warfare. Moreover, the approach taken by the MAT in both cases had drastic legal consequences for the laws of war applying to air warfare in general. Not only did it effectively bring to a halt any new serious attempts to clarify the *ius in bello* in this aspect; it also suddenly reversed the volatile process of forging new sets of rules, sparked by the drafting of the Hague Rules of Air Warfare of 1923.[7] In the long term, the MAT's awards would even be used to justify certain acts of controversial air operations during World War II, as they exemplified the ambiguity of international law with regard to air warfare.

The aim of this paper is to present the legal and factual background relating to these awards. It is divided into five sections. Section 1 presents the overall legal architecture concerning air warfare before World War I – its origins, progress and interpretation. Section 2 is related to the problem of 'law in action', ie the problematic application of the Hague Regulations in the context of battlefield practice. Section 3 addresses the widely unknown interplay between the Treaty of Versailles and air operations in the light of the post-World War I reparations framework. Section 4 presents and comments the main arguments used by the Greco-German MAT in its two awards. Finally, Section 5 highlights the consequences of the awards for the law of air warfare.

4 *Kiriadolou v Germany* (n 1) 103.
5 ibid, 104; *Coenca v Germany* (n 1) 688.
6 *Coenca v Germany* (n 1) 687; *Kiriadolou v Germany* (n 1) 103.
7 General Report of the Commission of Jurists of the Hague Part II: Rules of Aerial Warfare (1923) 17 AJIL Supp 245.

1. The Law of Air Warfare Before World War I

Until the beginning of the 20th Century, military activities during conflicts were limited to naval and land dimensions. This division was reflected in the structure of international law regulating the conduct of warfare – ie what is known today as international humanitarian law (IHL).[8] This bi-polar perspective of *ius in bello* was challenged by the progress of military aviation. Although the latter only became an effective combat tool with the development of military aircraft, balloons had been deployed in a military role since the battle of Fleurus in 1794.[9] They were used extensively in the American Civil War and the Franco-Prussian War, playing a pivotal role as reconnaissance and transportation assets. In the late 19th century, before the development of the conventional airplane, airships were considered the most promising platforms, since it was assumed that their increasing range and payload would soon allow them to become the first generation of tactical (or even strategic) bombers.[10]

It was with this knowledge in hand that the plenipotentiaries at the First Hague Peace Conference in 1899 discussed the codification of the laws of war. The agenda included an item concerning 'the discharge of projectiles and explosives from balloons'.[11] The *travaux préparatoires* show a significant clash between two perspectives. The vast majority of delegates considered that the accuracy of air bombing was too low – especially in comparison with artillery – for it to be accepted as a lawful method of warfare. However, the suggestion of a permanent ban was opposed by Britain, France and Romania. Arguing that 'aerial navigation' was still in an early phase of development and that it was too early to accept any permanent legal solution in that matter, they suggested a five-year ban instead. With the support of the United States, they eventually managed

8 Until the 1949 Geneva Conventions, *ius in bello* was more commonly referred to as the 'law of war'.

9 The same year, the French revolutionary government established the first air force detachment in the history (*1re Compagnie d'aérostiers)*. Frederick S Haydon, *Military Ballooning During the Early Civil War* (Johns Hopkins University Press 2000) 9.

10 Mateusz Piątkowski, *Wojna powietrzna a międzynarodowe prawo humanitarne* (Wydawnictwo Uniwersytetu Łódzkiego 2021) 33–34.

11 Sarah McCosker, 'Domains of Warfare', in Ben Saul, Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law* (OUP 2020) 84; 'Program Proposed By the Impartial Government of Russia to the Governments Invited to The First Peace Conference', in James B Scott, *The Conference of 1899 and 1907: Index Volume* (OUP 1921) 1.

to secure a consensus on this proposition.[12] This resulted in the Fourth Hague Declaration of 1899 prohibiting the discharge of projectiles or other explosives from balloons and 'other methods of similar nature' for a period of five years.[13] At that time, this amounted in fact to a total prohibition of air bombardment. However, the next few years saw an unprecedented progress in aviation technology.[14] As a result, at the Second Hague Peace Conference in 1907, almost all major military powers (except the United States and the United Kingdom) eventually refrained from signing the Fourteenth Declaration extending the ban on air bombardment 'until the next Peace Conference [would] be adjourned'.[15] From a technical point of view, the Declaration is still in force, although it is deemed to have fallen into desuetude.[16]

The hesitancy regarding any strict prohibition of air bombardment raises an issue when discussing the laws and customs binding in air warfare.[17] Participants at the Second Hague Peace Conference generally agreed that while air warfare as such was a legitimate method of warfare, there should be certain restrictions imposed on it. As matter of compromise, the French delegation suggested changing the wording of Article 25 Hague Regulations regarding the prohibition of the bombardment of undefended towns, buildings and villages. By adding the phrase 'by whatever means', the provision's scope of application now covered bombardment from both land and air.[18] However, the rewording of Article 25 Hague Regulations did not challenge the rules concerning naval bombardment. The preparatory works of the 1907 Ninth Hague Convention on Bombardment

12 James B Scott, *The Proceedings of the Hague Peace Conferences: Translation of the Official Texts: The Conference of 1899* (OUP 1920) 280, 287–88; Arthur K Kuhn, 'The Beginnings of an Aerial Law' (1910) 4 American Journal of International Law 109, 118.

13 Declaration respecting the Prohibition of Discharge of Projectiles from Balloons etc (signed at The Hague, 29 July 1899) 187 CTS 456.

14 Geoffrey S Corn and others, *The Law of Armed Conflict: An Operational Approach* (Wolters Kluwer 2019) 478.

15 Stuart Casey-Maslen and Steven Haines, *Hague Law Interpreted: The Conduct of Hostilities under the Law of Armed Conflict* (Hart 2018) 247.

16 Mateusz Piątkowski, 'Judging the Past: International Humanitarian Law and the Luftwaffe Aerial Operations During the Invasion of Poland in 1939', in Mats Deland, Mark Klamberg and Pål Wrange (eds), *International Humanitarian Law and Justice: Historical and Sociological Perspectives* (Routledge 2019) 115.

17 Hamilton DeSaussure, 'The Laws of Air Warfare: Are There Any?' (1971) 5(3) International Lawyer 527, 530.

18 Soterios Nicholson, 'Aerial Bombardment of Undefended Towns' (1915) 23 Law Student's Helper 5.

by Naval Forces show that delegates accepted one point of paramount importance, namely that the realities of the naval warfare preclude the possibility of occupying objects and urban areas localised on land.[19] In other words, for naval forces, the only technical way to harm the enemy's capacity to wage war (apart from naval encounters), is to allow warships to shell enemy infrastructure on land. To regulate the above-mentioned activity, Article 2 Ninth Hague Convention allowed naval forces to destroy an enumerative catalogue of targets, which in present-day IHL language would qualify as 'military objectives'. The provision specifies that naval commanders may bombard objects on land without prior warning, when there is a matter of military emergency.

It is an unresolved mystery why the delegates at the Second Hague Peace Conference created different legal regimes for naval and land bombardment but omitted to foresee the capabilities of military aviation. Article 25 Hague Regulations clearly refers to the problem of tactical bombardment, directed against urban areas in close proximity to the frontline and conducted by artillery fire.[20] It would have been much more logical and practical to consider air warfare as a method of warfare having much more in common with naval activities than with land-based operations.[21] The crucial distinction between so-called 'destruction' and 'occupation' types of bombardment was based on an awareness of military realities. Since land forces have the capacity to occupy a portion of land, one could consider that it was pointless (and unlawful) to shell undefended urban areas. On the contrary, as warships could not perform acts of 'occupation', their actions against certain categories of objects could be justified because of these technical restrictions, even if the location was undefended. However, the delegates did not foresee the strategic capabilities of air bombardment, and ultimately air operations were qualified as a form of land-based warfare, thereby creating an area of legal ambiguity.[22]

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19 Convention (IX) respecting Bombardments by Naval Forces in Time of War (signed 18 October 1907, entered into force 26 January 1910) (1907) 205 CTS 345.

20 Jay D Terry, 'The Evolving Law of Aerial Warfare' (1975) 27(1) Air Force University Review 22, 26.

21 James W Garner, 'International Regulation of Air Warfare' (1932) 3 Air Law Review 103, 119.

22 'These rules and incentives were specific, however, to the strategies and traditions of land warfare. Their applicability to air warfare was short-lived.' Christian H Robertson II, 'Different Problems Require Different Solutions: How Air Warfare. Norms Should Inform IHL Targeting Law Reform & Cyber Warfare' (2019) 52 University of Michigan Journal of Law Reform 985, 992; William F Fratcher, 'The New Law of Land Warfare' (1957) 22 Missouri Law Review 143, 148.

Finally, if the attacker established that an urban area was 'defended' in light of Article 25 Hague Regulations, this allowed him to consider the whole location (city, town, village) as one single target. The attacker was not obliged to confine his attack only to military installations, fortifications or barricades. 'Occupational' bombardment was in fact also a type of 'morale attack', and it was permissible to influence the civilian population in order to force and accelerate the defender's decision to surrender.[23]

2. *World War I and the Law of Air Warfare*

A few months before the war, British lawyers and military experts argued whether the city of London would be considered as 'undefended' due to its remoteness from the anticipated frontline.[24] Even before war, there were significant doubts whether the enemy would be forced to cancel an air attack against military objectives located within city limits. In 1914, the fixed-wing military aviation was capable of performing reconnaissance missions only, while bombardment missions were conducted by Zeppelin airships. The air campaign directed against the British Isles caused massive social disturbance (although its real significance is disputed), and the bombardment of French urban areas forced Allied reprisals strikes on German cities (eg the bombardment of Karlsruhe on 22 July 1916). The introduction of new four-engine bombers (eg the German *Gotha*) increased the payload and range of air attacks, and it was believed that, if the conflict were to continue in 1918–19, air warfare would escalate into massive terror campaigns on both sides.[25]

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23 'In case of bombardment, the attacking force is not required by The Hague Regulations to confine its operations to fortifications. Subject to the limitations noted, such a force is free to destroy any edifices, public or private; and it may be expected so to direct its fire as to cause the reduction of the bombarded place by the surest and quickest process.' Charles C Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, vol 2 (Little, Brown and Company 1922) 305.

24 'Letter of Professor T E Holland to the Times (24th April 1914): Attacks From The Air The Rules of International Law' in Thomas E Holland, *Letters To 'The Times' Upon War And Neutrality (1881–1920)* (Longmans 1921) 55; James M Spaight, *Aircraft in War* (Macmillan 1914) 13.

25 In the final stage of the war, the German authorities were determined to execute the so-called 'Fire Plan' (*Feuerplan*), which included the massive bombardment of main Allied urban areas by incendiary weapons. Conversely, the Allied aviation was planning to deploy in 1919 its increasing amount of bomber forces

Before and during the war, international law experts jointly underlined the problematic application of the law of land warfare to regulate the conduct of air operations. The notion of 'undefended' towns and villages did not correspond with the realities of strategic aerial bombardment directed against urban areas located far from the main theatre of war.[26] It was unclear whether the notion of 'defended locality' included localities equipped with air defences, including anti-aircraft guns and interceptor aircraft.[27] In fact, it was plausible to consider every town or urban areas behind the frontline as 'defended' in the context of aerial operations.[28] Prominent jurists like James Spaight and Paul Fauchille and even the *Institut de droit international* submitted new models of interpretation, presenting 'hybrid' concepts based on both bombardment regimes.[29] These proposals generally maintained that air power was entitled to attack targets of military importance, irrespectively of whether the location was 'defended' or not.[30] Although logical from both a legal and military point of view, these ideas were merely doctrinal reflections and not *prima facie* grounded in the provisions of the 1907 Hague Conventions.

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against German cities. Jon Guttman, *Zeppelin vs. British Home Defence 1915–1918* (Bloomsbury 2018) 74.

26 Michael N Schmitt, 'Air Warfare' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 121; 'The bombardment of a fortified place has only one purpose: to force the place to surrender. Consequently, the person who is not in a position to receive a surrender has no right to attack. Now, one must admit that the dirigible or the aeroplane which flies over a city which is not being attacked by any land or marine forces has no way of bringing the city to open its gates. To whom shall the city open, then? To a besieging army? There is none.' Albert de La Pradelle, 'Aerial Warfare and International Law' (1915) 58 Scribner's Magazine 21.

27 Mateusz Piątkowski, 'War in the Air from Spain to Yemen: The Challenges in Examining the Conduct of Air Bombardment' (2021) 3 Journal of Conflict and Security Law 497.

28 Frank E Quindry, 'Aerial Bombardment of Civilian and Military Objectives' (1931) 2 Journal of Air Law 474, 484.

29 James M Spaight, *Aircraft in War* (Macmillan 1914) 32–33, 118; Paul Fauchille, 'Le bombardement aérien' (1917) 24 Revue générale de droit international public 57, 73; 'Régime juridique des aérostats: Dix-huitième commission: Rapporteur M Fauchille' (1911) 24 Annuaire de l'Institut de Droit International 303, 343.

30 Myres S McDougal and Florentino P Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (reissue, New Haven Press and Martinus Nijhoff 1994) 642; H Meyrowitz, 'Le bombardement stratégique d'après le Protocol additionnel I aux Conventions de Genève' (1981) 41 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1, 5.

3. Air Warfare and the Paris Peace Conference

During the Paris Peace Conference in 1919–20, the victorious Allied and Associated Powers agreed that the Central Powers should bear financial responsibility for the conduct of their armed forces during World War I. The Treaty of Versailles established a comprehensive framework for reparations, both with regard to states (see Part VIII, entitled 'Reparation') and private persons (see Part IX, entitled 'Financial Clauses', and Part X, entitled 'Economic Clauses').[31] The Versailles Treaty granted direct rights to individuals, who were allowed to submit claims regarding the unlawful conduct of defeated states and given the capacity to independently present their case before the Mixed Arbitral Tribunals.[32] The MATs' jurisdiction included claims concerning the adoption of 'exceptional war measures' resulting in damage or injury inflicted upon the property, rights or interest of nationals of Allied or Associated Powers.[33]

The legal basis for Germany's responsibility was Article 231 Versailles Treaty, which established the Reich's overall liability to compensate for the loss and damages caused during the war to Allied and Associated Governments and their nationals. This provision later became known as the 'War Guilt Clause' and would prove hugely controversial, including from a geopolitical point of view.[34] Article 232 Versailles Treaty underlined that Germany had to compensate for harm done to civilians and their property as a result of 'aggression by land, by sea and from the air'. Annex I to Part VIII Versailles Treaty further elaborated that Germany would be held responsible for any damages and injury of personal character as a result of

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31 Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) 225 CTS 188 ('Versailles Treaty').

32 'It may be readily admitted that, according to a well-established principle of international law, … an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations …'. *Jurisdiction of the Courts of Danzig* (Advisory Opinion of 3 March 1928) PCIJ Series B no 15, 17–18; Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (OUP 2018) 88.

33 See art 297 Versailles Treaty.

34 Fania Domb, 'Human Rights and War Reparations' (1993) 23 Israel Yearbook on Human Rights 77, 83; Tatah Mentan, *The Elusiveness of Peace in a Suspect Global System* (Langaa Research & Publishing CIG 2016) 89–91; Marcus M Payk, 'What We Seek Is the Reign of Law': The Legalism of the Paris Peace Settlement after the Great War' 29(3) European Journal of International Law 809, 817–18.

acts of war 'including bombardments or other attacks on land, on sea, or from the air' and damage to property, including:

> damage to and destruction of the homes and property of civilians, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war.[35]

As was highlighted during the preparatory works, civilians affected by air bombardment were also entitled to receive compensation for their losses.[36] Reparations in this system were paid through the Allied Reparations Commission.[37]

Interestingly, Annex I to Part VIII Versailles Treaty underlined that the responsibility of the defeated state was limited in case of actions conducted against 'naval and military works or materials'. It thus further increased the legal ambiguity surrounding aerial bombardment. On the one hand, in terms of individual criminal responsibility, the 'deliberate bombardment of undefended places' was qualified by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties as a war crime (whose reasoning followed Article 25 Hague Regulations).[38] On the other hand, in the context of state responsibility, the belligerent was exempt from liability if damage or destruction concerned objects of a purely military character. The wording of Annex I to Part VIII Versailles Treaty was similar to that of Article 2 Ninth Hague Convention. Surprisingly, the second section of Annex I clearly indicated that the scope of the provision included air operations. The above-mentioned dissonance is clear evidence that the drafters and delegates at the Paris Peace Conference of 1919 were

35 Mixed Claims Commission, United States and Germany, Organized Under the Agreement of August 10, 1922, Between the United States and Germany, *German Memorandum Concerning the Meaning of the Clause 'Naval and Military Works Or Materials': (Section 9 of Annex 1 to Art. 232 of the Treaty of Versailles) as Applied to American Vessels and Cargoes*, 1921, 100.

36 *Papers Relating to the Foreign Relations of the United States 1919: The Paris Peace Conference: Volume II* (US Government Printing Office 1942) 587.

37 On this Commission, see: Jean-Louis Halpérin, 'Article 231 of the Versailles Treaty and Reparations: The Reparation Commission as a Place for Dispute Settlement?', in Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019).

38 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' (1920) 14 American Journal of International Law 95, 115.

unsure about what legal standard to apply to bombardments, especially air attacks.[39]

Nevertheless, while most experts supported the 'military objective' doctrine, this standard was not yet enshrined in binding international instruments. In 1922, during the Washington Disarmament Conference, the participating states agreed to establish a so-called Commission of Jurists, whom they entrusted with reviewing the existing framework and proposing new rules regarding air warfare. The outcome of this endeavour was a comprehensive draft of the law of air warfare ('Hague Rules of Air Warfare').[40] The solutions brought forward by the Commission of Jurists were legally ahead of their time, as they included for instance a definition of military objectives and the first written example of the proportionality rule. However, the document never moved beyond the stage of proposal.[41] Accordingly, when dealing with the *Coenca Brothers* and *Kiriadolou* cases, the Greco-German Mixed Arbitral Tribunal was still operating in a highly ambiguous legal context.

4. The Kiriadolou and Coenca Brothers Decisions: Hard Cases Make Bad Law

German Zeppelins were extensively deployed on the Western Front, but their efficiency was hampered after the introduction of incendiary ammunition (the so-called Pomeroy bullet) in 1916. The remaining units were transferred to other fronts, especially to the Balkan sector. The Central Powers planned to prepare a final offensive against Serbia, and to prevent that, the Allied forces landed in Greece. Greece had officially remained neutral in the war, but the Salonika region had been occupied by Allied troops. As a result, the city became a target of Zeppelin air raids in January 1916. One of these raids caused damage to property (260 bags of coffee) belonging the Greek Coenca Brothers, who later sued for compensation in

39 See the discussion within the Council of Ten, regarding the aerial disarmament of Germany as a retaliatory action for 'unjustifiable bombing of open towns': *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919: Volume IV* (US Government Printing Office 1943) 337.

40 'Commission of Jurists To Consider and Report Upon The Revision of The Rules Of Warfare-General Report, Part II: Rules Of Aerial Warfare' [1924] International Law Studies 108.

41 Mateusz Piątkowski, 'Security of the Civilian Population from the Consequences of Aerial Warfare in the Light of the Hague Rules of Aerial Warfare of 1923' in *3rd International Conference of PhD Students and Young Researchers: Security as The Purpose of Law: 9–10 April 2015* (Vilnius University 2015) 183.

the Greco-German MAT.[42]. Germany claimed that since the bombardment was a military operation conducted in conformity with international law, the claim had no legal grounds.

On 27 of August 1916, the Kingdom of Romania declared war on the Central Powers. In order to address this situation, combined forces under the command of Erich von Falkenhayn were deployed in Transylvania. German aviation conducted several air strikes against Bucharest, causing destruction and death among non-combatants. One of the persons directly affected by the operation of German aviation was the Greek national Kiriadolou, a father of four, who was killed in the air strike. His widow submitted a claim against Germany before the Greco-German MAT.[43]

In both cases, the main issue for the Greco-German MAT was to determine whether the death and destruction caused by German air forces was an outcome of unlawful conduct. In other words, the Tribunal needed to review the relevant military operations in the light of *ius in bello*. The trials were conducted by the MAT's president, Carel Daniël Asser, a Dutch barrister and scholar from the University of Groningen. The Greek judge was Jean Youpis, who during the war had worked within the Greek judicial system. His German counterpart, Walther Froelich, had served as officer in the German army during World War I.[44] From the three arbitrators, only Froelich had a military experience.

In *Coenca Brothers*, the Tribunal determined that Greek neutrality did not preclude Germany from launching hostilities against enemy forces occupying Greek territory. In this context, German actions were justified and not considered as an act of 'aggression', since it was determined that the aim of the Allied occupation in Greece had been to open a new front against the Central Powers in Macedonia. Despite the fact that no state of war existed between Germany and Greece, the Tribunal established that the rules and customs of warfare were applicable to the bombardment of Salonika. Moreover, it seems that the tribunal also understood that from the viewpoint of *ius ad bellum*, German actions were an example of self-de-

42 *Coenca Brothers v Germany* (n 1) 685.

43 *Kiriadolou v Germany* (n 1) 101.

44 Between 1930 and 1933, Froelich would serve as president of the League of Nations Administrative Tribunal (LNAT). In 1933 he was a part of the judicial panel that dealt with the famous Reichstag fire case and resisted the Nazi plot to blame communist and liberal movements for the arson attack. He died in 1945 in Soviet captivity.

fence.[45] With regard to the actions themselves, it was observed that they took place at night, from the high altitude of 3,000 meters and without prior warning from the German authorities. The Tribunal then turned to the 1907 Fourth Hague Convention and its Regulations Concerning the Laws and Customs of Land Warfare and highlighted that the belligerents were generally obliged to respect the civilian population and civilian property. It then noted that, based on this principle, Article 26 Hague Regulations required the commanding officer to issue a notification, prior to commencement of the bombardment, except in cases of assault. The Tribunal noted that the notification allowed defenders to either surrender the area or evacuate its civilian population. It added that, while Article 26 Hague Regulations was binding only in land warfare, it had nevertheless to be considered as representing the *communis opinio* on this matter, and that there was no reason to deny its applicability to air warfare. The arbitrators moreover rejected the defendant's claim that there was a practical impossibility in air warfare to warn belligerent authorities. The Tribunal also noted that due to the surrounding conditions (night, low visibility and high altitude), the attackers had been unable to avoid damaging civilian housing and warehouses. From all this, it concluded that unnotified bombardment in these conditions was a violation of international law.[46]

The Tribunal's reasoning seems fundamentally flawed in three respects.

Firstly, the tribunal simply assumed that by analogy rules of land warfare were applicable in air warfare.[47] The main argument behind it was the observation that this was the '*communis opinio*', ie the 'overall viewpoint of the international community'.[48] However, in order to determine whether the rules of the 1907 Hague Regulations were actually considered applicable to air warfare, the Tribunal should have reviewed the corresponding state practice. As stressed above, apart from the general agreement that air bombardment was a lawful method of warfare, no clear binding regulations had been established, except Article 25 Hague Regulations. The Tribunal overlooked the fact that even before the war it had been

45 ibid, 687. See also: John N Moore, *Law and the Indo-China War* (Princeton University Press 1972) 650.

46 ibid, 687–88. Natalino Ronzitti, 'The Codification of Law of Air Warfare', in Natalino Ronzitti and Gabriella Venturini (eds), *The Law of Air Warfare: Contemporary Issues* (Eleven International 2006) 6.

47 Hersch Lauterpacht, *The Function of Law in the International Community* (first published 1933, OUP 2011) 120.

48 *Coenca Brothers v Germany* (n 1) 687.

questionable whether the rules concerning land warfare were of practical applicability in the domain of air warfare. State practice during World War I had further blurred the legal architecture. However, it should be noted that during this war all belligerents had generally omitted to give any form of direct warning before launching an air attack.[49]

Secondly, not only did the Tribunal fail to critically assess the possible ways of analogy in the laws of war; it also wrongly assumed that Article 26 Hague Regulations regarding the requirement to give prior warning was actually backed up by state practice in the context of air operations. Contemporary experts noted the secondary character of the warning, due to the importance of military necessity.[50] Needless to say, in the regime applicable to naval bombardments the warning was only to be given by a commanding officer if the military situation permitted it. Finally, as observed by the representatives of the German government, air attacks share a certain similarity with assaults in land warfare, which called into question the necessity of a prior warning.[51]

Thirdly – and perhaps even more crucially – by simply applying Article 26 Hague Regulations, the Tribunal failed not only to address the status of Salonika as a 'defended' or 'undefended' city, but also to evaluate the nature of the target and the circumstances surrounding the bombardment. It seems that the Tribunal was already satisfied that the internationally wrongful conduct of the defendant could be invoked due to the lack of the prior warning required by Article 26 Hague Regulations. This simplified conclusion completely neglected crucial questions regarding the bombardment itself: could all of Salonika be considered a legitimate target? Did the belligerent party have the obligation to limit its attacks to 'military objectives'? Did the presence of military targets within the city limits justify the incidental harm among non-combatants and their property? In the opinion of H Wayne Elliott, the Tribunal by 'implication' recognized the possibility of attacking the military targets even behind enemy lines, thereby abandoning the 'classic' concept of 'undefended' place.[52] *A minori ad maius*: invoking Article 26 Hague Regulations, the Tribunal should also have assessed the applicability of Article 25 Hague Regulations and

49 Fauchille (n 29) 70.

50 Burrus M Carnahan, 'Protecting Civilians Under the Draft Geneva Protocol: A Preliminary Inquiry' (1976) 18(4) Air Force Law Review 32, 62; Eberhard Spetzler, *Luftkrieg und Menschlichkeit* (Musterschmidt 1956) 44–45.

51 *Coenca Brothers v Germany* (n 1) 687.

52 H Wayne Elliot, 'Open Cities and (Un)defended Places' [April 1995] The Army Lawyer 39, 43.

possibly declared Salonika a 'defended' city against which bombardment was permissible. However, this assumption was not clearly formulated in the Tribunal's reasoning, as it was not explained on what grounds military aircraft were permitted to conduct strategic bombardment of military objectives. As observed by Anthony Rogers, the Tribunal's 'obsession' with the warning requirement was actually a side aspect of the case: its core problem lay in the unanswered questions formulated above.[53]

In *Kiriadolou*, which concerned the bombardment of Bucharest, the tribunal underlined that the distinction between bombardment for occupation and bombardment for destruction 'ha[d] no juridical basis and [could not] absolve air forces from the duty to give prior notification'.[54] As already recalled above, this was a highly questionable observation: in fact the tribunal ignored the rationale behind the Ninth Hague Convention and the realities of naval warfare (and air warfare). Surprisingly, it nevertheless referred to Article 6 Ninth Hague Convention in considering that the absence of a duty to warn the bombarded area before the attack would endanger the lives of non-combatants in case of gas attacks from the air.[55] Clearly, the arbitrators were concerned about the indiscriminate effects of the chemical warfare, fearing that releasing the belligerents from the warning obligation in air warfare would create unchecked rights for the attackers. It should be noted that the proceedings before them took place in the context of an important moment in the history of the laws of warfare, namely the adoption (1925) and entry into force (1928) of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (so-called Geneva Protocol).[56]

The main positive contribution of both decisions – which would later earn them the praise of Georg Schwarzenberger – was their clear affirmation that air warfare should not affect civilian lives and property.[57] How-

53 Anthony PV Rogers, *Law on the Battlefield* (Manchester University Press 1996) 52.

54 French original: '*la distribution faite entre les bombardements d'occupation et de destruction n'a pas de base juridique et ne saurait dispenser les forces aériennes d'un avertissement préalable*'. *Kiriadolou* (n 1) 103.

55 ibid.

56 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (signed on 17 June 1925, entered into force 8 February 1928) (1925) XCIV LNTS 65.

57 'Thus, these decisions command respect as lonely attempts to uphold the standard of civilisation against wartime sovereignty at its most virulent and destructive. If, in the nuclear age, this display of moral courage and integrity has its quixotic aspects, this is not necessarily a reflection on the members of this Mixed Arbitral

ever, the decisions did not provide a clear legal explanation to back up their humanitarian viewpoint. The Tribunal did defend its position on the necessity of warning, especially during the night and high-attitude bombing, but focused only to the humanitarian perspective, omitting the conditional aspects of warning itself and its practical possibility in the light of the circumstances existing in air warfare. In both cases, one cannot help but get the impression that the Tribunal indirectly tried to reconcile the rules of bombardment in land warfare with those applying to naval warfare – despite the fact that in *Kiriadolou* the tribunal had unequivocally rejected the framework of the Ninth Hague Convention regarding naval bombardment. Nevertheless, it failed to identify a clear legal basis for the protection of civilians during air operations.[58]

Conclusion: Good Intentions but Bad Result?

Through its decisions in *Koenca Brothers* and *Kiriadolou*, the Greco-German Mixed Arbitral Tribunal had thrown its authority as an international judicial body behind the analogous applicability of the rules binding in land warfare in air operations. However, in applying this analogy, it had overlooked core practical issues and dilemmas which had already been addressed by a fair amount of state practice and opinions by international law experts.[59] The Tribunal had focussed on a secondary problem, ie the laws of war regarding prior warning, and had dealt it with it, as observed by David Johnson, in a way that was 'surely unrealistic'.[60] Moreover, it had rejected the logical reference to the international regime on naval bombardment in the context of strategic air operations. In both the *Coenca*

Tribunal who were responsible for these decisions.' Georg Schwarzenberger, 'The Law of Air Warfare and the Trend Towards Total War' (1959) 1 University of Malaya Law Review 120, 128.

58 Mateusz Piątkowski, 'Bombardowania powietrzne w okresie II wojny światowej w świetle prawa międzynarodowego: problem ataku na Wieluń 1 września 1939 roku' (2021) 227 Przegląd Historyczno-Wojskowy 141.

59 In a major article published in 1915, Percy H Winfield made the argument that prior warnings were impossible in air warfare and that the framework governing naval warfare was the most suitable legal regime in the context of air warfare: Percy H Winfield, 'Aircraft Attacks' (1915) 40 Law Magazine and Review 257. See also the critical appraisal of the Hague Regulations in the context of air warfare by the prominent American expert James W Garner: James W Garner, *International Law and the World War*, vol I (Longmans, Green & Co 1920) 469–70.

60 David H N Johnson, *Rights in Air Space* (Manchester University Press 1965) 32.

Brothers and *Kiriadolou* cases, it had lost a great opportunity to correct, or at least to attempt a reasonable interpretation of, the existing legal framework with regard to this new phenomenon. This seems even more regrettable if one considers that the MAT issued its decisions respectively in 1927 and 1930 – ie, at a time where it should have been aware of the numerous opinions of international legal experts already published at that time in renowned academic journals, as well as the existence of the 1923 Hague Rules of Air Warfare. Regardless of the latter consideration, the tribunal could simply have applied the existing conventional framework in a more coherent way, eg by considering Salonika and Bucharest as 'defended cities' and accepting the brutal reality that the attacking party was entitled to treat urban areas as 'whole targets'.

The MAT's blurred legal reasoning behind its overall statement that air forces should respect the civilian population, its 'uncontrolled' use of analogy regarding the applicability of the Hague Regulations to air bombardment and its focus on the secondary (and rather irrelevant) issue of prior warning had crucial negative consequences. Instead of constituting a tangible contribution to the progressive development of international law, the decision rendered by the MAT was actually a regression, as it contributed to expanding the legal 'grey zone' surrounding air bombardment.[61] As a matter of fact, the decisions in *Coenca Brothers* and *Kiriadolou* lent themselves to almost every kind of interpretation. The decisions in these cases could be read as either validating the most radical version of air bombardment – ie unrestricted strategical air strikes against defended cities – or allowing only limited actions exclusively directed against objectives of a military character. The MAT's argument regarding the applicability of the 1907 Hague Regulations on land warfare to air operations resurfaced during the Nuremberg Trials (although its case law was not mentioned directly). It is significant that, when asked about the reasons behind the indiscriminate bombardment of Warsaw in September 1939, Albert Kesselring, who at that time had been in command of the 1st German Air Fleet, responded that:

> In the German view, Warsaw was a fortress, and, moreover, it had strong air defences. Thus the stipulations of the Hague Convention for

61 'The case is of little value in determination of the issue before us.' William H Parks, 'Air War and the Law of War' (1990) 32 Air Force Law Review 1, 37.

land warfare, which can analogously be applied to air warfare, were fulfilled.[62]

Thus, the analogy applied by the MAT unfortunately ended up serving as an excuse to justify the very controversial bombardment of the Polish capital. More generally, it seems to have defined the whole conduct of air warfare in World War II, during which all parties to the conflict – including the Allies – led air attacks of a very questionable nature. This consideration ultimately forced the International Military Tribunal at Nuremberg (IMT) to evade the issue concerning the legality of air bombardment altogether.[63] The legal 'silence' only ended in 1977, with the adoption of Additional Protocol I to the Geneva Conventions.[64] The Protocol abandons for good the criterium of 'defended locality', accepting that 'military objectives' might be lawfully subjected to air attacks.

In conclusion, it should nevertheless be noted that despite their tragic flaws with regard to the regulation of aerial bombardment, the Greco-German MAT's decisions in *Coenca Brothers* and *Kiriadolou* also made at least one contribution to the laws of war that is still valid today. In particular, its dictum in *Coenca Brothers* according to which 'it is one of the generally recognized principles of the law of nations that belligerents must respect, as far as possible, civilian populations and property',[65] later reaffirmed in *Kiriadolou*,[66] is still considered to be at the origins of the principle of distinction in present-day international humanitarian law.[67]

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62 *Trial of the Major War Criminals Before The International Military Tribunal: Nuremberg 14 November 1945–1 October 1946: Volume IX* (International Military Tribunal 1947) 185.

63 The issue of air warfare almost damaged the IMT's legitimacy as a court, as the defendants were invoking the *tu quoque* defence. Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (MacMillan Press 1999) 47.

64 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

65 French original: '*il est un des principes généralement reconnus par le droit des gens que les belligérants doivent respecter, pour autant que possible, la population civile ainsi que les biens appartenant aux civils*'. *Coenca Brothers v Germany* (n 1) 687.

66 It did so in nearly identical terms. French original: '*d'après la doctrine généralement admise, la vie et les biens des non-combattants doivent, autant que possible, être respectés*'. *Kiriadolou* (n 1) 103.

67 Vincent Chetail, 'The Contribution of the International Court of Justice to international humanitarian law' (2003) 85 International Review of the Red Cross 235, 253.