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Hélène Ruiz Fabri | Michel Erpelding (Eds.)

The Mixed Arbitral Tribunals, 1919–1939

An Experiment in the International Adjudication of Private Rights

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Introduction: International Adjudication and the Legacy of the Mixed Arbitral Tribunals

Michel Erpelding[*] *and Hélène Ruiz Fabri*[**]

Creating a system of Mixed Arbitral Tribunals (MATs) was a major contribution of the post-World War I peace treaties to the development of international adjudication.

Indeed, the MATs were international tribunals. For sure, such a statement could sound quite blunt since, once agreed that the MATs met the basic requirements for being considered as 'tribunals' (ie, bodies that resolve disputes with binding decisions based on the application of the law), whether they were international or domestic tribunals remained controversial for some time, at least at the time the MATs were created and developed their activity.

The great positivist dualists of the early 20th century, who discussed the separation between the national and the international at length, considered that the quality of the litigants was not only a sufficient, but also the only valid criterion for qualifying a court or tribunal as international. A court deciding inter-state disputes was considered international because no domestic legal order alone could govern its activity; otherwise, it would not respect the sovereign equality of the states in dispute. But, since individuals were not considered subjects of international law, disputes concerning them could only be dealt with by domestic courts. Under such an analysis, MATs could only be domestic courts. Thus, Anzilotti wrote that the MATs, established as from 1920 by agreements between states, and endowed *inter alia* with jurisdiction over claims of foreign individuals harmed by a state, were not international tribunals but common organs of the parties.[1] They were part of the internal law of each of them because of the litigants, who were individuals. Therefore, the awards could only have

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1 Dionisio Anzilotti, *Cours de droit international* (Gilbert Gidel tr, 1929, reedn, Editions Panthéon Assas 1999) 135-36.

an effect within the internal law of each state party. Jurisdiction *ratione personae* took precedence over jurisdiction *ratione materiae*, and the fact that international agreements created MATs apparently had no bearing. This approach took some time to be overcome,[2] mainly in the face of the development of undoubtedly international courts or tribunals with private persons as litigants, such as the European Court of Human Rights.

However, the dualists were not the only ones to rely on a single criterion for considering a court or tribunal as international. Two other theories also used a single criterion to reach the opposite conclusion. First, Kelsen focused on the constituent act. He believed that an international court or tribunal derived its authority and function from an international legal act, particularly a treaty.[3] Its judgments were acts of a (possibly partial, ie, two or more) society of states, not of a particular state. The critical element was the nature of the creating act. From this perspective, the status of the litigants was irrelevant, as was the applicable law (national or international). A court or tribunal was considered international when created by an international act of at least two States, even if it only dealt with disputes between individuals. Since treaties created the MATs, they were international tribunals. Second, Scelle focused on the function of the court or tribunal.[4] Based on his theory of functional duplication ('*dédoublement fonctionnel*'),[5] one could consider as international any court or tribunal that states international law or decides by application of international law. The nature of the litigants or the constituent act was irrelevant, as the application of international law overrode all other considerations. Since the MATs applied international treaties, they were international tribunals.

None of these theories has wholly withstood the test of time or the increasing complexity of the international judicial landscape, except the Kelsenian criterion of the requirement of a constituent act of an international nature. But it is doubtful that it is sufficient or, more generally, that

2 See, for example, Gaetano Morelli, who agrees with Anzilotti on the nature of MATs: 'Cours général de droit international public' (1956) 89 Recueil des Cours 437, 510. For an opposite view, see, for example: Maurice Bourquin, 'Règles générales du droit de la paix' (1931) 35 Recueil des Cours 1, 44 ff.

3 See: Hans Kelsen, 'Théorie générale du droit international public' (1932) 42 Recueil des Cours 117, 168.

4 Georges Scelle, *Cours de droit international public* (Domat-Montchrestien 1948) 690.

5 Georges Scelle, *Précis de droit des gens*, vol 1 (Sirey 1932) 56; Georges Scelle, *Manuel élémentaire de droit international public*, vol 1 (Domat-Montchrestien 1943) 21-23; Georges Scelle, 'Règles générales du droit de la paix' (1933) 46 Recueil des Cours 327, 358-59; Georges Scelle, 'Théorie et pratique de la fonction exécutive en droit international' (1936) 55 Recueil des Cours 87, 99-100.

a single criterion is sufficient, just as it is doubtful that we can now be satisfied with a binary vision separating international courts and domestic courts into two quite distinct categories, just as we can no longer be satisfied with a vision that limits the status of subject of international law to the state and relegates individuals – and, more generally, private persons – to the status of an object.

Diversification has accompanied the multiplication of international courts and tribunals from several points of view. Thus, purely inter-state courts, such as the International Court of Justice, coexist with courts that judge only individuals, such as the International Criminal Court, and a number of courts before which private individuals can bring claims against a state, including their own (eg, human rights courts). Courts of global reach coexist with courts of bilateral or regional reach. The lines separating the international from the domestic have blurred. This is illustrated by the creation of hybrid or mixed courts in criminal matters (Extraordinary Chambers in the Courts of Cambodia, Kosovo Specialist Chambers, Hybrid Court for South Sudan, Extraordinary African Chambers, etc.), national courts with international participation (like in Bosnia-Herzegovina), courts with a dual domestic and international function (Common Court of Justice and Arbitration of the Organisation for the Harmonisation of Business Law in Africa (OHADA), Caribbean Court of Justice), regional integration courts, or the situation of investment arbitral tribunals (whether created under ICSID rules, or UNCITRAL rules, or others). However, what all these bodies have in common is that they escape the state monopoly of justice,[6] but also pave the way for a debate about the 'the level of internationality'[7] of a court or tribunal, in which several criteria are considered and weighed, especially the nature (domestic or international) of the constituent act from which the court or tribunal derives its authority, the composition of the court or tribunal and the status of its members, the function(s) of the court or tribunal,[8] the applicable law (domestic, international, or both), the procedure followed and its source.

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6 Hervé Ascensio, 'La notion de juridiction internationale en question', in Société française pour le droit international (ed), *La juridictionnalisation du droit international* (Pedone 2003) 174.

7 Robert Kolb, 'Le degré d''internationalisation des tribunaux pénaux internationalisés', in Hervé Ascensio, Elisabeth Lambert-Abdelgawad and Jean-Marc Sorel (eds), *Les juridictions pénales internationalisées (Cambodge, Kosovo, Sierra Leone, Timor Leste)* (Société de Législation Comparée 2006) 58.

8 On courts as multifunctional actors, see: Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2016).

The Mixed Arbitral Tribunals, too, existed at a time characterised by an extraordinary multiplication and diversification of international dispute settlement bodies. Inaugurated by the 1919-20 Paris Peace Conference, this period gave rise to various 'experiments' in international organisation, administration, and adjudication that, just like the MATs, defied traditional categories of international law.[9] As none of these 'experiments' proved able to prevent the advent of another World War in 1939, international lawyers have often underestimated their relevance for post-1945 international law. However, upon closer examination, based on both primary and secondary sources, it often becomes possible to establish analogies or even genealogies between interwar and present-day institutions. This is also true for the MATs, which form an integral part of the heritage of present-day international law. Still, their contribution to this heritage is all too often ignored, which is not only unfair in view of its richness but also paradoxical in view of the extent of the amount of work accomplished.

Indeed, the MATs were undoubtedly the busiest international courts of the interwar period. The sheer number of MATs that were in fact established is already impressive. Whereas this number has often been estimated at 36,[10] a document compiled in all likelihood in the late 1930s by the Secretary-General of the last remaining MATs, Antony Zarb, and preserved at the French National Archives, allows us today to set it at 39.[11] Based on this unpublished document and other archival sources, an appendix to this book will present readers for the first time with a list of all MATs and their members. All in all, the MATs handled about 90 000-100 000 cases.[12] This is a staggering figure, especially considering that most MATs

9 On this subject, see, eg: Nathaniel Berman, '"But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law' (1993) 106 Harvard Law Review 1792; Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri, *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019).

10 See, eg: Walter Schätzel, 'Die Gemischten Schiedsgerichte der Friedensverträge' (1930) 18 Jahrbuch des öffentlichen Rechts der Gegenwart 378, 389; Carl Friedrich Ophüls, 'Schiedsgerichte, Gemischte', in Hans-Jürgen Schlochauer (ed), *Wörterbuch des Völkerrechts* (vol 3, Walter De Gruyter 1962) 173, 174.

11 'Répertoire alphabétique des Tribunaux Arbitraux Mixtes et de leurs Membres', undated typoscript (late 1930s?), French National Archives, AJ/22/NC/33/2. The three MATs not listed in the other accounts are the Czechoslovak-Hungarian, the Greek-Hungarian, and the Yugoslav-Bulgarian MAT.

12 Based on estimates from the early 1930s, Hess and Requejo Isidro reach a total of some 78 500 cases dealt with (as opposed to individual decisions handed down) by the MATs. Burkhard Hess and Marta Requejo Isidro, 'International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of

were discontinued after only a decade of activity, at the beginning of the 1930s.[13]

The MATs are similarly remarkable from a procedural point of view. First, their respective Rules of Procedure were so detailed that contemporaries described them as 'miniature civil procedure codes'.[14] Second, as already noted, in a departure from most other international courts and tribunals of the interwar period, they allowed individuals to present claims before them. In this regard, they could be seen as considerably expanding a still inconclusive state practice, characterised by the demise of the Central American Court (1907-1918),[15] the failed attempt to establish an International Prize Court (1907),[16] and the stillborn German-Russian Arbitral Tribunals (1918), which allegedly inspired the creation of the MATs.[17] However, the MATs also combined features from two older types of institutions:[18] on the one hand, mixed commissions, which were avowedly international, but more administrative in nature;[19] on the other

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1919-1922', 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) 246-48. However, these figures do not include the cases examined by the MATs established with Turkey pursuant to the 1923 Lausanne Peace Treaty. According to its former President, the Greek-Turkish MAT alone handled 11 940 cases. Boeg, 'Le Tribunal arbitral mixte turco-grec' (1937) 8 Nordisk Tidsskrift for International Ret 3, 7. In 1930, Schätzel estimated that some of the six MATs with Turkey would ultimately handle more than 1000 cases each. Schätzel (n 10) 450.

13 See Erpelding and Zollmann (Epilogue).

14 Piero Calamandrei, 'Il Tribunale arbitrale misto italo-germanico e il suo regolamento processuale' (1922) Rivista del diritto commerciale 293.

15 See: Rosa Riquelme Cortado, 'Central American Court of Justice', in Rüdiger Wolfrum, *Max Planck Encyclopedia of International Law* (OUP 2013); Freya Baetens, 'First to Rise and First to Fall: The Court of Cartago (1907-1918), in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (CUP 2019) 211-39.

16 Natalino Ronzitti, 'International Prize Court (IPC)', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of International Law* (OUP 2006).

17 Schätzel (n 10) 379-80. While bearing a close resemblance to the MATs, these tribunals had only jurisdiction over disputes between private persons of both states relating to pre-war contracts, cheques, bills of exchange and intellectual property rights. See: Arts 13-45 Deutsch-Russisches Privatrechtsabkommen zur Ergänzung des Deutsch-Russischen Zusatzvertrags zu dem Friedensvertrage zwischen Deutschland, Österreich-Ungarn, Bulgarien und der Türkei einerseits und Rußland anderseits (signed 27 August 1918) Reichsgesetzblatt, 1918, no. 130, 1190.

18 Scelle, 'Règles générales…' (n 5) 537-38.

19 See Prieto Muñoz (ch 3).

hand, mixed courts established within semi-colonial contexts, which were clearly judicial, but formally belonged to the domestic legal order of the host polity.[20] Finally, although the MATs failed to produce a universally consistent body of case law, their semi-official collection of decisions, the 10-volume *Recueil des décisions des Tribunaux arbitraux mixtes institués par les Traités de Paix* (Recueil TAM), edited by the French Office of Private Property and Interests and published between 1921 and 1930 by Sirey, was a major source for legal doctrine in the 1920s and 1930s and remains of interest for international lawyers today.

A combination of features distinguishes the MATs from other international courts and tribunals. First, they were directly provided for and mentioned as such in the definitive post-World War I peace treaties.[21] Second, they had jurisdiction over both claims between private persons and by private persons against a foreign state or its institutions. Third, although not established as permanent bodies, but as temporary post-war institutions, they were not constituted on an *ad hoc* basis. They were rather composed of (usually three) members appointed on a permanent basis by public actors (usually states, occasionally the Council of the League of Nations). They were thus of a semi-permanent nature. Third, while allowing private persons to bring claims before them, they nevertheless did not strip states of the right to make determinations on behalf of their nationals based on the principle of diplomatic protection. In particular, through their state agents before the MATs, governments could settle or withdraw claims on behalf of their nationals or, conversely, oppose a settlement or withdrawal of claim envisaged by their national. Fourth, their decisions did not require an *exequatur* but were directly enforceable within the respective states' legal orders. Fifth and lastly, both the procedural rules of the MATs (which included the publicity of hearings and decisions) and the habitus of their members (including, in some MATs, their dress) strongly resembled those of ordinary courts. Based on the three last factors, the author of the last major commentary on the MATs, Charles Carabiber, described

20 See Theus (ch 1). See also: Michel Erpelding, 'Mixed Courts of the Colonial Era', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2020).

21 Namely, the Treaties of Versailles with Germany (28 June 1919), Saint-Germain-en-Laye with Austria (10 September 1919), Neuilly-sur-Seine with Bulgaria (27 November 1919), Trianon with Hungary (4 June 1920), and Lausanne with Turkey (24 July 1923).

them as 'predominantly judicial' (rather than arbitral) institutions.[22] For many commentators, including Georges Scelle, another quality inherent to the MATs was their discriminatory nature vis-à-vis the former Central Powers and their nationals. Present in most MATs and compounding a mistrust in local courts with the punitive dimension of the relevant peace treaties, this deeply problematic feature further encouraged comparisons with mixed courts established in semi-colonial contexts.[23] However, the creation of non-discriminatory MATs with Turkey showed that it was not inherent to the phenomenon (although the issue of the lack of trust in local courts remained).[24] This realisation eventually sparked attempts to create permanent MATs between friendly countries: in the early 1930s, there was at least one serious attempt to do so.[25]

Owing to their innovative characteristics, especially as guarantors of private rights, the MATs were a source of inspiration for other international and supranational courts and tribunals. This was already the case during the interwar period. In 1922, they served as a model for the even more sophisticated Arbitral Tribunal for Upper Silesia.[26] Originating not in the peace treaties, but in a bilateral convention between Poland and Germany,[27]it notably allowed individuals to file claims against their own state.[28] In 1923, on the same day as the Lausanne Treaty, Greece signed another convention with Britain, France, and Italy. Under this instrument, nationals of the latter three countries could sue the Greek Government directly before 'an arbitral tribunal consisting of a representative of the Greek Government, of a representative of the claimant, and of an umpire chosen by mutual agreement'.[29] While the different nomenclature and

22 Charles Carabiber, *Les juridictions internationales de droit privé* (La Baconnière 1947) 173-77.

23 Scelle, *Manuel élémentaire…* (n 5) 517-18.

24 ibid, 192-94. On these MATs, see Muslu (ch 2).

25 See Erpelding and Zollmann (Epilogue).

26 Michel Erpelding, Fernando Irurzun, 'Arbitral Tribunal for Upper Silesia', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2019).

27 Convention between Germany and Poland relating to Upper Silesia (signed 15 May 1922, entered into force 3 June 1922) 9 LNTS 465; 118 BSP 365.

28 See: Michel Erpelding, 'Local International Adjudication: The Groundbreaking "Experiment" of the Arbitral Tribunal for Upper Silesia', 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) 277-322.

29 Convention Regarding Compensation Payable by Greece to Allied Nationals (24 July 1923) 28 LNTS 267.

composition of these tribunals ultimately exclude them from the category of the MATs,[30] both types of institutions were certainly related. However, the impact of MATs on post-1945 international courts and tribunals was arguably much more momentous than these still rather anecdotal realisations of the interwar period. Most notably, the MATs were cited as an important precedent for the future European Court of Justice during the *travaux préparatoires* of the 1951 European Coal and Steel Community Treaty.[31] Today, their example is especially relevant in the field of international investment law,[32] particularly with regard to potential future negotiations over institutionalised investment tribunals.

And yet, like many other international 'experiments' of the interwar period, the MATs are often barely mentioned in post-World War II accounts of international law. During the interwar period, they inspired several book-length publications.[33] Conversely, despite (or perhaps because of) the number of cases they handled and the vastness of archival records they generated, they have not inspired a single major monograph after 1945 – the year Charles Carabiber finished writing his book suggesting the creation of permanent MATs.[34] In recent years, several publications have allowed to spell the end of what had become a form of collective amnesia.[35] Nevertheless, many questions remain. What motives and models

30 Contradicting his own criteria, Carabiber nevertheless characterised them as such: Carabiber (n 22) 195-96.

31 See: Michel Erpelding, 'International Law and the European Court of Justice: The Politics of Avoiding History' (2020) 22 Journal of the History of International Law 446, 454-55.

32 See: Hepburn (ch 12); Stanivuković and Djajić (ch 13).

33 See, in particular: Fanny Parain, *Essai sur la compétence des Tribunaux arbitraux mixtes* (Blanchard 1927); Walter Schätzel, *Das deutsch-französische Gemischte Schiedsgericht, seine Geschichte, Rechtsprechung und Erbgebnisse* (Georg Stilke 1930); Jean Teyssaire and Pierre de Solère, *Les Tribunaux arbitraux mixtes* (Éditions Internationales 1931); Rudolf Blühdorn, 'Le fonctionnement et la jurisprudence des Tribunaux arbitraux mixtes créés par les traités de Paris' (1932) 41 Recueil des Cours 137-244.

34 Carabiber (n 22) 35. The book was prefaced by Georges Scelle.

35 See, in particular : Jakob Zollmann, 'Reparations, Claims for Damages, and the Delivery of Justice : Germany and the Mixed Arbitral Tribunals (1919-1933)', in David Deroussin (ed), *La Grande Guerre et son droit* (LGDJ 2018) 379-94; Hess and Requejo Isidro (n 2); August Reinisch, 'The Establishment of Mixed Arbitral Tribunals', in Société française pour le droit international (ed), *Le Traité de Versailles : Regards franco-allemands en droit international à l'occasion du centenaire / The Versailles Treaty: French and German Perspectives in International Law on the Occasion of the Centenary* (Pedone 2020) 267-88; Jakob Zollmann, 'Mixed Arbitral

inspired the creators of the MATs? How did these institutions operate in practice? Who were the people that staffed them? Who were the claimants? How did contemporaries perceive the MATs? To what extent did the MATs contribute to a 'judicialisation' of international relations? What is their relevance for contemporary international law? And finally: how did they disappear into quasi-oblivion? By organising a conference specifically dedicated to the MATs and their impact on international adjudication of private rights, the Max Planck Institute Luxembourg for Procedural Law provided researchers with the opportunity to suggest answers to these and other questions, thus shedding new light on an often-overlooked chapter in the history of international law. Like many scientific projects, this one was disrupted by the COVID-19 pandemic. We are grateful to all contributors for having kept the momentum and to the Max Planck Institute teams for their invaluable support to the organisation of the conference and the finalisation of this book.

The first part of this volume, entitled '*A New Form of International Adjudication? The MATs in Context*', is intended to show the reader that far from being *ex-nihilo* creations of the post-World War I peace treaties, the MATs built on earlier, sometimes even less known, forms of international or transnational adjudication. By comparing the MATs to these earlier institutions that already presented similar features, but also major differences, the chapters presented in this first part will allow to better grasp the specificities of the MATs already mentioned in the introduction.

Adopting a *longue durée* perspective, *Willem Theus* describes the MATs as but one manifestation of the various institutions that have been set up throughout the ages to solve complex transnational legal problems. In particular, he shows that the MATs built forth upon the ancient traditions of extraterritoriality in private matters and arbitration between nations, combining them with the more recent practice of 'international' courts and tribunals. After providing the reader with the historical background on extraterritoriality and present consular courts and mixed judicial bodies such as mixed courts and mixed commissions as partial precursors to the MATs, the chapter demonstrates that the MATs were the institutions that for the first time brought together the Western and non-Western nations (such as Japan and Turkey) on an equal footing with respect to international dispute resolution. It notes that by combining elements of both the personal and territorial jurisdiction traditions of international

Tribunals: Post-First World War Peace Treaties', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2022).

law, the MATs were 'mixed' on multiple levels, ie, beyond their mixed composition. The chapter then briefly discusses developments in international dispute resolution after and next to the MATs, before moving on to the contemporary phenomenon of international commercial courts, which include certain features already present in mixed courts and MATs.

Examining the process that led to the establishment of MATs with Turkey pursuant to the 1923 Lausanne Treaty, *Zülâl Muslu* provides another illustration of the relevance of colonial-era mixed courts as a reference for the critics of MATs. The chapter first shows how the Allies' demand to set up MATs as part of a peace treaty triggered negative reactions within the Turkish leadership, who saw it at aiming to revive the capitulatory system with its separate Mixed Commercial Courts for foreigners. These courts, which the Ottoman Empire had unilaterally abolished in 1914 and the Allies had tried to re-establish as part of the ill-fated Treaty of Sèvres of 10 August 1920, had relied on a civilisational narrative like that used by the Allies to justify the recourse to MATs rather than Turkish domestic courts. Moving on to the negotiations of the Lausanne Treaty, the chapter explains how Turkey was able to obtain much more favourable terms regarding its MATs than the other former Central Powers. This included a narrowed-down territorial and subject-matter jurisdiction and a reciprocal (ie, non-discriminatory) personal jurisdiction, which rendered them unique among all MATs established pursuant to the post-World War I peace treaties. The chapter's second part describes the establishment and operation of these Istanbul-based MATs.

Leaving behind Europe and its immediate surroundings for the Americas, *José Gustavo Prieto Muñoz* establishes a comparison between the Mexican Claims Commissions (MCCs), created in 1923 following the Mexican Revolution on the model of 19th century mixed claims commissions, and the MATs established by the 1919-23 post-World War I peace treaties. Despite their differences, these contemporaneous institutions faced a common challenge: establishing the rules and principles that should be applied in setting the international liability of States for damages suffered within their territories by aliens. Against this background, the chapter highlights differences between the MCCs and the MATs. After providing the historical background for the MCCs, it explains how their legitimacy was constructed using *ex-gratia* clauses, which allowed them to assume a less punitive role than the MATs, before analysing the legal position of individuals before the two types of bodies. The chapter concludes by providing an assessment of the legacy of the MCCs and MATs in the history of international adjudication.

The second part of the book, entitled *'Identifying Rights-Holders: Post-World War I Arbitration and the Nationality of Private Persons'* insists on the importance of nationality as a factor for including (or excluding) private persons from submitting claims invoking treaty-based rights before international judicial bodies created by the peace treaties. By examining how the MATs and the Arbitral Tribunal for Upper Silesia (which had been modelled on the MATs but had a slightly different subject-matter jurisdiction), handled this issue, both regarding natural and legal persons, it highlights certain inherent limitations of these bodies, but also shows how they contributed to the rise of the individual as a subject of international law.

Analysing the MATs as part of the broader post-World War I legal settlement, *Jakob Zollmann* highlights their deeply ambivalent impact on individual rights. On the one hand, by handing down thousands of awards enabling individuals to claim and receive damages from foreign governments based on treaty provisions, the MATs' work anchored and strengthened the position of the individual in public international law to a hitherto unprecedented degree. On the other hand, within the vanquished states, they were seen as not only implementing treaty provisions that many considered to be unjust, but also as doing so in a way that unilaterally favoured the nationals of the victorious states. The chapter sets out by showing how the war impacted millions of individuals and their property based on their nationality, notably through the internment of 'enemy aliens' and measures of requisition, confiscation, sequestration, and liquidation of their assets. It then explains how the creation of new states and the other territorial cessions decided pursuant to the Paris Peace Conference, which notably aimed to undo German colonisation policies in Central Europe, had a major impact on the property rights of individuals based on their nationality and domicile. However, whereas Allied nationals could claim compensation for wartime measures enacted by the Central powers against their property, the latter's nationals did usually not enjoy this right under the Paris peace treaties. The chapter then examines the numerous questions that the MATs faced regarding the determination of the nationality of individual claimants, highlighting the far-reaching consequences that the decision to grant or deny these claimants standing had not only for individuals (who would be deprived or not of their property rights) and the defendant state's finances, but also for the perception of the MATs. As an illustration of these issues, it analyses the Franco-German MAT's controversial decision to declare itself competent over cases filed by claimants from Alsace-Lorraine for damages

that had occurred before that region's reintegration into France on 11 November 1918.

Addressing another major issue that is still of relevance today, *Emanuel Castellarin* analyses the content and the implications of MATs case law on issues specifically related to the nationality of legal persons. His chapter first explains the historical legal context, noting that the nationality of legal corporations had already been debated for decades as an issue of corporate law or private international law, and occasionally in the framework of diplomatic protection and that the MATs were the first international tribunals that settled disputes on a large scale in this field. It then shows that the MATs contributed, albeit in a limited way, to the conceptual clarification of the concept of corporate nationality, in particular to the idea that legal persons have a nationality. The chapter's next part analyses the criteria followed for the determination of corporate nationality. It notes that, without a clear common methodology, MATs alternatively chose three different criteria: the place of the *siège social*, the place of incorporation, and the theory of control, ie the nationality of the persons in control of the corporation. The admissibility of claims by shareholders is another subject addressed in the chapter. While not an aspect of corporate nationality *stricto sensu*, it shows that MATs had diverging approaches regarding the need to pierce or not to pierce the corporate veil for procedural purposes. The chapter finally takes stock of the legacy of MATs case law on the nationality of legal persons. It concludes that, in spite of some original features, the MATs' contribution to the development of international law was limited, especially due to a lack of consistency.

Enriching this account of how international courts open to private persons dealt with issues of nationality in the interwar period, *Momchil L Milanov* examines the case law on nationality handed down by the Arbitral Tribunal for Upper Silesia. Created pursuant to the German-Polish Convention regarding Upper Silesia of 15 May 1922, this tribunal was distinct from the 39 MATs directly created by the 1919-23 peace treaties. Nevertheless, it had been conceived as an enhanced version of the MATs and applied procedures and rules similar to those devised for the latter, but without discriminating between Allied and 'enemy' nationals. The chapter argues that the reasoning and the conclusions of the Arbitral Tribunal for Upper Silesia in matters of nationality and residence could be considered among the first signs of a still ongoing process of the separation of citizenship from nationality. It asserts that the Tribunal decoupled nationality from rights without necessarily 'weakening the state as a location of identity'. After outlining the conceptual distinction between nationality and citizenship, it briefly discusses two important cases which had an immedi-

ate incidence over the approach on nationality and citizenship cases adopted by the Tribunal, before providing a deeper discussion of five instances in which the Arbitral Tribunal for Upper Silesia was able to protect the nationality and rights of individuals, either directly or indirectly.

The third part of the book is entitled '*Arbitrators as Peacemakers: The Case of Professor Paul Moriaud (1865-1924)*'. The choice to realise a case study on a single individual – in this case Paul Moriaud, as Swiss law professor who presided several MATs and was appreciated by both the Allies and the former Central Powers for his impartiality – was based on two considerations. First, since international law experts from neutral states – and notably the presidents of MATs – played a decisive role in establishing the figure of the 'international judge' as a source of authority distinct from that of diplomatic actors during the interwar period,[36] studying the individual figure of a neutral MAT president widely regarded as exemplary in this regard seemed warranted. Secondly, in the case of Paul Moriaud, the existence of a personal archive covering both his years before and during his time at the MATs allowed to realise a portrait that was both a character study and an account of the inner workings of individual MATs.

Introducing the reader to the figure of Paul Moriaud, *Pascal Plas* aims to identify the factors that enabled this Swiss law professor to successfully participate in the MATs and become the very example of an arbitrator widely respected for his impartiality. After describing Moriaud's family context, which was already very much linked to mediation and pretrial negotiation, he notes how Moriaud's studies and his activity as a professor in Geneva allowed him to establish a social network reaching well beyond Switzerland. The chapter also examines Moriaud's various commitments both before and after World War I, notably in the field of individual rights, the development of international law, and in favour of the League of Nations, before concluding with an account of his appointment as President of several MATs.

Completing this portrait, *Jacques Péricard* focusses on Paul Moriaud's activity as a President of four MATs between April 1920 and his death in September 1924. Also making use of Moriaud's personal archive, he highlights two main aspects of this activity. First, he shows how Moriaud and his correspondents needed to quickly set up the human and material organisation of MATs as the pressure from governments and plaintiffs

36 Guillaume Sacriste and Antoine Vauchez, 'Les « bons offices du droit international » : la constitution d'une autorité non politique dans le concert diplomatique des années 1920' (2005) 26 Critique Internationale 101, 112.

mounted, while still ensuring their neutrality. In this context, he takes a close look at the appointment of the Belgian lawyer Jean Stevens as Secretary-general of the German-Polish MAT, which was challenged by Germany but ultimately upheld by Moriaud. In the second part of his chapter, he reveals how Moriaud worked on building the legitimacy the unprecedented institutions he had been entrusted with despite a general climate of mistrust between the states parties. He managed to do so not only by establishing internal rules – including each MAT's Rules of Procedure – and harmonising and organising the publication of case law, but also by outmaneuvering obstructionist gestures and resisting diplomatic pressure from states and other actors, especially during the Ruhr crisis.

The fourth part of the book, entitled *'The Promises and Limitations of 'Peace Through Law': MATs and the International Adjudication of "Mega-Politics"'*, shows the reader that present-day issues of judicial power and legitimacy raised by the 'international adjudication of mega-politics', ie, of disputes 'where both the respective publics and governments of the disputing states perceive strong stakes in the outcome',[37] already existed before the MATs in the interwar period. The publicity of MAT hearings, combined with the possibility of mass claims by individuals, resulted in certain cases becoming a major subject in contemporary public opinion. Two of these cases – the first of which was handled by a MAT presided by Paul Moriaud – are analysed here.

Zooming in on a single case with major political ramifications, *Michel Erpelding* presents the lawsuit of the Belgian deportees examined by the German-Belgian MAT under the presidency of Paul Moriaud in 1923-24. Between 1916 and 1918, Germany had deported tens of thousands of Belgian workers as forced labourers for its war-relevant industries and armed forces, sparking an international outcry amongst both Allied and neutral states. Pursuant to Part VIII of the Versailles Treaty, Germany was under the obligation to compensate Belgium for these deportations to forced labour. However, when the former deportees realised that the sums agreed to by Germany and partly handed out to them by the Belgian State were far below their expectations, they tried to obtain satisfaction before the Belgian-German MAT. Coordinated by a young Brussels lawyer, Jacques Pirenne, this early example of international legal mobilisation was followed with concern by both Germany and Belgium. Both feared that were the Belgian-German MAT to accept jurisdiction over the depor-

37 Karen J Alter and Mikael Rask Madsen, 'The international adjudication of mega-politics' (2022) 84 Law and Contemporary Problems 1, 9.

tees' claims, this might considerably increase Germany's war debt vis-à-vis Belgium, thus further deteriorating the relations between both countries which were already strained because of the Ruhr crisis. Relying in part on previously uncommented archival material from Belgium, Germany and France and using contemporary press reports, including photographs, the chapter provides the reader with an in-depth description and analysis of the trial during its various procedural stages. After presenting the reader with the factual and legal background of the case, it takes a close look at the arguments of the parties during both the written and the oral phases of the proceedings. Analysing the MAT's decision, it questions its frequent characterisation as a major German victory, before concluding on its long-term legacy.

Focussing on another example of 'mega-politics', *Marilena Papadaki* addresses the dispute regarding the agrarian reform carried out by the Romanian Government after 1921 before the Romanian-Hungarian MAT. The peace treaties had confirmed the inviolability of private property in victorious countries but not in those states which had lost the war, with an exception under Article 250 of the Treaty of Trianon. In 1923, after a series of negotiations, various Hungarian optants, whose property had been expropriated by the Romanian Government, filed petitions with the Romanian-Hungarian MAT, seeking to declare that the measures taken against them were contrary to the provisions of Article 250 of the Treaty of Trianon and to require Romania to return their property. This chapter analyses the major issues that arose during the Hungarian optants case, namely whether the Romanian-Hungarian MAT had jurisdiction over these cases and whether its decisions on this matter could be challenged before the League Council. It furthermore examines the Hungarian optants case as part of the larger process of state-building in the successor States of the Austro-Hungarian Empire, using it to highlight the interaction between international legal theory and governmental practice, the roles of international lawyers as promoters of social development and institutional renewal, and the contribution of the MATs and the Permanent Court of International Justice (PCIJ) to the development of international law.

The fifth and final part of the book is entitled '*Arbitral Awards as Sources of International Law: Assessing the Impact of the MATs' Case Law*'. It intends to assess the legacy of the MATs by studying how their case-law remains relevant for present-day international law. Although it also covered many other fields, based on the MATs' jurisdiction over treaty-based rights in general and property rights in particular, this case-law seems particularly relevant for today's law of treaties and international investment law.

Covering the first of these subjects, *Guillaume Guez Maillard* highlights the role played by the MATs in developing a case law relating to the law of treaties before the codification of that law under the 1969 Vienna Convention on the Law of Treaties. Noting that it is impossible to give an exhaustive overview of the thousands of decisions involving the law of treaties handed down by the MATs, he relies instead on a representative selection of these decisions covering the different stages in the life of treaties. After analysing decisions relating to the birth of treaties, from their conclusion to their entry into force, the chapter turns to the life of treaties in force, through the notions of observance, application, and interpretation, before finally studying their demise by examining one of the grounds for termination of treaties and the consequences of such termination. The chapter concludes by noting that much of the case law contributed to building up the body of law in the field, often coinciding with those later adopted by the Vienna Convention on the Law of Treaties.

Noting that the absence of MAT decisions in modern investment claims is in stark contrast to the frequent citation of decisions of the other mixed claims commissions established around the same time, *Jarrod Hepburn* analyses the particular relevance of MAT case-law to contemporary investment treaty arbitration. His chapter first 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. Noting that these issues are largely limited to questions of international procedural law, it then identifies five constraints which may explain this 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. Finally, the chapter surveys the remainder of the available voluminous MAT case-law, identifying other issues relevant to modern investment claims on which the MATs offered views.

Discussing another precedent demonstrating how the MATs could be of relevance to present-day investment treaty arbitration, *Maja Stanivuković* and *Sanja Djajić* address the right of appeal against MAT awards. This right was first implemented in the Paris Agreements concluded on 28 April 1930, which reformed the MATs established by the 1920 Treaty of Trianon between Hungary and the Allied and Associated Powers. This reform had been prompted by the dispute between Hungary and the countries of the Little Entente (Czechoslovakia, Romania and the Kingdom of Serbs, Croats and Slovenes, which in 1929 was renamed in Yugoslavia) regarding the expropriation of Hungarian nationals and companies by the latter, notably as a part of agrarian reforms. The appeal was to be submitted to

the PCIJ, an international judicial institution inaugurated just eight years earlier. Focussing on the jurisdictional decisions of the Hungaro-Yugoslav MAT preceding and following the 1930 reform, the relevant PCIJ jurisprudence and interwar writings of Yugoslav and foreign authors on these topics, the chapter explores the political and doctrinal origins of the ideas on the reform of the Trianon MATs, outlines the main features of this reform and, finally, discusses the relevance of the specific appeals procedure against MATs awards to the current debate on the appeals mechanism against investment arbitration awards.

Further completing this survey, *Mateusz Piątkowski* shows that the MATs' case law was also relevant for the laws of war. His chapter more specifically addresses two momentous decisions rendered by the Greco–German MAT in 1927 and 1930 respectively on the rules applying to aerial bombardment. After presenting the first discussions about international rules regarding air warfare before World War I and the evolution of this issue during the war, he addresses the widely unknown interplay between the Treaty of Versailles and air operations in the light of the post-World War I reparations framework. He then examines the main arguments used by the Greco–German MAT in its two decisions, highlighting how the Tribunal's pioneering affirmation of the principle of distinction between combatants and non-combatants was overshadowed by its failure to address the issues discussed in contemporary legal debates on air warfare and to provide viable answers thereto. He concludes by noting the tragic consequences of this failure, which he describes as having ultimately contributed to leaving civilians without clear legal protections against aerial bombardment during World War II.

These chapters are followed by the concluding remarks delivered by *Burkhard Hess* at the end of the conference organized at the Max Planck Institute Luxembourg for Procedural Law on 30 September-1 October 2021. In his remarks, Professor *Hess* highlighted four major issues discussed at the conference, namely: the innovative nature of the MATs and its limitations, notably with regard to the standing of individuals; their relation with mixed courts established in colonial or semi-colonial contexts; the debates regarding their nature as either international or domestic courts; and, finally, their rules of procedure, which took into account both the requirement of fairness and the challenges inherent in the settlement of mass claims.

Finally, in an epilogue entitled *'The Early and the Long End of the Mixed Arbitral Tribunals, 1920-1939'*, *Michel Erpelding* and *Jakob Zollmann* shed light on the often-neglected question of how the MATs, after entering the international stage as a result of the post-World War I peace treaties,

disappeared into near oblivion. They first note that the main Central Power, Germany, often tried to avoid the establishment of MATs in the first place or to impose deadlines limiting the number of claims submitted to those MATs which it had not been able to thwart. After examining the efforts already made by governments during the 1920s to phase out various MATs, they address the attempts made by some actors within the MAT-system to establish permanent MATs (partly reminiscent of present-day investor-state arbitration) between a number of Western countries and describe how government officials from these countries eventually derailed these attempts. They then move on to the liquidation of the last remaining MATs, which was mostly completed on the eve of the Second World War, although three MATs actually continued to operate – albeit in a way that could hardly be considered judicial – until 1943. The chapter concludes by an account of the constitution, wartime preservation and peacetime destruction of the MATs' archival records.

The individual contributions to this book are followed by an appendix providing the reader with a list of all MATs and their members. While necessarily incomplete, the information provided therein should nevertheless constitute a useful resource for future research on the MATs and their ties to other international courts and tribunals.

Part I.
A New Form of International Adjudication? The MATs in Context

Chapter 1: There and Back Again: From Consular Courts through Mixed Arbitral Tribunals to International Commercial Courts

Willem Theus[*]

1. Introduction

This chapter aims to contextualise the Mixed Arbitral Tribunals (MATs), established by the Peace Treaties of 1919-23. MATs are but one manifestation of the various institutions that have been set up throughout the ages to solve complex transnational legal problems. They built upon the ancient traditions of extraterritoriality in private matters and arbitration between nations, as well as the more recent practice of 'international' (including those who would in today's terminology be classified as 'internationalised') courts and tribunals. In order to fully comprehend the MATs, a contextualisation spanning multiple centuries and one that takes multiple perspectives into account is required.[1]

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1 This paper follows the vision of a global history of international law as put forward by Bardo Fassbender and Anne Peters, 'Introduction: Towards A Global History Of International Law', *The Oxford Handbook of the History of International Law* (OUP 2012) and of decentering (or 'provincializing' Europe) as set out by Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (reissue, Princeton University Press 2008). Also see: Anne-Charlotte Martineau, 'Overcoming Eurocentrism? Global History and the Oxford Handbook of the History of International Law' (2014) 25 European Journal of International Law 329. and Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 Rechtsgeschichte 152. Whilst a large part of what follows has a major European dimension, I have nevertheless tried to limit the influences of

Section 2 will provide the reader with the historical background on extraterritoriality and present consular courts and mixed judicial bodies such as mixed courts and mixed commissions as partial precursors to the MATs. These precursors, however, originate from two very different backgrounds. Both mixed and consular courts mainly, though not exclusively, find their origin in the non-Western world and in the principle of extraterritoriality. They are thus very much connected to the idea of personal jurisdiction. Mixed commissions on the other hand mostly find their origin in the Western world and were established to solve disputes between Western territorial 'states', fitting into the typical international law territorial state centric background.

Section 3 demonstrates that the MATs were the institutions that for the first time brought together the Western and non-Western nations (such as Japan and Turkey) on an equal footing with respect to international dispute resolution. Furthermore, MATs combined elements of both the personal and territorial jurisdiction traditions of international law as mentioned above. The MATs were therefore 'mixed' on multiple levels, ie beyond their mixed composition of arbitrators. Section 4 briefly discusses developments in international dispute resolution in parallel with and after the MATs before moving onto section 5, which focuses on the contemporary phenomenon of international commercial courts (ICCs): are they the successors to all that came before? The conclusion stresses the importance of a comprehensive understanding of legal history. Institutions such as the MATs and others are relatively unknown and important lessons and insights from the past have long been forgotten. Consequently, many current-day 'innovations' are actually less novel than often claimed.

2. *Extraterritoriality Throughout Time: Personal Jurisdiction, Consular Courts and Mixed Legal Dispute Resolution Mechanisms*

> *The extreme difference that exists between those countries enlightened by Christianity and those people who follow other religions, most notably their institutions and their customs, has given rise to this privilege (ed. the right to consular jurisdiction). Today one must envision this (ed. privilege) to be part*

Eurocentrism, fully aware of the difficulties of doing this as a European myself. The same applies to scholars from other regions. An Indian or Chinese scholar for example will always have their own cultural, historical, religious and linguistic environment as a starting point, as do Europeans. Thus a fully 'universal' view appears to me to be unattainable by one single person.

of public international law due to its general application and its long and continuous functioning.[2]

The above quote, embedded in the Belgian Code on Consular Affairs from the mid-19th century, perfectly illustrates the distrust Europeans had for non-western/Christian legal systems ('*pays hors chrétienté*') and why consular jurisdiction and extraterritoriality were deemed necessary. However, these views are a mere crystallization of the age-old practice of extraterritoriality that was prevalent in many parts of the world. What follows is a summary of extraterritoriality through the ages.

It is Herodotus who provides us with one of the first cases of extraterritoriality: 'King Amasis (570-526 BC) [based in Egypt] permitted the Greeks to establish a factory at Naucratis, where they might live as a distinct community under their own laws and worshipping their own gods.'[3] This is not strange as for a very long time legal pluralism based on the system of personality of laws (or personal jurisdiction) was the prevailing situation: your tribal or religious affiliation (and later nationality) determined the laws applicable to you or your company.[4] As such, 'foreigners' were often partially immune from numerous local laws.[5] In order to keep a modicum of control, the sovereigns often confined the 'foreigners' to a certain dis-

2 Self-translation of the following extract from Explanation (1) with Title II of the Belgian Law on Consular Affairs of 31 December 1851, Belgisch Staatsblad / Moniteur Belge, n° 561, 469: '*L'extrême différence qui existe entre les pays éclairés par le christianisme et les peuples qui suivent d'autres religions, notamment entre leurs institutions et leurs usages, a donné naissance à ce privilège [ed. la juridiction consulaire], qu'il faut envisager aujourd'hui comme étant entré dans le droit public international, par suite de sa généralité et de la longue et constante adhésion qu'il a reçue*.'

3 As reported in Shih Shun Liu, *Extraterritoriality: Its Rise and Its Decline* (Columbia University Press 1925) Ch 1, fn 4. There is some discussion as to whether Herodotus actually places the establishment of this 'factory' at the right time. See: Peter James, 'Naukratis Revisited' (2003) 9 Hyperboreus: Studia Classica 235. Note that there are also reports of the Phoenicians having had similar rights in Ancient Egypt, but these are harder to verify.

4 Simeon L Guterman, 'The Principle of the Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas (1966) University of Miami Law Review 259.

5 See the original quote of Bishop Agobard as reported by Savigny in his Conflict of Laws: 'it often happens that five men, each under a different law, would be found walking or sitting together' – as quoted by George W Keeton, 'Extraterritoriality in International and Comparative Law' (1949) 72 Recueil des Cours 2900-91. However, one must read this critically as this practice greatly differs over time and according to the region. Often, immunity had to be explicitly granted by the local ruler and it could be rescinded in times of conflict etc.

trict within a city or to their colony or 'factory'[6]. In some cases, such as with the Franks, the sovereigns 'adopted' the foreigners and granted them the right to follow their own rules via capitularies, a kind of royal decree.[7] In all cases, the court best suited to apply 'one's law' was one staffed by one's own kinsmen. All major civilizations and empires had a way of legislating this concept. For example, the Romans had the institution of the *praetor peregrinus*, which dealt with non-Roman citizens cases in the Roman provinces.[8] The Arabs, and later the Ottomans and Persians, established a legal system that was largely defined by one's religion. One of the first examples of this can be found in the so-called 'Capitulation of Omar', which granted the Christians of Jerusalem all their previous rights.[9] There is even evidence that Imperial China granted Muslim traders the right to retain their own laws and appoint their own judges within their realm.[10] As the Islamic world was considered one (the *ummah*), this judge could come from anywhere in the Islamic world, regardless of his origin. This tradition of 'foreign' Muslim judges continued for a long time (and continues to do so[11]) and is excellently illustrated by the appointment of

6 The term 'factory' is also used for the first European trading establishments in the Americas and in the Far East (most notably China) and was used throughout Europe - think of the numerous factories or *kontors* of the Hanseatic League. The Italian term *fondaco* was used in the early capitulations in the Mediterranean and denoted a trading outpost where the foreigners could rule their own affairs and follow their own religion. As such, it was *de facto* a self-governing trade district. It is closely related to the Levantine Arabic word *funduq* (now the Arabic word for 'hotel') and stems from the Old Greek (πανδοχεῖον). It seems to have already been an ancient practice. See: Roger Le Tourneau, 'Funduḳ', in Peri Bearman and others (eds), *Encyclopaedia of Islam* (Second Edition, Brill 2012); Alexander H De Groot, 'The Historical Development of the Capitulatory Regime in the Ottoman Middle East from the Fifteenth to the Nineteenth Centuries (2003) 22(83) Oriente Moderno 575.

7 These capitularies often promulgated mixed secular and ecclesiastical rules decided by the royal Court and were thus unilateral. See: Sören Kaschke and Britta Mischke, 'Capitularies in the Carolingian Period' (2019) 17 History Compass 1.

8 David Daube, 'The Peregrine Praetor' (1951) 41 Journal of Roman Studies 66.

9 Maher Y Abu-Munshar, 'The Compatibility of Islam with Pluralism: Two Historical Precedents' (2010) 1 Islam and Civilisational Renewal 613. Even if the exact wording and historical origin of this particular Capitulation can be debated, there are others like it and it is known that the Arabs in the beginning did not greatly change the structure of the societies they conquered, they even drew inspiration from them.

10 Keeton (n 5) 296.

11 For example, in Sri Lanka, the Judicial Service Commission may appoint any male Muslim of good character and position and of suitable attainments to be

the famous Arab world traveller and scholar Ibn Battuta – hailing from the Moroccan city of Tangier – as chief *qadi* or judge of Delhi by Sultan Tughluq around 1333-34, a position he held for several years.[12] In various Muslim countries the branch or school of Islam the follower adheres to will still define how certain Islamic law provisions are to be interpreted and applied, regardless of the nationality of the Muslim involved. For example, in Bahrain, if there is a family dispute between Shia-adherents, the law applied will be interpreted according to Shia legal principles and vice versa for Sunnis. Non-Muslim foreigners mostly remain subject to their own national personal status laws or to Bahraini civil law.[13] Likewise, echoes of this ancient practice of personal jurisdiction still live on in many other countries such as Lebanon and Israel, which have religious courts that hold jurisdiction in all personal status matters.[14] As such, personal jurisdiction is still among us in one form or another.

As international trade further blossomed and international exchanges expanded, personal jurisdiction became more and more manifested in the right to be made subject to the laws of one's home nation, in the host nation – ie what would later become known as the principle of extraterritoriality. Consular courts and concessions were established by treaties between (city-) states, which provided for the right of extraterritoriality. These courts were staffed by professional diplomats or, more often, by (consul-) merchants.[15] They handled the civil, commercial and criminal cases against and amongst their nationals, according to their own national

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a *quazi* (ed. *qadi* written in a different form), as to art 12(1) Muslim Marriage and Divorce Act 13 of 1951 (as amended s 2(a) Act 1 of 1965). A *quazi* can rule in cases retaining to personal status and family matters amongst Muslims. In theory, it thus appears that for example an Indonesian male Muslim who has lived sometime in Sri Lanka and speaks the local language can become a *quazi*.

12 Tim Mackintosh-Smith, The Travels of Ibn Battutah, Abridged, Introduced and Annotated by Tim Mackintosh-Smith (Picador 2003) 189-90.

13 art 4 Promulgation of Law No 19 of 2017 (Bahraini Unified Family Law); Bahrain State Party Report, UN Doc CEDAW/C/BHR /2 (2007) paras 323 and 325. Also see: 'British Expat Divorce in Bahrain: Where to Start' (*Expatriate Law*) <https://expatriatelaw.com/where-to-divorce/divorce-where-you-live/expat-divorce-in-bahrain/> accessed 25 July 2021.

14 Anat Scolnicov, 'Religious Law, Religious Courts and Human Rights within Israeli Constitutional Structure' (2006) 4 International Journal of Constitutional Law 732; Zeina Ghandour, 'Religious Law in a Secular State: The Jurisdiction of the Shari'a Courts of Palestine and Israel' (1990) 5 Arab Law Quarterly 25.

15 Acting in the capacity of 'honorary' consuls; a practice that continues to flourish to this day.

laws, whilst respecting local customs and traditions. It thus became necessary for conflicts of law to become more and more formalised.[16]

The first formal treaty with a specific reference to a consular court appears to be that concluded between the cities of Amalfi and Naples in 1190.[17] Likewise, the concept of concessions became widespread in the wider Mediterranean with the Italian states of Pisa, Venice and Genoa having a presence in the Byzantine Empire and Fatimid Egypt.[18] The crusades saw a new period of intensive exchange reach the eastern shores of the Mediterranean. The Christian kingdoms founded there were quite 'mixed' as their populations consisted of people from various European regions as well as numerous local inhabitants. Hence, they had to establish laws and courts that could cope with this large variety. Due to the personality of law-principle there were different courts for the 'Latin' nobility, the 'Latin' freemen, the Italian merchant states, such as Genoa and Venice, and the local (largely Christian) Syrian population.[19] Jurisdiction was already based on the principle of *actor sequitur forum rei*.[20] It was here, in this 'mixed environment', that the first predecessor to the later Mixed Courts emerged in the form of the special *Cour de la Fonde*, which dealt with all commercial litigation between 'Latin' and Syrian parties.[21] Muslims likewise retained the right to keep their own Courts in the contemporary Norman Kingdom of Sicily[22] and they later acquired similar rights in other cities (such as Constantinople) in the Byzantine Empire.[23] They seemingly also had such rights in the Crusader States.[24] Elsewhere, numerous other European cities and regions followed with similar arrangements for certain 'foreigners',

16 Keeton (n 5) 292.

17 There appear to have been earlier ones, such as the one concluded between the Varangians and the Byzantine Empire in 912 but these are hard to verify and require more research.

18 De Groot (n 6) 577-578.

19 Pierre Christin, *Étude des Classes Inférieures d'après les Assises de Jérusalem* (Société Française d'Imprimerie et de Librairie 1912) 12-13.

20 Keeton (n 5) 297.

21 ibid, 297. This Court also had jurisdiction for other 'mixed' cases.

22 Sarah Davis-Secord, 'Muslims in Norman Sicily: The Evidence of Imām al-Māzarī's Fatwās' (2007) 16 Mediterranean Studies 46, 49.

23 Nevra Necipoğlu, 'Ottoman Merchants in Constantinople During the First Half of the Fifteenth Century' (1992) 16 Byzantine and Modern Greek Studies 158; Jasper Y Brinton, *The Mixed Courts of Egypt* (rev edn, Yale University Press 1968) 1.

24 Benjamin Z Kedar, 'The Subjected Muslims of the Frankish Levant' in James M Powell (ed), *Muslims Under Latin Rule, 1100-1300* (Princeton University Press 1990).

such as in eastern central Europe where the most influential laws were those of the *Hanse* cities of Lübeck and Magdeburg due to the influx of German settlers.[25]

Arguably the first formal 'modern' treaty on this matter was the 'Capitulation' between the King of France, Francis I, and Sultan Suleiman the Magnificent in 1535/36.[26] This treaty and other similar treaties merely formalised the existing age-old practices and gave the 'Franks' the same rights as the other recognized minorities in the domain of the Caliph.[27] This stems from the core principles of Islam itself: its sacred laws are only applicable to the faithful followers, and not to those of other religions.[28] Certain religions are recognized by the Quran itself and are to be allowed to manage their own affairs, including having their own court system, as long as they pay the mandatory 'minority' taxes.[29] The Franks, as Christians, were therefore merely granted what the other Christian minorities (such as the Armenians) under the Caliph had already obtained: their own districts, certain tax exemptions and their own court system for internal

25 Mia Korpiola, 'Customary Law and the Influence of the Ius Commune in High and Late Medieval East Central Europe', in Heikki Pihlajamäki, Markus D Dubber and Mark Godfrey (eds), *The Oxford Handbook of European Legal History* (OUP 2018) 411-15.

26 See: Ahmed Rechid, 'La condition des étrangers dans la république de Turquie' (1934) 46 Recueil des Cours 165, 171 and Baron I. De Testa, *Recueil des Traités de la Porte Ottomane*, vol 1 (Amyot 1864) 15-21. However, there is some debate as to whether this capitulation actually came into effect or not, see: Gilles Veinstein, 'Les capitulations Franco-ottomanes de 1536 sont-elles encore controversables?' (2008) Ottoman Empire and its Heritage 39, 71-88. In all cases, all these previous arrangements were again 'codified' in the 1740 Capitulation between the Ottomans and France: Capitulations between France and Turkey (signed at Constantinople, 28 May 1740) 36 CTS 41.
For the sake of clarity: previous treaties with Italian states such as Venice already had many 'modern' elements, but were concluded under a tributary system, which was not the case for the Capitulation vs the French Sovereign. See De Groot (n 6), 595 and Maria Tait Slys, *Exporting Legality: The Rise and Fall of Extraterritorial Jurisdiction in the Ottoman Empire and China* (Graduate Institute Publication 2014) ch 3, para 5.

27 De Groot (n 6) 578.

28 For more on this (especially on the *dhimmi*-system) see: Anver M Emon, *Religious Pluralism and Islamic Law: Dhimmis and Others in the Empire of Law* (OUP 2012).

29 This is what the Ottoman millet system was based on. For more on this see: Karen Barkey and George Gavrilis, 'The Ottoman Millet System: Non-Territorial Autonomy and Its Contemporary Legacy' (2016) 15 Ethnopolitics 24.

disputes. A similar system existed for Jews.[30] The main difference was that in cases involving Ottoman Muslims, Europeans were protected via the presence of a western-employed dragoman[31] or consular official in court. The Europeans seem to have had a valid distrust of the local Islamic courts, as there appeared to have been a bias against non-Muslims in Ottoman courts.[32] This, coupled with other reasons, eventually led to a push for secular courts much later by the Ottomans themselves (see below). One must remember that at the time, these systems were already in place throughout Europe: Europeans distrusted other Europeans too. From their side, the Ottomans had to flexibly apply and interpret Islamic law as, in theory, it could not recognize relations with non-Muslim states (*dar al harb*).[33] It is therefore fair to say that 'consular' jurisdictions were already very well established long before colonial rule and that they were not an exclusively European practice.

Due to the changing power balances and the (informal) imperialism[34] of certain European nations or major trading companies such as the *Vereenigde Oostindische Compagnie* (the Dutch East India Company) or the British Levantine Company, this privilege was extended and misused by Europeans as time progressed. Even so, it appears that in the 16th-18th centuries, the European powers sometimes granted reciprocal rights to the Ottomans and Persians.[35] For example, it is proven that in Marseille in 1715 there was a Persian consular official who successfully pushed for

30 See: 'Chapter 7: The Ottoman Empire and the Jews', in Marianna D Birnbaum, *The Long Journey of Gracia Mendes* (Central European University Press 2013) 79.

31 C Edmund Bosworth, 'Tarḏjumān' (2012), in Peri Bearman and others (eds), *Encyclopaedia of Islam, Second Edition* (Brill 2012). Also see: Muslu, Zülâl. 'Language and Power: The Dragoman as a Link in the Chain Between the Law of Nations and the Ottoman Empire' (2020) 22 (1) Journal of the History of International Law 50.
These dragomans mostly came from the Christian minorities of the Ottoman Empire and some of them *de facto* became a hereditary office.

32 Timur Kuran and Scott Lustig, 'Judicial Biases in Ottoman Istanbul: Islamic Justice and Its Compatibility with Modern Economic Life' (2012) 55 Journal of Law and Economics 631.

33 De Groot (n 6) 603.

34 Kate Miles, '"Uneven Empires": Extraterritoriality and the Early Trading Companies', in Péter D Szigeti and others, *The Extraterritoriality of Law: History, Theory, Politics* (Routledge 2019).

35 Such as for example the 1715 Treaty between the French King and the Persian Shah: Treaty of Amity and Commerce between France and Persia (signed at Versailles, 13 August 1715) 29 CTS 303.

fiscal exemptions for Persian merchants[36] and that the Ottoman consul had similar powers in the Kingdom of the Two Sicilies in 1740.[37] The Ottomans also actively pushed for the access of their traders – including their Jewish and Armenian subjects – to Italian ports, such as Ancona.[38] It remains unclear to what extent Ottomans and Persians established functioning consular courts in Europe.[39] It is important to note here that certain European cities and colonies were under full Ottoman control or protection and that they were therefore also Ottoman 'subjects'.[40] Even between strongly established European states reciprocal extraterritorial rights were slow to disappear and continued to have a place in some treaties until the mid-18th century.[41]

By the late 18th-early 19th century these extraterritorial practices and institutions became increasingly professionalised. Various western Ministries of Foreign Affairs even had complete manuals on this matter for their rotating professional staff (including judges).[42] They were also expanded

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36 Albeit not always successfully. For more information on this interesting first Persian Consul (hailing from the Armenian community of Isfahan - who often acted as the interlocutors with the West for the ruling Shahs - see: Guillaume Aral, 'Hagopdjan de Deritchan, Consul de Perse à Marseille (1715-1726)' (2001) 6 Revue du Monde arménien moderne et contemporain 29-36.

37 Mehmet Demiryürek, 'The Legal Foundations of the Commercial Relations between the Ottomans and Neapolitans' (2015) 69 Bilig 53.

38 Birnbaum (n 30) 94-96. Also note that Ottoman non-Muslim subjects could buy 'berats' which allowed them to fall under European consular jurisdiction – *they then became a sort of 'honorary' employees of these European missions* – perhaps one of the first recorded cases of forum shopping. See: Cihan Artunç, 'The Protégé System and Beratlı Merchants in the Ottoman Empire: The Price of Legal Institutions' Working Paper 31.

39 They did establish the first mosques and Muslim burial places in Western Europe based on the rights granted to them by the Capitulations. This as reported by Auguste Laforêt, 'Étude sur les galères à Marseille' (November 1859) Revue de Marseille 489-507 as found in Michel Renard, 'Aperçu sur l'histoire de l'islam à Marseille, 1813-1962: Pratiques religieuses et encadrement des Nords-Africains' (2003) 90 Outre-Mers: Revue d'histoire 269, 270-71. Perhaps they therefore also actually handled legal disputes between their subjects, but more research has to be done on this interesting matter.

40 Such as Ragusa/Dubrovnik, certain Greek Venetian islands, Galata... See: De Groot (n 6). Certain cities throughout the Levant (especially in Turkey) have, and continue to have, people of European decent (especially French and Italian) – the so-called Levantines, next to numerous persons of Greek decent.

41 Keeton (n 5) 294.

42 See for example: United States, Department of State, Rules for the Consular Courts of the United States of America, in Turkey: With Forms and a Table of Costs and Fees (David Tucker 1864).

into the Far East by the European imperial powers through the 'Unequal Treaties' that were signed with China,[43] Japan, Korea and other Asian countries.[44] These treaties often granted access to districts of certain ports – the so-called treaty ports.[45] Parts of these ports were *de jure* still under the sovereignty of the host state, but a complete different legal system applied in the special zones; the *de facto* governing was done by the imperial powers. At the same time the Unequal Treaties confined the Europeans into these 'concessions'; they were not permitted to settle elsewhere. It must be remembered that this was an era where leaving the 'realm' or conducting foreign trade was barely allowed for most local citizens of many Asian nations.[46] Most nations, however, had been by then – often brutally – colonised by European powers, which frequently established separate legal and court systems for the colonials and the colonised.[47] A somewhat softer alternative to this was the use of protectorate-mechanisms, which largely

43 It is important to note that the successive Chinese Empires had already run a similar system of unequal treaties during certain periods – the so-called tributary system – with their surrounding states. In contemporary Chinese view, their civilisation was deemed to be superior to all others. As such, those interested in establishing relations and trade with China had to accept this secondary status and pay tribute to the Chinese Emperor. At first, some foreign European powers also fell under this system and thus had to pay tribute or otherwise they had limited trading options. For more on this see: David C Kang, *East Asia before the West: Five Centuries of Trade and Tribute* (Columbia University Press 2012). China had also already signed a treaty with Russia granting reciprocal (!) extraterritorial rights as early as 1689. See: Commission on Extra-territoriality in China, Report of the Commission on Extraterritoriality in China (HM Stationery Office 1926) 11.

44 See: Pär K Cassel, Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan (OUP 2012); Turan Kayaoğlu, Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China (CUP 2010).

45 For an interesting insight into these Treaty Ports see: Donna Brunero and Stephanie Villalta Puig (eds), *Life in Treaty Port China and Japan.* (Palgrave Macmillan 2018).

46 Li Kangying, *The Ming Maritime Trade Policy in Transition, 1368 to 1567* (Harrassowitz 2010) 3-4.

47 Keeton (n 5) 338-48. Although it was not only European Powers that used such an approach in the 19th century. The Omani sultanate conquered and one could say 'colonised' parts of the South-Eastern African seaboard and established a capital on Zanzibar. As Oman largely follows the third branch of Islam – the Ibadi-creed – , the Islamic courts that they established followed this branch of Islam. They too thus established separate courts for themselves – the occupiers. To this day Ibadi's are to be found in that area (especially Zanzibar) and Oman only relinquished its last overseas holding – the city of Gwadar in Pakistan – in 1958 – the time of

kept the local ruling institutions in place. As other Europeans ruled those nations, they were deemed to be under control of the 'civilised' and, as such, the use of the principle of extraterritoriality was often not deemed necessary.[48] Other Europeans could appear before the same courts as the nationals of the colonising power.

From here on, it is necessary to highlight the distinction in evolution in international law in the so-called 'civilised' or the Christian (-ruled) world and the so-called 'un-civilised' world – the non-colonised and non-Christian world – as from this point on, a divergence in international law appears. In the 'civilised' world, international law developed further on the basis of territorial sovereignty and jurisdiction, whereas in the 'uncivilised' world, the old system based on personal jurisdiction largely stayed in place.[49] What exactly the 'civilised' world entailed would never become very clear; it was prone to the subjective (and religious) views of the main (Western) powers and the exact context and power of the other side.[50] This, however, does not mean that there was no exchange between the two worlds, as we will see later.

2.1. International Law in the So-called 'Civilised' World

In the 'civilised' world, territoriality became the norm and (nation) states more or less trusted the courts of the other 'civilised' states – including in their direct colonies –, except in case of war or other grievous situations. Yet, there were still whispers of personal jurisdiction to be found in the proposals for the statute of Neutral Moresnet in the early 19th century.[51] In the Balkans, the above-mentioned Ottoman system of extraterritoriality

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decolonisation. For more on this see: Jeremy Jones and Nicholas Ridout, 'Oman, Zanzibar and Empire', *A History of Modern Oman* (CUP 2015).

48 James Sloan, 'Civilized Nations', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2011).

49 This practice was of course already ongoing, with Europe becoming ever more 'state-based' and convinced of its superiority, as opposed to other places of the globe. For a good insight into these discussions see: Alexis Heraclides and Ada Dialla, 'Eurocentrism, "Civilization" and the "Barbarians", *Humanitarian Intervention in the Long Nineteenth Century* (Manchester University Press 2015).

50 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (CUP 2009) 127-36; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 52-63.

51 For more on this fascinating 'country' see: Philip Dröge, *Moresnet: Opkomst en Ondergang van een Vergeten Buurlandje* (Uitgeverij Unieboek Het Spectrum 2016).

and local courts remained in place until the Austrians took Bosnia from the Ottomans in 1878. Even then, the Muslims were allowed to keep their own court system.[52] In situations of serious legal conflict, European and other Christian countries tended to resort to treaty-formalised inter-state arbitration[53] or later to the establishment of 'international' courts or tribunals to settle their various disputes. A first early example of this is the arbitration mechanism established by the Jay Treaty of 1794 between the newly independent United States of America and the United Kingdom. The mixed commissions established by this treaty were to settle the various disputes between the states but also between their nationals, such as the questions of outstanding pre-peace debts owed by US citizens or residents to British creditors.[54] These questions mainly related to claims under domestic private law. The mixed commissions were composed of three or five members, with one or two chosen by each state. This dispute resolution between private parties of different states appears less original if one understands that disputes between different Christians of various Christian states in the Mediterranean were already solved this way with a mixed commission comprising of the different consuls.[55] This is even more so since the Jay Treaty involved disputes between governments of countries linked by common legal, cultural and ethnic traditions, and with the arbitrators well qualified for their task and accepted by both sides as men of the highest moral integrity; and in a non-tense atmosphere as opposed to the difficult setting in the Levant or elsewhere.[56] Yet the Jay Treaty does remain the breakthrough that launched modern day inter-state arbitration

52 Noel Malcolm, *Bosnia: A Short History* (updated edn, NYU Press 1996) 138.

53 Arbitration between (self-declared) sovereigns is a very old concept. See for example the Battle of Siffin in 657 when arbitration occurred between representatives of the two contenders for the position of *caliph* or head of the Muslim nation. See: Maria Massi Dakake, 'Ṣiffīn, Battle of', in Jane Dammen McAuliffe (ed), *Encyclopaedia of the Qurʾān* (Brill). These were however often ad-hoc arbitrations and not necessarily based on a treaty.

54 Katja S Ziegler, 'Jay Treaty (1794)', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2013).

55 Fanny Parain, *Essai sur la Compétence des Tribunaux Arbitraux Mixtes* (Blanchard 1927) 11-12.

56 Georg Schwarzenberger, 'Present-Day Relevance of the Jay Treaty Arbitrations' 53 (1978) Notre Dame Law Review 715.

and dispute resolution. These dispute resolution principles were then further developed by the well-known Alabama arbitration[57] and other cases.[58]

This continuing and evolving arbitration and dispute resolution practice eventually led to the establishment of institutions such as the Permanent Court of Arbitration (PCA) created pursuant to the 1899 Hague Convention for the Pacific Settlement of International Disputes[59] and the first Central American Court of Justice (1907-18).[60] With regard to the former, it is important to note that numerous delegates at the Hague Conference had a (diplomatic) background in or dealing with the 'un-civilised' world - some even acting as judges – and were thus well aware of the institutions present there.[61] Likewise, it is clear that the Western tendency to distinguish between 'uncivilised' and 'civilised' countries was increasingly under pressure and highly debated, as countries such as the Ottoman Empire, Persia and China were original signatory states to the PCA Act.[62] Japan

57 Tom Bingham, 'Alabama Arbitration', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2006).

58 Mary Ellen O'Connell and Lenore Vanderzee, 'The History of International Adjudication' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2013) 44-62.

59 Revised in 1907.

60 Charles Ripley, 'The Central American Court of Justice (1907-1918): Rethinking the Word's First Court' (2018) 19 Diálogos Revista Electrónica 47; Manley O Hudson, 'The Central American Court of Justice' (1932) 26 American Journal of International Law 759; Freya Baetens, 'First to Rise and First to Fall: The Court of Cartago (1907-1918)' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication* (CUP 2019). This Court is not to be confused with the Central American Court of Justice (*Corte Centroamericana de Justicia*) established in 1962.

61 Such as, for example: (a). Ernest Mason Satow who held postings in Japan, China and Siam amongst others – see: Ernest Mason Satow and Ian C Ruxton, *The Diaries and Letters of Sir Ernest Mason Satow (1843-1929), a Scholar-Diplomat in East Asia* (Edwin Mellen Press 1998); or (b). The Baltic-Russian Friedrich Martens who wrote his doctoral dissertation on Consular jurisdiction in the east – see: Andreas T Mueller, 'Friedrich F. Martens on The Office of Consul and Consular Jurisdiction in the East' (2014), 25 (3) European Journal of International Law 871-891; or (c). the Frenchmen Paul Henri Balluet d'Estournelles de Constant who had held diplomatic postings in the Ottoman Empire, Tunisia and Montenegro amongst others. See: Nobel Media AB, 'Paul Henri d'Estournelles de Constant: Biographical' (*The Nobel Prize*) <https://www.nobelprize.org/prizes/peace/1909/balluet/biographical/>.

62 For more background on this see the aforementioned Heraclides and Dialla (n 49).

had arguably been fully admitted to the 'civilised' nations in the 1890s[63] and all extraterritorial rights held by westerners were abolished by 1899.[64] Japan itself had claimed extraterritorial rights in China in 1895 and Siam in 1898.[65] The Ottoman Empire had been admitted to 'the concert of Europe' in 1856, yet there was considerable debate if, at that time, they were truly counted amongst the society of nations.[66] This was often more a (geo)political question than a legal one.[67] Yet the Capitulations (including mixed courts and consular courts – see below) continued to exist in those countries, so the dual system of international law largely remained in place.

The modern-day distinctions between private and public international law find their origin in the mid-to-late 19th century, at least in relations between Western states.[68] It was then that the first specific treaties on recognition and enforcement of judgments and on what would ultimately become investment law were adopted.[69] Of note here are the Venezuelan Mixed Claims Commissions, which were established to settle mostly investment claims that arose between Venezuela and the citizens of certain influential states during the civil war in Venezuela from 1898 to 1902.[70] However, these claims were often still carried by their home states.[71] Many other mixed claims commissions existed before and after those of Venezuela. They were most often used in Latin America, where they were 'forced' on those new states by the (major) European powers, in part due

63 Douglas Howland, International Law and Japanese Sovereignty: The Emerging Global Order in the 19th Century (Palgrave Macmillan 2016) 17.
64 Kayaoğlu (n 44) 66-69.
65 Keeton (n 5) 333; Francis Bowes Sayre, 'The Passing of Extraterritoriality in Siam' (1928) 22 American Journal of International Law 70, 77.
66 Hugh McKinnon Wood, 'The Treaty of Paris and Turkey's Status in International Law' (1943) 37 American Journal of International Law 262.
67 Toyoda Tetsuya, 'L'aspect universaliste du droit international européen du 19ème siècle et le statut juridique de la Turquie avant 1856' (2006) 8 Journal of the History of International Law 19, 33-37.
68 Alex Mills, 'Connecting Public and Private International Law' (2017) SSRN Scholarly Paper 5-7 <https://papers.ssrn.com/abstract=3133078>.
69 Henri de Cock, 'La Convention franco-belge du 8 Juillet, 1899' (1910) 12 Revue de Droit International et de Législation Comparée 642.
70 Heather Bray, 'Venezuelan Claims Commissions', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2018).
71 ibid, paras 38-39.

to distrust of their national courts.[72] By contrast, in Europe they were only employed when there was a deep distrust present, such as *vis à vis* France after the Napoleonic wars.[73] Diplomacy, imperialism and major international commerce (in the form of capitalism) thus remained strongly intertwined and the state continued to play a critical role in all of this, much as in the 'non-civilised' world.[74] The main difference is the focus on a state-based dispute resolution system, as opposed to the more ambiguous systems in place elsewhere.

2.2. International Law in the So-called 'Uncivilised' World

In that 'elsewhere', in the so-called 'non-civilised' world, the distinction between the different branches of international law had not (yet) been made, with the Capitulations and Unequal Treaties – largely based on personal jurisdiction – continuing to provide the framework governing all relations, including civil, commercial (including investment and fiscal) and penal matters, between most Christian foreigners (including from various Latin American states[75]) and the local non-colonised nation until well into the 20th century. With growing trade came growing numbers of 'foreigners' and thus also more and more misuse and abuse.[76] Some of this misuse *de facto* became customary law, despite the fact that this customary law actually went against the Capitulations, leading to a very ambiguous system.[77]Interestingly, 'western' extraterritorial jurisdiction and consular courts amongst non-Christian nations themselves also came into existence.[78] For example, there is evidence that the Persians had an active

72 Frédéric Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication* (CUP 2019) 128-33.

73 Rudolf Dolzer, 'Mixed Claims Commissions', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2011) para 7.

74 Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (CUP 2013) 19-70.

75 As already mentioned this also entails that Mexico, Bolivia etc. had extraterritorial rights in certain regions.

76 John Wansbrough and others, 'Imtiyāzāt' in Peri Bearman and others (eds), *Encyclopaedia of Islam, Second Edition* (Brill 2012) under B(4).

77 Brinton (n 23) 5.

78 See, for example: art VII of the Convention between Persia and Turkey relative to Consular Jurisdiction, Civil and Commercial Trade Guilds, Protection, Nationality, etc. (signed 20 December 1875) 150 CTS 81.

consular court in Egypt in the early 20th century.[79] As seen earlier, Japan had also gained extraterritorial rights in neighbouring Asian countries. To add to the complexity, it appears that nationals of colonised countries were in certain cases also exempt of the local jurisdiction and fell under the consular courts of their colonising power.[80]

A good example of the prevailing ambiguous situation can be found in the Joris affair. In 1905, a Belgian man, Joris, together with Armenian revolutionaries from the Armenian Revolutionary Federation, tried to assassinate the Ottoman Sultan Abdülhamid II with a bomb in Istanbul. However, the plot failed, and he was apprehended. He was tried and handed the death penalty.[81] The case had taken place in an Ottoman court in the presence of the Belgian dragoman as this was the present Ottoman reading and understanding of the Belgian-Ottoman Capitulation. The Ottomans had reformed their legal system in different steps with European help, and apparently many European countries had silently accepted that their extraterritorial rights were now diluted.[82] However, the Belgian government and press had a different opinion about the affair and put pressure on the Ottomans to retry the case before the Belgian Consular Court in Constantinople. This was not an easy discussion, as Belgium only had a minor importance to the Ottoman Empire. It was not counted among the major European powers so the Ottomans did not fear strong reprisals. A tug of war thus erupted. Eventually, after two years, Joris was pardoned and sent back to Belgium.[83] Had he been an Ottoman subject he would undoubtedly have been executed. Had he been a French or British subject, the matter likewise might have had a different ending.

Incidents such as the Joris affair led the states that had granted these rights long ago to call for their complete annulment or modification. As seen in the Joris affair, the Ottomans had already completely overhauled

79 *United States v Egypt* (1932) 2 RIAA 1161.

80 Sayre (n 65) 77-78.

81 Houssine Alloul, Edhem Eldem and Henk de Smaele, 'Introduction' in Houssine Alloul, Edhem Eldem and Henk de Smaele (eds), *To Kill a Sultan: A Transnational History of the Attempt on Abdülhamid II (1905)* (Palgrave Macmillan 2018).

82 Will Hanley, 'Extraterritorial Prosecution, the Late Capitulations, and the New International Lawyers', in Houssine Alloul, Edhem Eldem and Henk de Smaele (eds), *To Kill a Sultan: A Transnational History of the Attempt on Abdülhamid II (1905)* (Palgrave Macmillan 2018) 163, 178-79.

83 Gaïdz Minassian, 'The Armenian Revolutionary Federation and Operation "Nejuik"' in Houssine Alloul, Edhem Eldem and Henk de Smaele (eds), *To Kill a Sultan: A Transnational History of the Attempt on Abdülhamid II (1905)* (Palgrave Macmillan 2018) 60-61.

their legal system[84] on their own initiative. Other countries swiftly followed. An excellent example of this legal modernisation drive can be found in the Mixed Courts of Egypt.[85] The foreign minister of Egypt, Nubar Pacha, successfully lobbied both in Europe[86] and Istanbul[87] for the creation of the Mixed Courts of Egypt in 1875, as the excessively broad jurisdiction of the local consular courts had led to a situation of *de facto* lawlessness in favour of foreigners. The solution proposed by Nubar Pacha was to establish 'mixed' courts: courts staffed by local and foreign (Western) judges, appointed by the Khedive. They were to handle Egyptian-Western civil and commercial cases, mostly in French.[88] Foreign companies claims against local companies and against the Egyptian State also fell within their jurisdiction.[89] Consular courts, however, continued to exist alongside these mixed courts for intra-national affairs.[90] The Bar of the Mixed Courts was also open to foreign lawyers.[91] The Mixed Courts of Egypt had a profound impact on the Egyptian legal system and society,

84 Avi Rubin, 'Civil Disputes between the State and Individuals in the Ottoman Nizamiye Courts' (2012) 19 Islamic Law and Society 257.

85 For a good overview of these mixed courts see: Michel Erpelding, 'The Mixed Courts of Egypt', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2020).

86 With all the capitulary powers (also including the United States).

87 Egypt was nominally still under Ottoman sovereignty but it could largely determine its own policy in all domains. Yet, it needed the formal approval of the Sultan by way of a specific *firman*. See Mark Hoyle, 'The Origins of the Mixed Courts of Egypt' (1986) 1 (2) Arab Law Quarterly 225.

88 The Mixed Courts of Egypt also had limited criminal jurisdiction. They operated mostly in French (the main legal language of the Courts) and in Italian. The exact usage of Arabic and other languages such as Greek is unclear. Arabic did become an official language of the Mixed Courts by way of the Montreux Convention of 1937. Likewise, English became an official language from 1905 onwards but its use was rather limited. For more on the complex language situation see Erpelding (n 85), paras 71-72.

89 This was also possible before the Ottoman *Nizamiye* Courts. See: Rubin (n 84).

90 This was not so for all mixed courts. For example, in Tangier this was not the case according to art 13 Convention regarding the Organization of the Tangier Zone (signed 18 December 1923, entered into force 14 May 1924) 28 LNTS 541.

91 Advocates of all nationalities who had a minimum of 3 years of legal practice, a legal degree, good character and who were based in Egypt, were allowed to plead before these courts. This arrangement oddly resembles the current day rules for being allowed to plead before for example the Dubai International Financial Centre Courts (DIFC). On the latter, see below, Section 5.

and even on the larger Arab world:[92] their established case-law and principles partially live on in the 1949 Egyptian Civil Code, which has acted as the blueprint for most other Arab Civil Codes.[93]

The mixed courts-model[94] quickly became the model for non-colonised nations to advance their legal systems and to fully join the 'civilised' international legal order. In certain international zones such as the Shanghai International Settlement and the Tangier International Zone, the Mixed Court was the very lynchpin of the local judicial and legal system. These Courts brought with them a veritable exchange of legal ideas and influences.[95] Yet one must not forget that the western powers maintained a dominant influence in all these institutions and countries.[96] It is against this complex background of a dual system of international law that the establishment of the MATs must be viewed.

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92 It must be stated that there was already an increasing professionalisation of legal practice in Egypt before the establishment of the Mixed Courts. See: Omar Youssef Cheta, 'A Prehistory of the Modern Legal Profession in Egypt, 1840s-1870s' (2018) 50 International Journal of Middle East Studies 649. Next to the Mixed Courts, national courts also came into existence in 1883, which handled intra-Egyptian cases. These had a majority of Egyptian judges, but also had some foreign judges serving on their benches. See: Mahmoud Hamad, *Judges and Generals in the Making of Modern Egypt* (Cambridge University Press 2018) 53.

93 Guy Bechor, *The Sanhuri Code, and the Emergence of Modern Arab Civil Law (1932 to 1949)* (Brill 2007).

94 There were different terms in use, such as 'International Court' or 'Joint Court' (when only two major powers were involved). Of course, all had different procedural rules etc, but they were largely structured in the same way and allowed for a certain flexibility as to applicable law. Different categories can be distinguished though. For one possible categorisation see Michel Erpelding, 'Mixed Courts of the Colonial Era' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2020). For another possible categorisation see Willem Theus, 'International Commercial Courts: a New Frontier in International Commercial Dispute Resolution?', in Jelena Bäumler et al (eds), *European Yearbook of International Economic Law 2021* (Springer 2022).

95 For example, in Egypt: numerous local and European personalities were involved in these Courts as lawyers, judges or prosecutors. One can think of Dr Abdel Razzaq Al Sanhouri (as a lawyer), the drafter of the current Egyptian civil code and thus also 'father' of many other Arab civil codes, Alexandre Millerand (as a lawyer), president of France from 1920 until 1924 and Arnold Struycken (as a judge), one of the co-founders of the European Court of Human Rights in Strasbourg.

96 David Todd, 'Beneath Sovereignty: Extraterritoriality and Imperial Internationalism in Nineteenth-Century Egypt' (2018) 36 Law and History Review 105.

3. The Establishment of the MATs: Grounded in History?

> *The drafters of the Peace Treaties had little confidence in the German national courts nor in those of the other former enemy states. In view of this, the best idea was to establish international tribunals to handle questions of such special nature.*[97]

The quote above shows that MATs were established by the Peace Treaties of 1919-1923 due to a strong distrust of the national courts of the Central Powers that had lost the war. MATs were established to resolve disputes regarding the treatment of private rights (related to property and contracts)[98] between parties from the 'civilised' nations that had fought in the not-so-civilised First World War.[99] In his opening address for the Belgian judicial year of 1922, Advocate-General Sartini van den Kerckhove[100] stated that MATs were established because national courts simply could not suffice to handle these matters. The national courts of the Allied Powers would sometimes have to convict a foreign state – something which a national court cannot do – and the courts of countries that lost the war were deemed to be untrustworthy for the cases for which they normally should have held jurisdiction (contracts between companies before the war). Another reason was the massive devaluation of the currencies of the countries of the losing side – the Allied Powers wanted their nationals to

97 My own translation of Parain (n 55) 20-21: '*Les rédacteurs des Traités de Paix n'avaient guère confiance dans les Tribunaux nationaux allemands ou autres États ex-ennemis. Dans ces conditions, c'était une idée très heureuse que de créer des Tribunaux internationaux pour statuer sur des questions de cette nature si spéciale.*'

98 Separate 'Clearing Houses/Offices' were established for settling debt claims - see for example art 296 Versailles Treaty (signed 28 June 1919) [1919] UKTS 4 (Cmd. 153); [1920] ATS 1 or art 231 Trianon Treaty (signed 4 June 1920) (1923) 113 BSP 486.

99 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 Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 243-45; Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (OUP 2018) 87-91. Note that in certain cases such as between Japan and Turkey, MATs were not established, but it was rather opted to give national courts this jurisdiction. See art 80 Lausanne Treaty (signed 24 July 1923) [1923] UKTS 16 (Cmd. 1929).

100 Counsel to the Belgian government in numerous MATs involving Belgium. See: 'Benoemingen' (*Belgisch Staatsblad*, 14 June 1922).

be protected against the depreciation of currencies and the insolvency of their counterparties.[101]

Before discussing certain similarities between MATs and the previously-mentioned mixed judicial institutions, it is important to point out that the setting up of MATs heralded one of the first times that previously 'uncivilised' states, such as Siam,[102] China[103] and Turkey (as successor to the Ottoman Empire), were able to take part in the 'civilised' system of handling international legal disputes on an equal footing.[104] It appears that only Turkey – the Ottoman Empire had been one of the former Central Powers that had lost the war – was involved in this on a large scale. An extra war was, however, required for Turkey to participate in the 'civilised' MAT system, once again strongly confirming the arbitrary manner of when the 'civilised' classification was conferred. The Turkish War of Independence of 1919-23 was a reaction to the dismemberment of Turkey (and the larger Ottoman Empire) as imposed by the Treaty of Sèvres of 1920 between the Ottoman Empire and the Allied Powers. Turkey emerged victorious from this war and could therefore push for more favourable terms during the ensuing negotiations at Lausanne. The new terms included the full withdrawal of the Capitulations[105] and the establishment of MATs. This had not been the case with the Treaty of Sèvres.[106] Thus, only then did Turkey become a full and unburdened member of the society of nations.[107] Siam also managed to obtain the withdrawal of all extraterritorial rights. It had fought on the side of the Allied Powers, even sending an expeditionary force to Europe. Yet, these

101 Georges Sartini van den Kerckhove, *Les Tribunaux Arbitraux Mixtes* (Larcier 1922) 6-8.

102 It seems that the German-Siamese MAT only handled a very limited number of cases.

103 It is unclear if MATs with China were effectively set up.

104 The first time (in theory) was the aforementioned PCA Act. Japan, like China and Siam, had fought on the side of the Allied Powers and also established MATs with the Central Powers, but it was no longer counted amongst the 'uncivilised' nations.

105 art 28 Lausanne Treaty (n 99). Although note that the Ottomans had already unilaterally withdrawn these rights in 1915 (but this was not accepted).

106 See for example art 49 Sèvres Treaty (signed 10 August 1920) [1920] UKTS 11 (Cmd. 964)

107 Although the MATs of the Lausanne Treaty were slightly different from the other ones. See: Charles Carabiber, *Les juridictions Internationales de Droit Privé: de l'Arbitrage International à l'Expérience des Tribunaux Arbitraux Mixtes et à l'Institution de Juridictions Internationales Permanentes de Droit Privé* (La Baconnière 1947) 192-99. Also see Muslu (ch 2).

negotiations did not go smoothly and required a great deal of diplomatic manoeuvring by the Siamese; the whole process was only completed by 1926.[108] Other Capitulations and Unequal Treaties such as those with Egypt and China continued to exist. However, this was no longer the case for Germans and subjects of former Austria-Hungary, as their extraterritorial rights had been stripped by the Peace Treaties.[109] Likewise, after the Russian Revolution of 1917, the Russian communists had expressed their willingness to abandon Russia's extraterritoriality rights in China (and elsewhere) as this went against their ideology. Again, these discussions were apparently not easy and not entirely successful.[110]

The division between the 'civilised' and 'uncivilised' world continued to exist to some extent, despite the presence of many non-Western countries in the League of Nations and in the MATs-system. A good example of the continuation of the dual system of international law and the adjoined double standards can be found in a brief comparison between the Free City of Danzig and the earlier mentioned International Zone of Tangier.[111] Danzig – presently Gdańsk in Poland, but at that time still inhabited by a German majority – was to become a 'free' self-regulating zone with its own legal and court system, but with certain special provisions for Poland and a role for the League of Nations, following the Peace Treaties. It therefore had a *sui generis* status in international law.[112] Tangier – based on the Paris Convention of 18 December 1923 between France, Spain and the United Kingdom – became an 'international' self-regulating zone, under the sovereignty of the Sultan of Morocco, but it was to be governed mostly by Westerners and to have both a mixed court and local courts.[113] Both

108 Sayre (n 65) 83-88.

109 Commission on Extraterritoriality in China, Report of the Commission on Extraterritoriality in China (HM Stationery Office 1926) 12. Also see art 81 Trianon Treaty (n 98), which stipulates that Hungarian nationals fall under full Moroccan jurisdiction.

110 For example see: Qihua Tang, 'The Sino-Soviet Conference, 1924-1927' (2007) 1 Journal of Modern Chinese History 195.

111 This is also further illustrated with the different forms of League of Nations Mandates following World War One. See: Koskenniemi (n 50) 171-78.

112 Elizabeth M Clark, 'Borderland of the Mind: The Free City of Danzig and the Sovereignty Question' (2017) 35 German Politics and Society 24.; Christian Hattenhauer, 'Danzig, Free City of' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2009) para 13.

113 Please note that talks about the establishment of such a zone date from before WWI and that Tangier already had had some local 'internationalised' institutions. For more on this fascinating city and zone see: Graham H Stuart, *The International City of Tangier* (2nd edn, Stanford University Press 1955). For more

cities were thus treated differently, with the 'civilisation' factor, amongst other factors, most likely playing a role in this difference.

Many of the participating powers to the Versailles Treaty and other Peace Treaties of 1919-23 had intimate knowledge of history and the existence of legal institutions such as mixed courts, and ongoing questions such as on Tangier. Their Ministries of Foreign and Colonial Affairs were or had been involved in all of these consular or mixed courts and were conducting the negotiations. The establishment of MATs could thus draw on experiences from the legal institutions in place in both the 'civilised' and 'uncivilised' world. MATs do in fact show certain similarities to certain institutions discussed above, such as the mixed courts and claims commissions and the consular courts. This similarity did not go unnoticed by contemporary authors.[114] At a first glance MATs seem to be especially inspired by the mixed claims commissions discussed earlier.[115] What is equally true is that they somewhat resemble mixed courts. MATs shared the mixed character of their benches,[116] the establishment via treaty, the involvement of states and a certain flexibility as to the applicable law with both mixed courts and mixed claims commissions. However, MATs also had certain elements that are uniquely related to either mixed courts or to the mixed claims commissions.

For example, MATs allowed individual claims to a much greater degree than the previous mixed claims commissions and thus, in this sense, appear to be more aligned to the mixed courts. Similarly, MATs were competent to review or reverse judgments of the national courts of the Central Powers in certain cases, thus *de facto* acting as 'national' courts of second instance (or like the Appeal Section of a mixed court),[117] some-

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on its mixed court see: Michel Erpelding and Fouzi Rherrousse, 'The Mixed Court of Tangier', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2019).

114 Parain (n 55) 10-17; Carabiber (n 107) 162-64.

115 Dolzer (n 73) para 10.

116 In the case of MATs, the nationality of the arbitrators was more defined: one from each state and then one from a 'neutral' party, who was to act as the president. Such rules did not exist in Mixed Courts, yet the foreign judges were also nominated by their Ministries of Foreign Affairs or of Justice.

117 Rudolf Blühdorn, 'Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes créés par les traités de Paris' (1932) 41 Recueil des Cours 141, 144. In some cases, they went much further. For example, the Arbitral Tribunal for Upper Silesia, which was established in 1922 as an evolved version of the MATs, had an expanded jurisdiction. See: Michel Erpelding, 'Local International Adjudication: The Ground-breaking "Experiment" of the Arbitral Tribunal for

thing not possible in the more diplomatic mixed claims commissions. As to the caseload, here too the MATs resemble the mixed courts more closely – the only internationally-run court system then in existence that had successfully handled thousands of cases. Conversely, there is considerable debate as to whether MATs were courts or tribunals and if they presented a national or international jurisdiction or a bit of both.[118] This is the main difference with the mixed courts: these can be deemed to have been 'internationalised' national courts,[119] with the judges being appointed by the local state and having competence in civil and commercial matters, as well as limited competences in criminal matters. They often used specifically written codes and laws as the applicable law,[120] although they could also mix these with others if needed.[121] MATs were more a temporary 'shared' jurisdiction between two nations for specific claims relating to property and contracts, and in this way they are similar to the mixed claims commissions. Likewise, the mandates of both MATs and mixed claims commissions were temporary, as opposed to the more enduring and open-ended mandate of mixed courts.

MATs thus combined elements from both international law systems. How MATs were effectively run, what kind of issues they encountered and resolved and what their impact was on certain fields are discussed throughout this book and are not dealt with here. I will now briefly discuss further developments in international dispute resolution alongside and after the MATs.

Upper Silesia' 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).

118 Carabiber (n 107) 173-81; Requejo Isidro and Hess (n 99) 263-64.

119 Or in the case of Shanghai and Tangier, the main court of a special 'international' zone. How exactly mixed courts were to be defined was a hotly debated topic during their existence. For more on this see Erpelding (n 85) paras 78-80

120 Which themselves were based on the mixture of various European legal systems – although they were mostly built upon a French legal foundation. See for example art 48 Tangier Zone Statute of 1923.

121 They could for example sometimes mix these laws in certain cases via the principles of natural law and equity. See for example Title 1, art 34 of the 1875 Charter of the Mixed Courts of Egypt which reads: 'The new Courts, in the exercise of their jurisdiction in civil and commercial matters, and within the limits of the jurisdiction conferred upon them in penal matters, shall apply the codes presented by Egypt to the Powers, and in case of silence, insufficiency, and obscurity of the law, the judge shall follow the principles of natural law and equity.' (translation from French as reported in Brinton (n 23) 236).

4. Developments in Parallel With and After the MATs

During the interwar period, the old system of mixed claims commissions continued to exist alongside the MATs. Most notably the United States resorted to the establishment of such a commission with Germany, Austria and newly independent Hungary, as it did not ratify any of the Peace Treaties.[122] Likewise, for claims arising from the Mexican Revolution of 1910-20 such a mixed commission system was put in place again.[123] Other institutions such as the mixed courts and the Permanent Court of Arbitration co-existed with all of these tribunals and commissions. At the same time, other new institutions such as the Permanent Court of International Justice came into existence. Therefore, one can speak of a panoply of (experimental) international judicial bodies in the interwar period.

After World War II, new distinctions emerged within international law – for example, between international trade and investment law. The original concept of MATs was never really used again; although the Arbitral Commission on Property Rights and Interests in Germany, set-up after World War II, did somewhat resemble them.[124] This was not the case for the mechanisms for the resolution of similar disputes with Japan and Italy, which again followed the 'diplomatic' route of mixed claims commissions, with the states making the claims on behalf of their nationals.[125]

With the establishment of the United Nations (and all its institutions including the International Court of Justice), the various waves of decolonisation, the full withdrawal of most extraterritorial rights[126] and the firm establishment of the principle of territoriality in international law, the distinction between 'civilised' and 'uncivilised' was finally abandoned, thus making way for our current day understanding of international law.[127] Even the opposing sides during the Cold War never really questioned

122 Treaty of Peace between the United States and Germany (signed 25 August 1921, entered into force 11 November 1921) 42 Statutes at Large 1939. See also: Arthur Burchard, 'The Mixed Claims Commission and German Property in the United States of America' (1927) 21 American Journal of International Law 472.

123 Kjeldgaard-Pedersen (n 99) 91-94.

124 Ronald Bank, 'Arbitral Commission on Property, Rights and Interests in Germany', in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2006); Rodrigo Polanco, *The Return of the Home State to Investor-State Disputes: Bringing Back Diplomatic Protection?* (CUP 2019) 25-28.

125 Kjeldgaard-Pedersen (n 99) 95-96.

126 Although these continue to exist in the case of foreign military bases by so-called Status of Force-agreements.

127 Sloan (n 48) paras 10-12.

the centrality of states or the principle of territoriality as the basis of international law.[128] However, the distrust *vis à vis* foreign non-Western legal systems remained. One could argue that it has never disappeared.[129] It is also no mere coincidence that the Commercial Courts of London and New York and the different forms of international arbitration both exactly have their breakthrough moment in the 1940s-1950s, a period that coincides with the demise of colonial, consular and mixed Courts in many countries.[130]

For example, the first investor-state arbitration clauses appear in bilateral investment treaties (BITs) – Itself a new type of treaty – during this same period. Many of these first BITs referred to state-vs-state arbitration; only after the adoption of the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID) – Ie an international mechanism for the settlement of disputes between private parties and the 'host' state - in 1964 does this slowly start to change.[131] Most remarkable is that BITs are themselves successors to the Treaties of Friendship, Commerce and Navigation, or the very instruments that in the past often granted extraterritorial rights.[132] The more judicial solution of the MATs was, and is, however, not entirely forgotten as is evident in certain recent Claims

128 The Western 'capitalist' side did of course not do this as they had established the whole system. The Soviets had a different vision on international law but were pragmatic. See: Harold J Berman, 'Soviet International Law: An Exemplar for Optimal Decision Theory Analysis.' (1968) 20 Case Western Reserve Law Review 141. Also see: Eugene A Korovin, 'Soviet Treaties and International Law' (1928) 22 The American Journal of International Law 753.

129 Polanco (n 124) 44.

130 Anthea Roberts, 'Introduction to the Symposium on Global Labs of International Commercial Dispute Resolution. (2021) 115 AJIL Unbound 1. The pivotal Convention on the Recognition and Enforcement of Foreign Arbitral Awards (done 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 ('New York Convention') is also from this time period.

131 Polanco (n 124) 30-35. They still have a certain diplomatic side and often refer the jurisdiction to ICSID.

132 ibid, 31. See for example art 5 Treaty of Amity, Commerce and Navigation between Belgium and Japan (signed at Yedo 1 August 1866) 132 CTS 489; art 20 Treaty of Peace and Friendship between the United States and Morocco (signed at Marrakesh, 28 June 1786) 50 CTS 33. Note that extraterritoriality was later also granted following or explicitly referring to the most favoured nation clause, see: Endre Ustor, 'First Report on the Most-Favoured-Nation Clause', Yearbook of the International Law Commission, 1969, vol II, Document A/CN.4/213, 160-161.

Tribunals, such as the Iran-US Claims Tribunal.[133] The relevance of MATs to investor-state arbitration is discussed in more detail elsewhere in this book and I will therefore not pursue it here.

There are, however, developments pointing to alternatives to the current system. The proposed Investment Court System that can now increasingly be found in the EU's Deep and Comprehensive Free Trade Agreements (such as in the Canada-EU CETA) is one of these. Another such development is the rise of the International Commercial Courts (ICCs), which again contain echoes of MATs and other mixed judicial bodies such as the Mixed Courts.

5. *International Commercial Courts: Successors to All That Came Before?*

> *The laws establishing the DIFC Courts were designed to ensure the highest international standards of legal procedure thus ensuring that the DIFC Courts provide the certainty, flexibility and efficiency expected by the global institutions operating in, with and from Dubai and the UAE.*[134]

This quote explains why the Dubai International Financial Centre Courts (DIFC) were established in 2004 (operational in 2006): the local courts were deemed to be ill-suited for international business. The local courts and many legal professionals in the Gulf region often had, and still have, an Islamic element in them, be it because of the educational background of judges, through the standing rules or in the inspiration for those rules. These countries had a separate court or chamber for foreigners until very recently. In fact, the last such court, in Qatar, was only closed in 2003.[135] This practice was a continuation of the earlier discussed principle of personal jurisdiction. As a result, many international investors in the region preferred to resolve disputes via international commercial arbitration, investment arbitration or through foreign (mostly English) courts as mentioned earlier.

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133 Polanco (n 124) 34. The Iran-US Claims Tribunal itself is again 'mixed' as it distinguishes between small claims (under USD 250 000) that are introduced by the home state and larger claims that are presented by individual claimants.

134 DIFC Courts, 'About the DIFC Courts' (*DIFC Courts*) <https://www.difc-courts.ae/about/jurisdiction>.

135 A Nizar Hamzeh, 'Qatar: The Duality of the Legal System' (1994) 30 Middle Eastern Studies 79.

Rather than reform or completely overhaul Dubai's judicial system, the Emirate decided to establish a new free-trade zone with limited self-governing powers and its own legal system: the Dubai International Financial Centre. This free-trade zone operates under the British common law and not under the onshore civil law.[136] As such, it was described as a 'common law island in a civil law ocean' by DIFC Chief Justice Hwang. This visionary model has found a great following in neighbouring jurisdictions: Abu Dhabi, Qatar and Bahrain swiftly followed suit with their own version of such an international commercial court. Elsewhere, the idea has also started to gain traction, with ICCs now having been established in diverse jurisdictions such as the Netherlands, China and Kazakhstan amongst others.[137] This is happening for various reasons: for example China's and Kazakhstan's establishment of ICCs have to be seen in the light of China's One Belt, One Road initiative in the Central Asian region.[138] In Europe, there are other reasons behind the establishment of such ICCs. With Brexit, the EU has lost a massive legal hub (or will it?[139]). Many national courts have not yet wholly adapted to the modern digital era, or are not fully adapted to the use of different languages, in particular the business *lingua franca*, English, during court proceedings. In certain European countries very lengthy court proceedings (think of the infamous Belgian[140] or Italian

136 Which is also the system used in the other Emirates of the Federation of the UAE. One, however, must not forget that in many cases parties can define which law is to be applicable to their contract and which court is to have jurisdiction.

137 For a general overview, see: Marta Requejo Isidro, 'International Commercial Courts in the Litigation Market' (2019) (2) MPILux Research Paper Series, with the side-note that this a rapidly evolving field. Kazakhstan for example is missing in this overview paper.

138 Ren Jun and Zhang Jiye 'Spotlight: Kazakhstan's Financial Center Gearing up to Become BRI Regional Hub' (*Xinhua English News*, 24 September 2019) <http://www.xinhuanet.com/english/2019-09/24/c_138418521.htm>. One could deem them to be the 'legal arm' of the Chinese One Belt, One Road Initiative.

139 'Recognition and Enforcement of Judgments in Civil and Commercial Matters' (*LS Brussels*, 4 May 2020) <https://www.lawsocieties.eu/main-navigation/recognition-and-enforcement-of-judgments-in-civil-and-commercial-matters/6000993.article>.

140 Geert Van Calster, 'The Brussels International Business Court - BIBC: Some Initial Thoughts.' (*GAVC Law*, 8 November 2017) <https://gavclaw.com/2017/11/08/the-brussels-international-business-court-bibc-some-initial-thoughts/>.

Torpedo[141]) or possible state interference in courts[142] can be added to that list. The rapid globalisation or internationalisation that characterises the global economy has simply not yet occurred in many courts or legal systems. The typical territorial national courts are not entirely ready or set-up for such an interconnected world, despite admirable efforts of the judicial branch in many countries.

The ICC-model tries to change this perception and it attempts to regain the ground lost to (mostly privately organised and financed) international commercial arbitration institutions.[143] Whilst ICCs can have different names ('International Business Court', 'International Financial Centre Court', 'International Chamber' or 'International Court' are popular), they all share the goal of providing a smooth modern legal procedure, conducted in English, to respond to a global commercial environment.[144] Their focus is mainly on transnational commercial cases, as highlighted by their easy opt-in clauses that enable their jurisdiction. ICCs can generally be split into three different categories: (i) those that are completely integrated into the judicial systems of their host states (such as, for example, the Netherlands Commercial Court), (ii) those that are the main court of a special legal and economic zone (such as the aforementioned DIFC). A sub branch of (i) is (iii): the hybrid court-tribunal model, such as the Bahrain Chamber for Dispute Resolution (BCDR).[145]

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141 Jonathan Wood and Nick Allan, 'Sinking the Italian Torpedo: The Recast Brussels Regulation' (International Law Office, 10 February 2015) <https://www.internationallawoffice.com/Newsletters/Litigation/European-Union/RPC/Sinking-the-Italian-torpedo-the-recast-Brussels-Regulation>.

142 For example in Hungary: European Commission, 'Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary' (*Press Release*, 25 April 2012) IP/12/395 <https://ec.europa.eu/commission/presscorner/detail/LV/IP_12_395>.

143 Arbitration's Achilles heel remains the enforcement of the award. An executive judgment is still required. For reasons of the ill-defined 'public policy' this can then easily be turned down - often happens - leading to an unenforceable award.

144 For a good overview see: Xandra Kramer and Johan Sorabji (eds), *International Business Courts: A European and Global Perspective* (Eleven International Publishing 2019).

145 Legislative Decree No (30) for the year 2009 with respect to the Bahrain Chamber for Economic, Financial and Investment Dispute Resolution (BCDR Decree), can be found on <https://arbitrationlaw.com/sites/default/files/free_pdfs/Bahrain%20Legislative%20Decree%202009.pdf>; Robert Karrar-Lewsley, 'Revolution in Bahrain: Decree No 30 of 2009 and the World's First Arbitration Freezone' (2011) 14 International Arbitration Law Review 80.

It is the last type that shows a striking linkage to MATs. The BCDR shares certain characteristics with normal arbitration: one judge comes from a roster of 'neutrals' and the language can be chosen (Arabic or English). The procedural rules are largely based on arbitration. However, the BCDR is a regular Bahraini court – it issues judgments.[146] These judgments can thus directly be enforced in Bahrain and elsewhere (via bilateral or multilateral treaties such as the Gulf Cooperation Council Convention). There is only a possibility for a Cassation ground of appeal. It can however also act as a normal arbitration institute[147], with the awards being enforceable abroad via the New Convention of 1958. Belgium's plan to establish the Brussels International Business Court (BIBC) could arguably be placed within this category, too, though its current status is highly unclear.[148] This hybrid character raises the same question that was raised about MATs: is it a tribunal or a court?[149] It appears to be both.

ICCs are without any doubt national courts. They have no direct link to international law (such as a treaty) or to other states. They are established by states and by states alone. They are therefore not the direct successors to MATs or mixed courts or to any of the other judicial bodies discussed earlier. Yet at the same time there is a certain overlap: most of these courts are thoroughly 'international' as they employ foreign judges, apply foreign laws by default and allow the use of foreign languages. Some even conduct their own 'judicial diplomacy' with other courts.[150] One could therefore argue that some ICCs are in effect 'internationalised' national courts such as the earlier mixed courts of the colonial era, despite their radically different context of establishment. However, this should come as no surprise as the recurring theme throughout this paper and the reason for extraterritoriality and special mixed judicial bodies is simply distrust of and/or unfamiliarity with the local legal system. As such ICCs are simply a new approach to tackling these age-old problems.

ICCs are created from the bottom-up, ie from the national or regional level. There are no treaties involved. There is good reason for this, as

146 art 15 BCDR Decree.

147 See art 23 BCDR Decree.

148 See for example arts 37, 60, 9, 22 Wetsontwerp houdende oprichting van het Brussels International Business Court (10 December 2018), DOC 54 3072/010 can be found on: <https://www.dekamer.be/FLWB/PDF/54/3072/54K3072010.pdf>.

149 See above (n 118).

150 See for the DIFC for example: DIFC Courts, *'Protocols and Memoranda' (DIFC Courts)* <https://www.difccourts.ae/about/protocols-memoranda>.

many states and international or regional organisations throughout the world have been unable to establish multinational economic unions and strong local or regional trustworthy courts, in the eyes of many foreign[151] companies and investors. For example in the Arab region, not a single potent 'Arab-world-wide' court or free market currently exists, leading the region to be less connected than it ever was, despite organizations such as the Arab League and the feeling of Arab brotherhood.[152] The enforcement of foreign judgments likewise is an arduous task, despite the existence of treaties and protocols on the matter.[153] The same can be said of many regions in the world, with an exception being the European Union, which has a solid 'automatic' framework for the mutual recognition and enforcement of foreign judgments for its Member States.[154] It is from this angle that the European 'integrated' ICCs must be viewed as the European ICCs are mostly merely a new specialised court established by the state. The EU's idea of an Investment Court System, involving a specialised 'international' court, which would bind the states that have established the court in a Deep and Comprehensive Free Trade Agreement, likewise must be viewed from the age-old western practice of setting up international state-based courts and tribunals.[155]

Elsewhere, ICCs can evolve into partial alternatives for (investment) arbitration if they become well-trusted courts where foreign companies can successfully sue both local companies and the local State. This is similar to Mixed Courts and MATs, where foreign parties could successfully start proceedings against the local authorities. It is, however, much too early

151 Especially for companies from a different cultural sphere.

152 Cesare PR Romano, 'Mirage in the Desert: Regional Judicialization in the Arab World' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication* (CUP 2019). An Arab Investment Court does exist, but it has only handled a limited amount of cases. See: Walid Ben Hamida, 'Arab Investment Court', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2018)

153 Nicolas Bremer, 'Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries' (2016) 3 McGill Journal of Dispute Resolution 37.

154 art 25 Brussels 1 Recast - Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast).

155 Laura Puccio and Roderick Harte, 'From Arbitration to the Investment Court System (ICS): The Evolution of CETA Rules: In-Depth Analysis.' (Publications Office of the European Union 2018) <http://op.europa.eu/en/publication-detail/-/publication/48636506-562d-11e7-a5ca-01aa75ed71a1/language-en/format-PDF>.

to draw any conclusions, but we must not rule out the possibility. Both of these developments would annul a part of the reasoning behind investment arbitration and could perhaps in the long-term lead to a decline in such cases. The ICCs established in their own self-governing zones definitely deserve more attention as they are the most innovative: they appear to offer an alternative to the state-centric vision prevalent in the present-day conceptualization of international law. Will history repeat itself?

6. *Conclusion: There and Back Again?*

This chapter has explored the broad and varied context in which the MATs were established. It appears that a part of the story, the 'personal' history of international law, has often gone missing in many recent works. For a long time, international law as we now know and understand it was the applicable system for the Christian (-ruled) world, and not applicable for the 'Others', a nuance missing in various works.[156] This is remarkable, as it actually appears that the current fixation on territorial governance and territorial sovereignty is the historical anomaly and that personality of laws was the norm for most of history. The system of extraterritoriality also clearly did not arise from the urge to conduct 'legal imperialism' by Europeans as has been suggested[157], but it evolved naturally from ancient customs and trading practices for dealing with persons from different nations. Furthermore, it seems to have been rather universal for a large part of history, appearing in multiple different places, cultures and times and often being reciprocal, as I have argued in section 2. Extraterritoriality undoubtedly did eventually succumb to excessive (mis-)use by the European powers (who had by then adopted a territorial (international law) system and thought themselves to be the superior culture[158]) in the 19th-20th century, creating unequal relations that shaped the legal systems of many current countries for better or for worse. Even then, it appears that certain nations such as Persia and the Ottoman Empire established exactly the same system between themselves in the late 19th century and that many locals actively (mis-)used the systems in place. This then cannot

156 For example in O'Connell and Vanderzee (n 58).

157 The title of Kayaoğlu's book (n 44).

158 Such feelings of superiority are quite common in history. One can think of the visions the Greeks and Romans held towards 'barbarians', the Sino-centrism that applied for much of Chinese history, the Byzantine feeling of legacy compared to the 'provincial Franks', the Muslims during their Golden Age... .

be dismissed as a purely one-sided affair. Therefore, a broader history of international law is urgently required: a history which merges these two backgrounds and thus detaches itself from the territorial and state-centric/public vision (based on the Westphalian system). Both private and public international law (in our present interpretation thereof) have been very much intertwined for a large part of their history and still are. This discussion was already admirably started by Alex Mills some time ago[159] and recently also by Burkhard Hess in terms of present day international dispute resolution.[160]

This chapter has shown that the establishment of the MATs coincided with the first grand merger of both the 'civilised' and 'uncivilised' worlds, with the active involvement of Turkey and other 'peripheral' countries in the MAT-system and the abolition of capitulary rights for certain nations. Of course, the establishment of the League of Nations and later the United Nations are also important milestones. Yet, the dual-system of international law arguably only truly ended in 1956 when the International Zone of Tangier was abolished and returned to Morocco and when the United States of America finally relinquished its consular jurisdiction in Morocco.[161] Another possible end date is 1980, when the last 'colonial' Mixed Court – the Joint Court of the New Hebrides – closed with the independence of Vanuatu.[162] Regardless of the end date, the influence of this age-old practice lingers on in many different forms: one can think of the protection and help of consular agents during court proceedings

159 Alex Mills, The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law (CUP 2009).

160 Burkhard Hess, The Private-Public Law Divide in International Dispute Resolution (Brill 2018).

161 Before that the Mixed Courts of Egypt had shut down in 1949, the Mixed Court of the Tangier International Zone in 1956 and the various International Concessions in China in the late 1940s-early 1950s.

162 This Court was known as the Supreme Court of the New Hebrides for its final two years. See: Pacific Manuscripts Bureau, 'Collection MS 1145: Judgements of the Joint Court of the New Hebrides' (*Pacific Manuscripts Bureau*) <https://asiapacific.anu.edu.au/pambu/catalogue/index.php/judgements-of-joint-court-of-new-hebrides>. It was known as a 'Joint' Court and not 'Mixed' as there were only two powers involved: France and the UK. Although in French it was still referred to as a '*Tribunal Mixte*'.

abroad[163], the possible use of diplomatic protection in investment cases[164] and the extraterritorial scope of certain national (and European) legislation.[165] Even the idea of a Mixed Court has not completely disappeared: in certain small Pacific states, judges from Commonwealth countries are still employed in certain courts (or for certain cases), often to apply a mixture of different laws.[166] Other jurisdictions still hire foreign judges or legal experts: Egyptian jurists – amongst others – for example remain highly sought after in the GCC states.[167] Hong Kong also remains committed to hiring judges from Commonwealth Countries.[168] Likewise, in present day International Criminal Law, the concept of mixed courts has re-appeared and has been rebranded as 'hybrid' courts, with many authors seemingly unaware of the criminal competences of many Mixed Courts of the past.[169]

The 'mixedness' of numerous ICCs, which hire foreign judges and use the 'foreign' *lingua franca* English, should not come as a surprise then. It is exactly these elements that seem to inspire confidence in these ICCs, as foreign companies now often have someone on the bench that is familiar with their legal culture and background, and all parties can understand what is going on, much as was the case in the time of consular and mixed judicial bodies. If the ICC is based on the Common Law-system, certain major companies feel even more confident, as many of their contracts are

163 Art 5 Vienna Convention on Consular Relations (signed 24 April 1963, entered into force 19 March 1967) 596 UNTS 261.

164 Peter Muchlinski, 'The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution', in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009).

165 Belgium for example claims universal jurisdiction in child abuse matters. Likewise, one could also argue that with the recent codifications of data regulation such as the EU's GDPR or Canada's PIPEDA that extraterritoriality is partially returning, albeit only in the virtual world.

166 Anna Dziedzic, 'Foreign Judges on Pacific Courts: Implications for a Reflective Judiciary' [2017] Federalismi <https://papers.ssrn.com/abstract=3089449>.

167 David Mednicoff, 'Legal Actors and Sociopolitical Change in the Arab Gulf' in Nele Lenze and Charlotte Schriwer (eds) , *Participation Culture in the Gulf: Networks, Politics and Identity* (Routledge 2019).

168 Hong Kong Judiciary, 'Judiciary Fact Sheet' (*Hong Kong Judiciary*) <https://www.judiciary.hk/en/publications/judfactsheet.html>.

169 Antonio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in *Internationalized Criminal Courts* (OUP 2004); Sarah M. H. Nouwen, 'Hybrid Courts: The Hybrid Category of a New Type of International Crimes Courts' (2006) 2 Utrecht Law Review 190; Elena Baylis, 'Extreme Cases in Hybrid Courts' (2021) 35(1) Temple International and Comparative Law Journal 95.

based on this legal system. Moreover, the establishment of certain special legal and economic zones and their connected ICCs partially echoes what came before the 'era of the state' – a model based on 'merchant' cities with special rules in places for the foreign merchants, perhaps including some form of personal jurisdiction.[170] This entails a very different view to international law as we presently know it. Yet, perhaps the most important take-away of this chapter is the fact that it is territoriality and not personal jurisdiction that is actually the anomaly in the history of international law. Even in the state-centric West, the idea of personal jurisdiction has never completely disappeared[171]; in many countries throughout the globe it remains a key factor in personal status matters.[172]

Could a dual personal-territorial system of international law thus return one day? Was it ever fully gone? The heated discussions on international legal personality of certain unique institutions such as the ICRC[173] and

170 Mark Frazier, 'Emergence of a New Hanseatic League: How Special Economic Zones Will Reshape Global Governance' (2018) 21 Chapman Law Review 333. Philip Mansel, 'We Are All Levantines Now' (*Le Monde Diplomatique*, 1 April 2012) <https://mondediplo.com/2012/04/16levant>.

171 In Belgium for example a complex situation exists where your language 'follows' you if you live in the bilingual (Dutch-French) region of Brussels or in one of the '*Faciliteitengemeenten*' (which exist in Flanders, Wallonia and the German-speaking region of Belgium), ie municipalities with facilities for those of another specified 'linguistic community' in the Belgian legal sense. As such people have the right to be helped in the other recognised language in such areas. The principles of territoriality and personality are therefore somewhat combined. For more on this see: Nicolas Goethals, 'Het Taalgebruik in de Randgemeenten: Wat met het Minderhedenverdrag?' (2014) 50 Jura Falconis 635. One can also see links in the philosophical idea of Panarchy (each man can choose his own governmental system and rules) as first put forward by Paul Émile de Puydt in 1860 and which is now sometimes used to describe the notion of global governance. See for example: James P Sewell and Mark B Salter, 'Panarchy and Other Norms for Global Governance: Boutros-Ghali, Rosenau, and Beyond' (1995) 1 Global Governance: A Review of Multilateralism and International Organizations 373.

172 See for example Article 3 of the Egyptian Constitution of 2014, which states: 'The principles of Christian and Jewish canons of Egyptian Christians and Jews are the main source of legislation for their personal status laws, religious affairs, and the selection of their spiritual leaders.' (Translation provided by the State Information Service of Egypt, <https://www.sis.gov.eg/UP/Dustor/Dustor-English002.pdf>; Christa Rautenbach, 'Phenomenon of Personal Laws in India: some Lessons for South Africa' (2006) 39 (2) The Comparative and International Law Journal of Southern Africa 241.

173 See: International Committee of the Red Cross, 'Status Update: The ICRC's Legal Standing Explained' (*ICRC*, 12 March 2019) <https://www.icrc.org/en/document/status-update-icrcs-legal-standing-explained>.

the Sovereign Military Order of Malta,[174] as well as the application of international law to rebel groups[175] and all other related discussions seem to point the fact that the centrality of states and territoriality in international law has never ceased to be questioned. Many of these ongoing debates could be much better informed with an awareness and knowledge of this personal/private history of international law.

174 Karol Karski, 'The International Legal Status of the Sovereign Military Hospitaller Order of St John of Jerusalem of Rhodes and of Malta' (2012) 14 International Community Law Review 19.

175 Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (CUP 2015).

Chapter 2: The Mixed Arbitral Tribunals and Turkey: Negotiating the International Identity of the Young Republic Under the Sèvres Syndrome

Zülâl Muslu[*]

Introduction

Post-World War I peacemakers had the onerous task of restoring order and tranquillity after years of horror while dealing with strong public pressure, resentment against the members of the Entente, the unprecedented presence of the media, and the interests of colonial empires.[1] One of the outcomes of the 1919-23 peace treaties was the creation of a range of international judicial bodies, the Mixed Arbitral Tribunals (MATs). These aimed at dealing with the liquidation of the consequences of the First World War and the compensation of Allied nationals in respect of damage or injury inflicted upon their property, rights, or interests in so-called 'enemy countries'.[2] Having fought on the German side, the Ottoman Empire was also concerned by the MATs. Although the armistice of Mudros, which ended hostilities on the Middle Eastern front, was signed between the Porte and the Allies on 30 October 1918, the MATs with Turkey were only created after the signature of the last Peace Treaty of First World War, the Treaty of Lausanne in 1923. By contrast, the MATs with the other defeated countries had been established right after the end of the War. This was not so much due to the Turkish delegation's vehement opposition to the MATs during the Lausanne negotiations, rather that the protagonists and negotiating powers had significantly changed over the almost five years that had passed since the armistice.

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1 See eg Margaret Macmillan, *Peacemakers: Six Months that Changed the World* (Random House 2001).

2 Burkhard Hess and Marta Requejo Isidro, '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 Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 239.

Before the establishment of the MATs with Turkey in 1923, the Ottoman Empire went through several stages of negotiation, as its fate had first been in the hands of the Treaty of Sèvres, three years earlier in 1920. Taking up the plan of partitioning the Ottoman Empire, which had already secretly been agreed upon as early as 1915, the Treaty of Sèvres concluded open negotiations that had started with the Paris Peace Conference in 1919, continued at the Conference of London (12 February-10 April 1920) and had been finalised at San Remo in April 1920 after months of discussions reflecting conflicting interests. The Treaty of Sèvres dismantled the Ottoman territory, creating large mandates and influence zones in the Middle East. The Treaty of Sèvres still haunts contemporary political discourse and the collective Turkish psyche, because it carries with it the shock and the humiliation of the split of the Empire's Anatolian heartland. Only an interior small state was to remain after Great Britain, France, Italy, and Greece had occupied their assigned regions as League of Nations' mandates. The Treaty of Sèvres also led to strengthen the Turkish national movement and rebellions, which started as soon as the negotiations for partitioning and the *de facto* occupations began. They grew into a three-year war of independence from May 1919 onwards, including the tragic Greek-Turkish war on the Western front (1919-1922).

Following the Armistice of Mudros, by the end of 1918, the French, British, and Italian forces occupied sections of Istanbul. The Allies eventually consolidated and officialised their occupation of the Empire's capital on 16 March 1920 after they had dissolved the Ottoman parliament. They thus created a real political *vacuum* and paved the way for two paradoxical developments. On the one hand, it led to the last Ottoman Sultan, Mehmet VI, cooperating with the Allies and signing the Treaty of Sèvres in August 1920. On the other hand, it gave Mustafa Kemal the opportunity to convene a new Assembly with extraordinary powers in Ankara, the so-called Grand National Assembly of Turkey created on 23 April 1920. The troops of the Turkish Nationalist Movement under his command continued the war of independence and rejected the terms of the Treaty of Sèvres. Against all odds, and with the financial support of Bolshevik Russia, these troops quickly organized themselves militarily and politically, establishing a counter government in Ankara, which competed with that of Istanbul. It then dismissed the Sultan and drove the occupying forces out one by one, pushing to renegotiate the terms of the Treaty of Sèvres. This renegotiation had to be conducted with the members of this new government, victorious over the Allied forces as well as over the Ottoman government and its failures during the Great War.

After months of negotiations, the Treaty of Lausanne was signed on 24 July 1923 by the Grand National Assembly of Turkey on the one side, and by British Empire, France, Italy, Greece, Japan, Romania, and the Kingdom of Serbs, Croats, and Slovenes on the other. Replacing the Treaty of Sèvres, the Treaty of Lausanne marked the end of the Ottoman Empire and the birth of modern Tukey, which extended from the provinces of Asia Minor to Eastern Thrace, ie almost the current borders. The Republic of Turkey, officially proclaimed a few months later, on 29 October 1923, was thus the new interlocutor of the Allied powers. The establishment of the MATs, created to meet what the Porte was responsible for, as it had been for all defeated European countries, was thus negotiated with the delegation of the provisional government of the Turkish troops. The MATs with Turkey were thus negotiated in a unique post-Great War context, where accountability was discussed with a victorious actor that had dismissed the Sultan, broken with his legacy, and was in the process of creating a fully independent and sovereign state. Despite the Turkish delegation's 'fierce resistance',[3] the tough negotiations of the treaty eventually led to the creation of the MATs.

The Turkish delegation had been led by Mustafa Ismet Inönü, more commonly known as Ismet Pasha, who was a war hero and a fine strategist with no diplomatic experience and a loyal second-in-command of Mustafa Kemal. During the entire negotiation process of Lausanne, the delegation had stuck doggedly to its positions, firmly committed to repairing the humiliation of the Treaty of Sèvres and to protecting the sovereignty of the new young Turkish Republic to be, which became a *leitmotiv* during the negotiations. As Ismet Pasha stated during the Lausanne negotiations in January 1923:

> It has been complained that we speak too often of Turkish sovereignty. We represent here a nation conscious of its independence and desirous of achieving a just peace; we have come to the Conference with the assurance of being treated on an equal footing; if we have been led to speak frequently of our sovereignty, it is because we have been obliged to do so by the proposals of a nature to infringe it, which have been made to us…[4]

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3 Walter Schätzel, *Internationales Recht: Gesammelte Schriften und Vorlesungen. Internationale Gerichtsbarkeit* (vol 2, Ludwig Röhrscheid 1960) 248.

4 Ministère des Affaires Etrangères (MAE), *Documents diplomatiques : Conférence de Lausanne* I (21.11.1922 – 01.02.1923) PV 3, 6 January 1923, 473: *'On s'est plaint que nous parlions trop souvent de la souveraineté turque. Nous représentons ici une nation*

The recent victories of Turkish troops over the Allied forces had certainly given the Turkish delegation a large amount of leeway in the negotiations at Lausanne. The violence of the battles and the shock of the occupation of a former major imperial power probably also hardened their determination. But do these factors also explain why the sovereignty issue was so pervasive? And why was the Turkish delegation so suspicious of the MATs, which had already been established with other former Central Powers? To what extent did the iterative sovereignty issue provide the outline of the negotiations at Lausanne? Addressing these questions will also allow us to better grasp the specificity of the MATs *alla turca*. To that aim, the paper will firstly present some indications as to why the MATs with Turkey met with such opposition and fear for Turkish sovereignty, and how this stance commanded their specificities among all the MATs established pursuant to the post-WWI Peace Treaties. Secondly, it shall examine how the shaping of the MATs mirrors the after-war hybrid status of the defeated but victorious Turkey.

1. Burden of the Past: The MATs as a Trojan Horse against Turkish Sovereignty

1.1. The Sensitive Issue of the Capitulations Reinforced at Sèvres

1.1.1. The Phantom of the Capitulations

In the aftermath of the 1914-18 war, eager to restore order and peace, the Allied powers considered the MATs as impartial courts that would provide a new ground for common trust and justice, as the French delegation stressed to its Turkish counterparts during the tense negotiations of the Lausanne Treaty.[5]The Turkish delegation was very sceptical regarding the neutrality of the MATs and the common benefits they were supposed to ensure. They firstly perceived them as a way to infringe upon the country's sovereignty, the equal recognition and safeguarding of which had become the core claim from the Turkish side. However, neither the obsession nor the intransigence of his argument can be regarded as a post-War phe-

consciente de son indépendance et désireuse d'arriver à une paix de justice ; nous sommes venus à la Conférence avec l'assurance d'être traités sur un pied d'égalité ; si nous avons été amenés à parler fréquemment de notre souveraineté, c'est que nous y avons été obligés par les propositions de nature à y porter atteinte, qui nous ont été faites ; … .'

5 Seha L Meray, *Lozan Barış Konferansı: Tutanaklar Belgeler* (tr, series I, Siyasi Bilgiler Fakültesi 2018) vol 3, 355.

nomenon or as the mere consequence of the dislocation of the Ottoman territory. The Turkish delegation greeted the MATs with aversion because they were perceived as a possible threat of history repeating itself, namely the reminiscence of the capitulations. A document from the Belgian Diplomatic Archives underlines that this concern was still topical even four years after the establishment of the first MATs with Turkey. It relates to the words that were mentioned by a Turkish Foreign Ministry official, Subhi Zia Bey in 1929, who suggested, given the few existing cases, amicable settlements rather than going to the MATs. He justified his proposition reportedly saying, '[W]e don't like mixed tribunals, they remind us of the capitulations and you know how sensitive we are about this'.[6]

The Turkish unease with the MATs stemmed from a much earlier period that introduced extraterritoriality via the well-known capitulations. Initially freely granted concessions granted by the Ottoman Sultan from the early 15th century onwards, the capitulations evolved over time to unnegotiated unequal treaties, which provided European nationals settled in the Ottoman soil privileges such as tax or jurisdictional immunities, or the establishment of consular courts competing with local tribunals. The capitulations created the grounds for a semi-colonial situation by the 19th century, as the economic and fiscal privileges granted to foreign (mostly Western-European) nationals, ended up, on the one hand, stifling the Ottoman economy, while on the other hand, the extraterritoriality, which fell outside the scope of the Westphalian principle of territorial sovereignty, opened the path for intervention in Ottoman domestic politics. After decades of struggle and unheard claims for abolition, the Porte had just unilaterally repealed the capitulations at the very beginning of the First World War.[7] The humiliation of the capitulations partly explains why the Porte chose to fight alongside Germany during the Great War - as together with military support, Berlin had offered the abolition of the capitulations. Thus, at Lausanne, the Turkish delegation dreaded their legal, and so sustainable, restauration by an international treaty; a fear matching the scale

6 '*Nous n'aimons pas les tribunaux mixtes, ils nous rappellent les capitulations et vous savez comme nous somme[s] chatouilleux à ce sujet.*' Archives diplomatiques (Belgique), Correspondance politique 1830-34, 52. Légation – Turquie, 2e série et/ou Compléments, 37. 1926-32, no 239, 18 February 1929. The author expresses her gratitude to Michel Erpelding for sharing this document with her.

7 R Salem, 'Fixation de la date à laquelle ont été abrogées les capitulations en Turquie' (1925) Journal du droit international 514; Nasim M Soosa, 'The Legal Interpretation of the Abrogation of the Turkish Capitulations' (1931) 3(7) Dakota Law Review 357.

of their inflexibility in the negotiations. This Turkish intransigence did not escape the attention of contemporary newspapers, such as the Swiss daily *Journal de Genève*:

> The session of the capitulations commission which took place this afternoon only served to confirm the irreducible antagonism of the two opposing theses. The disagreement officially noted ten days ago has remained, despite all the conversations that have taken place since then behind the scenes. Ismet Pasha was absolutely intransigent. He does not want the transitional measures of a judicial nature foreseen by the Allies at any price.[8]

1.1.2. The Revival of the Capitulations at Sèvres

The Turkish delegation also assessed the capitulations risk based on the recent experience of the Treaty of Sèvres, signed in 1920. The term 'syndrome of Sèvres' is usually used to refer to the humiliation ensuing the Ottoman territorial dislocation and to the belief in inner and outer interfering enemies. The winding-up of the Ottoman Empire and the Allied occupation of parts of its remaining territories forged a collective trauma that still triggers a feeling of mistrust towards foreign – especially Western-European –influences. However, this paper argues that the syndrome carries a broader scope, as it constituted the latest and clearest manifestation of fears about Ottoman sovereignty that had already been triggered by long-established Western ambitions and practices of incursion and administration, as well as contemptuous narratives.

It should be noted here that the Peace treaties signed in the aftermath of the First World War certainly aimed at order and tranquillity, but were shaped by a major element of revenge, as the severe terms of the Treaty of Versailles, called the 'Diktat' by Germans, demonstrated. However, if the Allies intended to weaken Germany with this Treaty, they did not mean to eliminate a neighbour and future trade and diplomatic partner. They had

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8 *Journal de Genève* (Geneva, 7 January 1923), in Bilal N Şimşir, *Lozan Telgrafları I (1922-1923)* (Türk Tarih Kurumu 1990) 342: *'La séance de la commission des capitulations qui s'est tenue cet après-midi n'a fait que consacrer l'antagonisme irréductible des deux thèses en présence. Le désaccord constaté officiellement il y a une dizaine de jours a subsisté, malgré toutes les conversations qui se sont déroulées depuis lors dans les coulisses. Ismet pacha fut absolument intransigeant. Il ne veut à aucun prix des mesures transitoires d'ordre judiciaire prévues par les Alliés.'*

less inhibitions regarding the Ottoman Empire, and the terms imposed by the Treaty of Sèvres were much more severe. In addition to military and financial restrictions, as well as the aforementioned territorial provisions and zone of influences, it also included provisions concerning the capitulations, whose unilateral abolition in 1914 had been firmly contested by the Powers. In its Article 261, the Treaty of Sèvres did not only restore the capitulations, it also extended them to all Allied countries. Once bitten, twice shy, the Turkish delegation was careful to ensure that this provision about the capitulations was not enacted again in the Treaty of Lausanne.

In 1920, the Treaty of Sèvres was concluded with a defeated protagonist, the Ottoman Empire, that the Treaty placed under the control of the Allied forces, whose nationals benefitted from privileges and immunities through the capitulations. In this context, the MATs, as international judicial bodies established to deal with matters of reparation and compensation between the nationals of independent countries, seemed to have little relevance for the remaining occupied Empire. As a matter of fact, the Treaty of Sèvres stands out for being the only post-World War I Treaty, which did not give rise to any MATs. Instead, it established Arbitral Commissions as if it had acknowledged the fictional domestic feature of the disputes raised in the occupied Empire. This seems to be confirmed by Article 311 of the Treaty, which specifies that the establishment of MATs could yet be considered for specific situations, such as the compensation of Allied nationals – individuals or companies – if they, however, are in territories detached from the Ottoman Empire and placed under the authority or tutelage of an Allied Power. It thus looks like the absence of MATs in the Treaty of Sèvres is an implicit recognition of the lack of independence of the Ottoman Empire. Moreover, the Treaty reflected the ambiguous legal status of the Empire under occupation in the provisions concerning these Arbitral Commissions, which were at the edge of the MATs. They indeed were given jurisdiction not only over matters related to the compensation of minorities (Article 144), but also for claims by Allied nationals against the Ottoman government in economic matters.[9] However, the Treaty was surprisingly silent about pre-War debts, as if the maintenance of the capitulations had wiped the slate of the Great War clean.

Following this logic of the Treaty of Sèvres regarding arbitration, one may consider that the establishment of the MATs could have been the sign

9 On economic matters, see for example the arts 287, 284, 297, 307, 309-311 of the Treaty of Sèvres.

of the recognition of a vanquished but independent status of a country, entirely freed from unequal treaties. It would then be more difficult to understand the Turkish hostility towards the MATs shown during the Conference of Lausanne. But Ottoman recent history offered further arguments for the Turkish delegation to be defensive and keep driving hard bargain.

1.2. The Former Experience of Mixed Courts

1.2.1. The Ottoman Mixed Courts

Apart from privileges and immunities, the capitulations were also part of the Ottoman judicial system, which had incorporated their provisions in special courts that dealt with mixed litigation in civil and, especially, commercial matters involving the nationals of the signatory states of the capitulations. Therefore, the mixed feature of the MATs was not a new way of approaching conflict resolution in the eyes of the Turkish delegation. The Ottoman judicial system had indeed already successively welcomed mixed commissions at the beginning of the 19th century and mixed commercial courts from 1848 onwards, which respectively included foreign merchants and foreign assessors. The latter had developed on the ground of Ottoman legal philosophy and extra-judicial practices of conflict resolution for mixed litigations, evolving in established jurisdictions under the diplomatic pressures of Western powers. Although they had been integrated into domestic ordinary tribunals, the Ottoman mixed commercial courts resembled an early form of international judicial body, as they were composed of one Ottoman President and the equal number of Ottoman and foreign assessors, who applied domestic laws along with the provisions of the capitulations.[10]

10 About these courts see eg: Theodor Weber, 'Das gemischte Handelsgericht in der Türkei, unter besonderer Berücksichtigung des gemischten Handelsgerichts in Konstantinopel: Beitrag zum Kapitulationenrecht' (1907) 10 Mitteilungen des Seminars für orientalische Sprachen 96; Ahmet İzmirlioğlu, 'Ottoman commercial tribunals: closer than enemies, farther than friends' (2018) 45 British Journal of Middle Eastern Studies, 776-795; Zülâl Muslu, 'Ottoman Mixed Commercial Courts', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2023); Johannes Berchtold, *Recht und Gerechtigkeit in der Konsulargerichtsbarkeit: Britische Exterritorialität im Osmanischen Reich : 1825-1914* (Oldenbourg Wissenschaftsverlag GmbH 2009); Macit Kenanoğlu, *Osmanlı Ticaret Hukuku* (Lotus 2005); Theus (ch 1).

Because of their specific mixed feature and of the diplomatic pressure, which both shaped these unique courts and prevented the Sublime Porte from reforming them into an ordinary domestic tribunal, the Ottomans perceived the mixed commercial courts as an intolerable violation of the Empire's sovereignty, as well as of international law. Most international lawyers perceived them differently, comparing the mixed courts to the consular courts, which were entirely extraterritorial courts dedicated to the litigation in which their nationals were involved as defendants, and which were therefore increasingly considered outrageous in the modern international law setting. By contrast, many international lawyers viewed mixed commercial courts as a good compromise to further implement the capitulations within a sort of extraterritorial justice with a human face involving local actors and laws.[11] These views added to diplomatic pressures but did not hold out any hope of a forthcoming end to the mixed courts, nor of the capitulations. Accordingly, using several strategies, the Porte fought for a long time to render the mixed courts obsolete, which it eventually achieved after having unilaterally abolished the capitulations in 1914.[12] This long and difficult struggle left Ottomans feeling suspicious of mixed judicial institutions in general, seeing in any new form – here in the MATs – a possible Trojan horse for capitulations, as Subhi Zia Bey had implied.

1.2.2. The Similar Civilisational Narratives

As already mentioned, the Ottoman mixed commercial courts were often presented as a good transition from the extraterritoriality of consular courts, which was slowly accepted as incompatible with modern international law, towards a more acceptable form of extraterritoriality. This compromise was justified by the necessity of the exception of extraterritoriality in international law to further protect Western nationals and their interests in regions such as the Ottoman Empire, where the laws and judicial system were deemed untrustworthy, arbitrary and incompatible with the standards of civilisation.[13] In fact, this legitimising narrative based on an

11 See eg Georges Mikonios, *Les Consuls en Orient et les Tribunaux mixtes* (PhD dissertation, Geneva University 1881) 322.

12 Zülâl Muslu, *Mutations à la Maison des Roses: Souveraineté ottomane et tribunaux mixtes de commerce dans le long 19ème siècle* (PhD dissertation to be published, Paris Nanterre University 2018)

13 See eg: Michel Kebedgy, 'La juridiction consulaire et les affaires mixtes en Orient' (1895) 27 Revue de droit international et de législation comparée 322.

allegedly improper Muslim law and the necessity of a transitional justice pending their 'modernisation' of the Ottoman Empire, which had been supporting the mixed commercial courts, was also largely used to argue in favour of the establishment of MATs with Turkey, as one can consistently read through the records of the negotiations.[14] Indeed, the justification narratives of the MATs were strikingly similar. The Allies would agree to a change of regime of the capitulations – some of whose provisions were considered outdated, especially in tax matters – only on the condition of special guarantees for foreigners with regard to civil and criminal justice in the form of a new type of mixed judicial institution.

Decades of deep legal and administrative reforms, called the Tanzimat (1839-76), as well as a long process of codification on the European model throughout the 19th century, had given birth to a partly Sharia-based civil code, the *Medjelle*, that was still in force at the beginning of the 20th century. However, even despite European inspired codification, its ties to Islamic law provided an incentive for the Allies to continue considering Turkish civil law as neither modern nor civilised by their standards. In their view, a transitional judiciary that would include the assistance of foreign magistrates, trained 'according to the highest principles of modern legal science', was therefore all the more necessary as foreign colonies grown numerous and important on Ottoman soil throughout the centuries.[15] As a counterargument, during the negotiations the Turkish delegation constantly stressed that it had developed a fully independent judiciary. The Allies, annoyed by the relentless Turkish argument, mocked its courts as being reportedly 'perfect'.[16]

Interestingly, these argumentations were shared among the Allies, including Japan, which had itself been subjected to unfair treaties in the 19th century but had recently joined the ranks of the states recognized as fully sovereign after a long process of legal 'modernisation' and had afterwards developed its own ambition of regional domination.[17] Internalising the Western colonial narratives, the Japanese delegation thus came out in favour of its fellow Allies' line of civilisational argumentation:

14 MAE France, *Livre jaune: Conférence de Lausanne* (2 vol, Imprimerie nationale 1923)

15 ibid, vol 2, 465ff.

16 ibid, vol 1, 466.

17 See eg: Selçuk Esenbel, 'Japan's Global Claim to Asia and the World of Islam: Transnational Nationalism and World Power, 1900-1945' (2004) 109 The American Historical Review 1140.

> … *However, [Baron HAYASHI] wishes to draw the attention of Ismet Pasha to the fact that his country took twenty years or more to achieve a complete legal organisation. It was only after the hard work of Japan that the Powers were able to accept the abolition of the capitulations*.[18]
> ... He spoke of the experience gained by a great country which has passed through precisely the same transitional stage as that repelled by Ismet Pasha, and he appealed to the Turkish Delegation to urge it not to reject the advice, which his experience and authority enabled him to give.[19]

On several occasions, Japan encouraged Turkey to engage in a transitional process towards full independence pending the modernisation of its judiciary. Through the voice of Baron Hayashi, Japan argued that it had taken Japan a long time to get rid of the unequal treaties it had had to sign with Western powers. While stressing its specificity of non-Western country becoming – rather than intrinsically being – civilised, Japan both denied a century of profound reforms of the Tanzimat and addressed the unequal treaties as necessary rather than unfair, suggesting that the capitulations issue was still very topical among the Allies.

1.2.3. Shifting the Balance of Power and the Historical Legacy at Lausanne

The painful precedents of the capitulations and mixed courts, as well as the humiliation of the Treaty of Sèvres were key elements in Turkey's attitude during these negotiations. The continuity of the contemptuous narrative towards Turkey and its judiciary, even though secular republicans actually headed the provisional government, certainly also thoroughly contributed to making the Turkish delegation adopt a reluctant attitude towards the MATs. As a matter of fact, the historical, diplomatic, and emotional setting led the members of the delegation to approach the MATs through the same prism as that of the earlier mixed commercial courts and, by exten-

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18 MAE France (n 14) vol 1, 445: '… *Toutefois, [le Baron Hayashi] veut attirer l'attention d'Ismet Pacha sur le fait que son pays a mus vingt ans ou davantage pour se donner une organisation juridique complète. C'est seulement, après un travail ardu, accompli par le Japon, que les Puissances furent à même d'accepter la suppression des capitulations.*'

19 ibid, 464 : '… *Il a parlé de l'expérience acquise par un grand pays qui a passé précisément par le même stade transitoire que celui que repousse Ismet Pacha, et il a fait appel à la Délégation turque pour l'engager à ne pas rejeter le conseil, que son expérience et son autorité lui permettaient de donner.*'

sion, through the paradigm of the discriminatory and semi-colonial capitulatory regime. The challenge for the Turkish delegation was therefore to avoid a restoration of the capitular regime, whose unilateral abolition in 1914 had been strongly criticized and rejected by European powers. As far as Turkey was concerned, it was a question of ensuring its full sovereignty, its recognition as an independent and equal actor on the international scene, and avoiding an additional obstacle to its economic development after the War. As Ismet Pasha summarized by commenting on the European proposals during the negotiations:

> I declared, arguing with leading motives and proofs, that the proposal was more burdensome than the capitulations regime and that the introduction of the foreign rule to our courts was contrary to sovereignty. I said that our counter proposition consisted of agreements among independent states within the frame of the rules of public international law. And I added that we [the Turkish delegation] are consistent in our point of view.[20]

Far from being a mere rhetorical claim over sovereignty, the debate over the capitulations and the Turkish hostility against the MATs were deeply rooted in a latent resentment that had grown during decades of a semi-colonial situation, which had inflated with the recent partitioning of the Ottoman Empire amid the Allies' mandates from October 1918 onwards. In this context, the capitulations issue was of course crucial for the Turkish side to set the scene for an independent state and equal international actor that had shown to have a renewed and strong government, as well as a great military force. Accordingly, during the Lausanne Conference, it was much trickier to address the Ottoman Empire – actually, the Turkish Republic to be – as an 'enemy country', as it had been back in the Treaty of Sèvres. Indeed, the last post-WWI Peace Treaty had put an end to the three-year conflict between the Turkish troops and the Allied occupying forces, and notably its Western front against Greece (1919-22). Therefore the Turkish delegation did not discuss like other 'enemies' did, since it did not sit at the negotiation table as the vanquished Ottoman Empire, a member of the Entente, but as victorious Turkish troops of the provisional

20 Bilal N Şimşir (n 8) 341: '*Teklîf edilen şeklin kapitülasyon rejiminden daha ağır olduğunu ve ecnebi hükkâmının mahkemelerimize idhâli hâkimiyete münafi bulunduğunu söyleyerek ve mukâbil teklifimizin hukuk-i umûmiye-i düvel ahkâmı dâiresinde müstakil devletler gibi mukâvelât akdinden ibâret olduğunu esbâb-ı mûcibe ve müdellelesi ile söyleyerek nokta-i nazarımızda musırr bulunduğumuzu ilâve eyledim.*'

government that had just defeated the Allies, enabling the Turkish delegation to assert its interests and those of its nationals.

This major shift in the balance of negotiating power and the hybrid vanquished-victor status of Turkey had a great influence on the terms of the Lausanne Treaty, which made the Treaty of Sèvres null and void. Territorial provisions aside, it had established the conditions for a possible post-War economic recovery and development, which the Treaty of Sèvres had entirely hampered. The pressure of the new context and the evolution of international law, as well as Turkey's very firm stance, thwarted any ambition to renew the capitulations. The Turkish delegation thus eventually obtained the complete abrogation of the capitulations (Article 28), which paved the way for political, economic, and judicial sovereignty, as well as the recognition of Turkey as an equal sovereign actor on the international stage. The capitulations and their legal nature as treaties had already been questioned by late 19th century international lawyers, notably on the basis of their lack of synallagmatic character.[21] As if it was a double compensation for the capitular past, the Treaty of Lausanne had not only ended the capitulations, it also had solemnly affirmed the reciprocity of treatment in Article 1 of the 'Convention respecting Conditions of Residence and Business and Jurisdiction', signed the same day as the Treaty of Lausanne. Building on their recent military success and haunted by their recent discriminatory history, the Turkish delegation stressed the bilateral nature of the provisions of that treaty; a feature that makes it unique among the post-WWI Peace Treaties.[22]

These general frameworks subsequently defined the actors and fields falling under the jurisdiction of the MATs with Turkey, to which the Turkish delegation, like that of other former Central Powers, had eventually agreed. However, here too, the Treaty of Lausanne stood out for the restrictions and differences it brought to the previously existing MATs. In the abovementioned context of a redefinition of the protagonists involved, the issue at stake for the jurisdiction of the MATs was to determine which states were actually entitled to claim rights over the territorially reduced former Ottoman Empire, and what was the period during which the courts could validly consider Turkey an 'enemy'. When did the Empire take part in the war? What Ottoman territory could validly be considered

21 Halil İnalcık, 'İmtiyâzât' in (1998) Encyclopaedia of Islam 1178ff; Paul Pradier-Fodéré, 'La question des capitulations' (1869) 1 Revue de droit international 119.

22 Charles Carabiber, *Les juridictions internationales de droit privé* (La Baconnière 1947) 193ff.

as the Ottoman Empire? The question of the admitted chronology and the extent of responsibilities was not only a financial issue for Turkey. It was firstly about being recognized as both victim of the occupation and victor, as its War of Independence was considered an extension of the Great War. Turkey wanted the Treaty of Lausanne to ensure itself and its nationals a status and rights equivalent to those of the Allies and their nationals. For instance, unlike the other Peace Treaties, including the Treaty of Sèvres, it did not provide nationals of either side with any unilateral right to claim compensation for damages resulting from extraordinary war measures.[23]

2. Turkey's International Status via the MATs Provisions

2.1. Negotiating the Scope and Scale of the MATs with Turkey

2.1.1. Territorial and Subject-matter Jurisdictions

The negotiations required prior agreement on the dates of the several key events, which took place over the five past years starting with the Turkish troops' accountability. As already mentioned, the Grand National Assembly of Turkey, which the Turkish delegation represented at Lausanne, had been convened three days after the French and British occupation of Istanbul on 16 March 1920. This date was never controversial among the Allies. It was thus agreed that all contracts and arrangements concluded after 16 March 1920 with the Turks had to be submitted to the approval of this Grand National Assembly to be duly valid. Cases that were not approved, which would lead to claims for damages, fell under the jurisdiction of the MATs (Article 77).[24] Both sides having agreed on the protagonists involved had to determine the competence of the MATs. The latter covered many fields, but this chapter will only focus on Section I 'Property, Rights and Interests' of Part III of the Treat of Lausanne that deals with the economic clauses, as it crystallizes most of the nodes of the debates and competences of the MATs, and most importantly, the exceptional bilateral feature of the Treaty.

During the negotiations, Ismet Pasha was determined to accept responsibility only on the condition of reciprocal recognition of his own victim status, following the dislocation of the Empire's territory and occupation

23 ibid, 192-94 ; Walter Schätzel (n 3) 248.
24 Seha L Meray (n 5) II, vol 1, 93-98, 123.

by the Allies.[25] These were all areas of strong disagreement, on which the Turkish delegation was not ready to back off. In their eyes, this reciprocity implied the discharge of Turkey's responsibility to the new states born of their detachment from the Empire before and after the armistice of Mudros, on 30 October 1918.[26] The Turkish delegation thus declined any responsibility for the damages on property, rights, and interests that may have occurred on the territories that were occupied by the Allies before and after the armistice of Mudros, based on the argument that the Ottoman staff who remained in place, had done so on the decision of and under the authority of the Allies. Moreover, the Allies, by occupying certain parts of the Empire after the armistice, had assumed sole responsibility for these areas, whereas the Turkish delegation sitting at the negotiation table represented the new Turkish Government that had dismissed the Sultan and fought the occupation forces.[27] The Turkish delegation endeavoured to limit the jurisdiction of the MATs to cases occurring after the actual entry of the Porte into the war on 29 October 1914, ie a few months after it officially started.[28]

This date of 29 October 1914, indeed served as reference for both sides in the determination of which property, rights, and interests, could be subject of claim for return or reparation before the MATs (Article 65).[29] The Treaty of Lausanne reflected these debates in its provisions. For the Allies, their nationals were concerned if they were Allied nationals by 29 October 1914 and if the object of litigation still existed and could be identified in territories remained Turkish by the date of entry into force of the Treaty of Lausanne (Article 65 (1)). As for the Turkish side, the Turkish delegation had succeeded in obtaining the claims of its hybrid status by earning the right for reciprocity of reparation for Ottoman nationals in various constellations, as the country had experienced profound changes within the last ten years. This right to compensation concerned the territories which were under Allied sovereignty or protectorate on 28 October 1914, or in territories detached from the Empire during the Balkan wars (1912-13) and under the sovereignty of the Allied Powers (Article 65 (2)). Finally, as a sign of the victory of the new Turkish Government and a marker of the break with the former Empire, it was agreed that in territories detached

25 Telegram of Ismet Pasha to Ankara, no 68-49/2, 2 December 1922, in Bilal N Şimşir (n 8) 158.
26 Seha L Meray (n 5) I, vol 3, 385.
27 ibid, 71ff; MAE France (n 14) 1, 546ff.
28 ibid.
29 Charles Carabiber (n 22), 193.

from the Ottoman Empire under the Treaty of Lausanne, all existing and identified property, rights and interests that had been subjected to exceptional war measures by the Ottoman Empire, as well as real estate property liquidated by any of the signatories to the Treaty of Lausanne, should be restored to their owners, with all disputes about these issues coming under the jurisdiction of the relevant MAT (Article 65 (3)).

As already mentioned, the negotiations at the Lausanne Conference addressed the question of the capitulations as their unilateral abrogation at the beginning of the war had caused many Allied nationals to lose the rights and privileges attached to this regime. Cancelling the dispositions and spirit of the Treaty of Sèvres, the Allies accepted the abolition of the capitulations. However, they unanimously rejected the date of 1914. It was agreed that their official abolition would only take place with the Treaty of Lausanne, which would not have any retroactive effects (Articles 28 and 71).[30] As a result, the Treaty met neither the Turkish claims, who refused any reimbursement, nor those of the foreign companies, who wanted reimbursement of the losses of all the fiscal years since 1914 because of the unilateral abolition of the capitulations.[31] Indeed, its Article 69 established that no tax or surtax could be collected from Allied subjects or their property in virtue of the privileges they enjoyed under the regime of the capitulations, which ended with the Treaty of Lausanne and set the date in this matter on the 15 May 1923. The non-retroactivity principle prevents the repayment of the sums encashed before that date. However, the sums, levied after 15 May for the activities concerning the financial years earlier than the financial year 1922-23, had to be returned.

Another originality of the Treaty of Lausanne was at odds with the Treaty of Sèvres (Article 300) and the other peace treaties. It did not provide for compensation for exceptional war measures. However, even though not expressly written down in the Treaty of Lausanne as it was for instance in the Treaty of Versailles, the missing mention was somehow counterbalanced by another provision set out in Article 58. The latter stipulated that the signatory parties to the Treaty (except Greece) reciprocally renounce all pecuniary claims of the loss and the damage suffered respectively between 1st August 1914 and the coming into force of the present Treaty, as the result of acts of war or measures of requisition, sequestration, disposal, or confiscation, which loosely are what was meant by 'exceptional

30 See Seda Örsten Esirgen, 'Lozan'ın Ardından Başlayan Bir Hukuki Mücadele: Karma Hakem Mahkemeleri' (2019) 7(2) Avrasya İncelemeleri Dergisi 309, 315/

31 R Salem (n 7) 514.

war measures' in the Treaty of Versailles. The following article that concerns the specific case of Greece is a zero-sum game, as it first recognises Greece's obligation to repair out of principle and neutralises it immediately (Article 59 (2)) by the Turkish renunciation because of the critical post-War financial situation. As said, this does not explicitly provide ways of reparation for the Allied nationals. However, in practice, this reciprocal renunciation meant Turkey's abandoning of a very consequent amount that benefited the Allies as a lump sum.[32] The Treaty of Lausanne had thus managed to organise a way of compensation that cannot be compared in any way to the stifling financial and economic measures of the Treaty of Sèvres.

2.1.2. Personal Jurisdiction

The clarifications regarding the dates and the territory to define the scope of the jurisdiction of the MATs raised another crucial matter, namely the question of citizenship. Only the citizens of concerned countries could claim for compensation before the MATs. To be more accurate, one should rather add only citizens who were wealthy enough to claim for compensation. In other words, those who had both substantial losses to be claimed for return or reparation and capacity to swiftly build and bring up a legal case to the tribunal, whose jurisdiction is rarely examined through this prism of economic citizenship that MATs implicitly defined through property.[33] As for legal citizenship, its necessary reliance upon a definition of the Empire's national territory raised the questions of who was considered an Ottoman citizen after the beginning of hostilities in 1914 and what were the rights of those who were no longer, as a result of the War and the dislocation of the Empire.

The Treaty of Lausanne has clear provisions on that issue. In Articles 30-36, it provides that if someone asserting to have Ottoman nationality and living within the borders of the states outside of Turkey's borders, would automatically lose his or her nationality if he or she did not apply for that nationality within two years from the coming into force of the Treaty. However, even in case of loss of nationality, they still would be entitled to retain their immovable properties within Turkey's borders be-

32 Charles Carabiber (n 22) 194.

33 For interesting studies on the question of citizenship in MATs in this edition, see: Castellarin (ch 5), Milanov (ch 6), Zollmann (ch 4).

fore exercising their right to opt for another nationality. Thus, the identity of those concerned by the section 'Property, Rights and Interests' of the Treaty, which determines the jurisdiction of the MATs on these issues, was quite well defined. The Treaty specifies that property, rights, and interests entering the scope of the jurisdiction of MATs are those 'having been subjected by the Ottoman Government to an exceptional war measure' (Article 65 (3)). Even though the wording of the article does not state it expressly, case law admitted that this expression encompassed the Abandoned Properties Laws enacted by the Turkish Government on 15 April 1923, shortly before the signature of Treaty of Lausanne.[34] These laws confiscated properties of any Armenian who was not present on their property, regardless of the reason, thus continuing in some ways the genocidal policies of 1915 perpetrated by an Ottoman Government from which the Turkish troops had been keen to distance themselves.

During the negotiations concerning the reparations issue at the Lausanne Conference, one of the major concerns of the Turkish delegation referred to the possible claims issuing from the losses incurred by Armenians during the Great War. The MATs were certainly established to solve litigation between citizens of the Allied countries and of the Ottoman Empire – as defined earlier. Accordingly, they had no jurisdiction over the claims of 'Turkish' citizens of Armenian origin against the Turkish government because the very aim of MATs did not target the issue between a state and its own citizens, all the more so since the Treaty postulated the repatriation of Turkish citizens. However, what was at stake was rather the claims of Armenians who had American citizenship or who lived under French mandate in Lebanon or Syria, which were the main destinations of the deportations. Legally speaking, these claims fell under the jurisdiction of MATs, but the Turkish delegation hampered this competence. Some discussions during the negotiations seem thus to have disappeared from the final version of the Treaty, such as the question of property, rights, and interests in Turkey of former citizens, who acquired the nationality of an Allied State or of a newly formed state, that should be returned to them as such.[35]

More substantively, it seems that the Turkish government basically curbed the MATs' jurisdiction on this matter with two main arguments.

34 William Henry Hill, 'The Anglo-Turkish Mixed Arbitral Tribunal' 47(3) Juridical Review (1935) 247, quoted in Taner Akçam and Ümit Kurt, *The Spirit of Laws: the Plunder of Wealth in the Armenian Genocide* (Berghahn Books 2015) 96.

35 M Cemil Bilsel, *Lozan* (Ahmet Ihsan Matbaasi 1933) vol 2, 448-49.

On the one hand, a citizen who had a foreign citizenship prior to 1914 – and as such, was foreign according to the Treaty – was considered an Ottoman, now a Turkish, citizen on the basis that the change of citizenship was neither communicated nor agreed by the Ottoman government. Indeed, the Ottoman Citizenship Law of 1869, still in force at that time, established that an Ottoman citizen who took the citizenship of another country without permission could be removed from their first citizenship only if the state agreed, and that they could consequently be prohibited from entering Ottoman territory. On the other hand, a citizen who acquired a foreign citizenship after 1914 was considered Ottoman on the basis of the dispositions of the Treaty.[36] The jurisdiction of the MATs had not only been determined by the balance of negotiation powers during the Lausanne Conference, but also by the interests and old fears of the victors – including Turkey – after the coming into force of the Treaty, showing the discrepancies that can occur between 'law in books' and 'law in action'.

As already stated, the Turkish delegation had long resisted the establishment of Mixed Arbitral Tribunals. They eventually agreed upon the numerous accommodations it had obtained in its favour. The capitulations and the jurisdiction of the MATs were of course key issues. However, the representatives of the provisional Turkish government also ensured that the practice of the MATs could work in its favour by fiercely negotiating the latter's organisational and procedural aspects. All MATs shared the specificity of a lack of homogeneity.[37] However, the MATs with Turkey stand out again, as the hybridity of Turkey's defeated-victor status also reflected in these more formal matters.

2.2. MATs Mirroring the Double Hybridity of Turkey's International Status

2.2.1. General Provisions

The French were among the most important and established colonies in the Ottoman Empire. It is therefore not surprising that the first MAT was established between Turkey and France on 3 December 1925.[38] It was

36 For an extensive and documented study on these issues, see: Taner Akçam and Ümit Kurt (n 34) especially 78-103.

37 Burkhard Hess and Marta Requejo Isidro (n 2) 254.

38 The date is also defined as December 1st in further sources, eg by Emin Ali, a Turkish general representative (*umumi ajan*) of the MATs with Turkey: Emin Ali,

also lasted the longest, as it continued its activities until 1938, despite a short interruption.[39] Tribunals were created with almost all other signatories states to the Treaty of Lausanne, starting with the United Kingdom (1926-32), then with Italy (1926-30), Romania (1926-29), Greece (1926-36), as well as Belgium (1926-32).[40] Portugal could have been included within the other Allied countries, but the scarcity of litigation did not lead to the creation of a tribunal. It is also worth noting that Japan is a notable exception among the signatories of the Treaty. Against Japan's wishes, no Turkish-Japanese MAT was established due to Turkey's firm refusal, based on the argument that the Ottoman Empire never had consistent diplomatic relations with Japan before the First World War.[41]

Furthermore, true to its course, the Turkish delegation succeeded in having the seat of the Turkish MATs located in Istanbul (Article 93), and not in one of the Allied capitals, where all other MATs had their seat upon the decision of their president. The courts and their registries were established in the former building of Ministry of Education in Çemberlitas.[42] This exception reflected once again the determination of the delegation not to yield any Turkish judicial sovereignty, thus drawing lessons from history but also showing a wish to break with Ottoman judicial and diplomatic practices. However, as Schätzel pointed out, choosing the capital of one of the Treaty's signatories as a seat raised the question of the impartiality of these tribunals, even though Article 93 of the Treaty offered some flexibility as to alternative and more convenient places when the cases required it.[43] Similarly, while French was generally accepted as the official language of the MATs, the Treaty of Lausanne gave room for more flexibility. In this regard, Article 95 stated that the language shall be left to the decision of each tribunal. However, it seems that French remained the working language of the MATs with Turkey, just as it continued to be used by Turkish officials for their communications with the representatives of foreign governments in general.[44]

'Lozan Ahidnamesine Göre Muhtelit Hakem Mahkemeleri' (1926) I(4) Hukuku Bilgiler Mecmuası192, quoted in Seda Örsten Esirgen (n 30) 327.

39 *Akşam Gazetesi* (Istanbul, 6 April 1931).

40 Walter Schätzel, 'Die Gemischten Schiedsgerichte der Friedensverträge' (1930) Jahrbuch öffentliches Recht 1930 378, 389; M Cemil Bilsel (n 35) 486; Niels Vihelm Boeg, 'Le tribunal arbitral mixte turco-grec' (1937) 8(1) Nordisk Tidsskrift for International Ret 3.

41 Seha L Meray (n 5) I, vol 2, 20ff.

42 Emin Ali, 'Lozan Ahidnamesine', 192, quoted in Seda Örsten Esirgen (n 30) 329.

43 Walter Schätzel (n 40) 289.

44 Seda Örsten Esirgen (n 30) 327ff.

Another originality of the MATs with Turkey concerns their composition pursuant to Article 92 of the Treaty of Lausanne. This provision did not depart from the generally accepted rule that the President of the MAT should be chosen by mutual agreement of the two countries involved. However, Article 92 of the Treaty of Lausanne introduced a novelty, namely that the appointed president could not be agreed within two months from the coming into force of the Treaty, the latter should be appointed by the President of the Permanent Court of International Justice in the Hague. This contradicted the usual competence of the Council of the League of Nations to appoint a neutral President failing an agreement between the two states involved.[45] It rather seems to indicate that the Turkish delegation wanted to define their MATs as international judicial bodies established to settle disputes between equals, thus departing from the political victor-vanquished relation that had inspired the genesis of the other MATs.

Such an originality may have counteracted fears of the partiality of the Turkish MATs, especially as one of the criticisms against MATs in general was that they granted too broad powers to one single third-country actor, namely the President of the Tribunal.[46] The signatories of the Treaty of Lausanne appointed several well-known publicists to this position, such as Hammerich, who served as president for Turkish MATs with Italy and the British Empire, or Asser for the MATs between Turkey and France or Belgium, and Nordenskjöld for those with Romania and Greece.[47]

In addition to its president, each MAT included two arbitrators appointed by their own respective governments. The Treaty of Lausanne also mentions the nomination of 'agents' by the respective government to represent them before the Tribunal (Article 93 (2).[48] Along with their administrative duties, the extent to which they could express themselves on behalf of their government or receive the complaints against it varied from government to government. Moreover, as attorneys, they were also responsible for pro-

45 Walter Schätzel (n 40) 258.

46 Karl Strupp, 'The Competence of the Mixed Arbitral Courts of the Treaty of Versailles' (1923) 17(4) American Journal of International Law 661, 672.

47 Seda Örsten Esirgen (n 30) 325-26.

48 The English, French, and Turkish texts of the Treaty of Lausanne mention 'agent' for state agent. The Turkish version even uses the turcised French terminology, '*Ajan*' between brackets next to the Turkish '*memur*', literally 'state agent' ('*Her Hükûmet huzuru mahkemede kendisini temsil etmk için bir veya bir kaç memur (Ajan) tayin edecektir*').

tecting the rights of their nationals when needed.[49] While arbitrators had to act in a neutral manner, the function of representative agents required the close defence of national interests. To ensure better representation of the Turkish Government before the MATs, the country's Ministry of Foreign Affairs established a committee of representatives. The head of this committee, the general representative, had a very important position, as he could directly report to officials about ongoing cases, or request information and documents from institutions, courts, or privileged companies.[50] One could also add that, amid the dozen appointees to the MATs on the Turkish side, only one seems to have been an international lawyer, whereas this was more frequent before the other MATs.[51] This can reflect either how Turkey perceived the MATs as a form of domestic court, or that it did not have many staff trained in international law at that time.

All this somewhat obscured the main originality of the MATs, namely the possibility for individuals to be litigants themselves before an international tribunal.[52] But this was in fact not new to Turkey, since individuals already had such opportunity before the Ottoman mixed commercial courts, whose activities had eventually been terminated at the same time as the unilateral abrogation of capitulations. As well as shedding light on Turkey's lack of enthusiasm for MATs, this experience of the mixed commercial courts may partly explain the very diplomatic feature of the adjudication, which was very dependent of the Foreign Ministry.

2.2.2. Procedure

There were many commonalities the Treaty of Lausanne MATs shared with the MATs of the previous Peace Treaties, such as the admission of an attorney or the assurance of the freedom of defence. Moreover, Article 95 of the Treaty of Lausanne stated that the trial was mainly regulated by the courts themselves, implying a further similarity, which is that of diversity. As a matter of fact, the MATs were characterized by the variety of the procedure specific to each MAT established for a specific 'defeated country', but also within the latter, as there could be different types of rules of procedure depending on which Allied power was involved,[53] espe-

49 Emin Ali, 191ff, quoted in Seda Örsten Esirgen (n 30) 326.
50 *Resmi ceride* (official journal), 4 July 1926, IV/6/411, 1734-35.
51 Burkhard Hess and Marta Requejo Isidro (n 2) 250.
52 ibid, 243.
53 Burkhard Hess and Marta Requejo Isidro (n 2); Seda Örsten Esirgen (n 30) 329.

cially as the MATs were established on a bilateral basis.[54] Indeed, regarding the MATs with Turkey, the Official Journal published the procedural rules, *Usul-i Muhakeme Nizamnameleri* prepared by each tribunal, which mainly constituted three corpora of rules, because the tribunals with the same president mostly had the same rules. However, these rules were not strictly peremptory, as some flexibility was allowed if it was considered that procedure might lead to an unfair outcome.

Time-limits are always a key procedural strategy issue. In the case of a Peace Treaty, time left for claims is even more important. Article 70 of the Treaty of Lausanne provided that claims other than the recovery of property must be brought before the MATs within six months from the date of their establishment, while claims regarding property and interests (Articles 65, 66 and 69) could be submitted up to twelve months from the date of entry into force of the Treaty. However, since the stipulated deadlines had in fact already expired, as the establishment of the tribunals had taken much longer than originally foreseen in the Treaty, the rules of procedure prepared and adopted by each court admitted the claims up to nine months from the actual creation of the MATs.

Like the other MATs, those established with Turkey also took their decisions by a majority vote (Article 94). The three arbitrators collaborated and sat together. This collegiality meant that the vote of the president was of course decisive to the outcome of the judgment. Such power, even though from an actor that is theoretically neutral, gave rise to much criticism. Indeed, the neutral president, who decided between the national arbitrators, actually played the role of a single judge, the arbitrators acting as mere 'agents bis'. This was an important issue in the case of the MATs with Turkey because their decisions were not subject to appeal. However, one can observe many cases of revision, including on the merits of the case, when a new decisive element happened to arise after the course of the trial. Time limits varied however according to the rules of procedure of the MATs concerned. While the request could normally be brought before the court within two years of the judgement, in the Turkish-Greek or Turkish-Romanian tribunals the time limit was sixty days from the notification of the judgement or from that of the new element affecting the judgment.[55]

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54 'Bilateral' is here understood as two negotiating parties and not as reciprocal. Michel Erpelding, 'International Law and the European Court of Justice: The Politics of Avoiding History' in Anne Peters and Raphael Schäfer (eds), *Politics and the Histories of International Law* (Brill 2021) 298, 306.

55 Seda Örsten (n 30) 332.

The decisions of the MATs were recognized by national institutions and were submitted to execution. As such, no exequatur was needed, the decisions were directly enforceable within the signatories' domestic judicial systems, which seems to be a common feature of the MATs.[56] Turkish officials took this responsibility through the Execution Office, which had also been in charge of the execution of the judgments rendered by the Ottoman Mixed Commercial Courts. This stage of the procedure had been a very strategic one, as the Ottoman authorities often tried to slow down the execution of judgments that were unfavourable to them and to obstruct the functioning of a court they wanted to abolish in any case. The execution of the MATs' judgments does not seem to have suffered the same fate, although the Turkish side wanted to monitor it closely. Accordingly, a draft law, called 'The Bill on the Execution of Judgments Issued by Mixed Arbitral Tribunals' (*Muhtelit Hakem Mahkemelerinden Sadır Olan Hükümlerin Tenfizi Hakkında Kanun Layihası*), prepared by the Ministry of Justice, was presented to the Turkish Parliament by Ismet Pasha, who had become at that time a Member of Parliament. It stated that it was appropriate to leave the task of executing the provisions of the mixed arbitration courts to the Istanbul Execution Office, linked to the Ministry of Justice. It would also be more convenient for the relevant parties due to the location of the courts' seat. The draft project was adopted and published in the Official Journal in May 1930.[57] Thus, the Turkish side retained a measure of control over the entire procedure of the MATs, from its beginning to its final stages, as if to reassure itself and show the world its full judicial sovereignty.

3. Conclusion

As the number of requests decreased, the MATs with Turkey eventually lost their usefulness and one-by-one ceased their activities. The tenacity of the Turkish delegation during the negotiations made the MATs with Turkey an exception among an already exceptional institution. The MATs were indeed absolutely remarkable legal organs in their time, especially in that they allowed access to individuals within the frame of international law, which was predominantly seen as being a law dedicated to interstate

56 Charles Carabiber (n 22) 243-45.
57 https://www.resmigazete.gov.tr/arsiv/1503.pdf, accessed 28 September 2021.

relations and conflicts.[58] However, the MATs established by the Peace Treaties cannot only be seen as international law jurisdictions aiming at ensuring sustainable tranquillity and order after the War. The Turkish example of MATs reveals this outstanding jurisdiction as being firstly the legal institutional tool of the victors' justice and a means for ensuring a lasting dominance, not only among countries but also populations.

Well aware of how the composition, procedure, and practice of MATs, mainly shaped established during the tough negotiations at the Lausanne Conference, could have negatively impacted both the sovereign image and the finances of the young Republic of Turkey, a Turkish daily newspaper states after taking stock of all MATs' judgements and reparations awards against Turkey in 1932, of which the average was not too burdensome: 'Let us not forget that we owe this outcome to the provisions of Treaty of Lausanne, which are in our favour'.[59] The MATs with Turkey engage at approaching them in their imperial and colonial context at the turn of the 20th century and portrays a different picture of MATs, also recalling how emotions, such as humiliation, can be a powerful motivator for normative production and can redefine international relations.

58 Burkhard Hess and Marta Requejo Isidro (n 2) 14ff.

59 *Milliyet* (Istanbul, 15 March 1932). *'Bu neticeyi Lozan ahitnamesinin lehimize mevzu ahkâmına borçlu olduğumuzu unutmayalım.'*

Chapter 3: The Mexican Claims Commissions and the Mixed Arbitral Tribunals in the 1920s: Lessons on Legitimacy and Legacy in International Adjudication

José Gustavo Prieto Muñoz[*]

1. Introduction

In 1920, Álvaro Obregón, a former general and President of Mexico, was desperate to consolidate his grip on power after the Mexican Revolution, a tumultuous period that had begun with the fall of Porfirio Díaz's regime in 1911. On the external front, the United States and European nations refused to recognize any Mexican government that was unwilling to repair the damage caused to foreign nationals during the years of internal struggle. On the internal front, any reparation to foreigners threatened to make Obregón look weak or even appear a traitor to the several factions behind his newly formed government.

Obregón's administration thus took on the task of negotiating a formula that would allow Mexico to solve its disputes with foreigners, acquire recognition for his government, and at the same time avoid any perception within Mexico that the new government had bowed to the will of the Americans and Europeans. The result was a series of agreements that were reached, first with the United States – known as the 'Bucareli agreements' – and then with European states. These agreements resulted in one of the most innovative adjudicatory experiments of the 20th century: The Mexican Claims Commissions (MCCs), eight adjudicative bodies based on similar international agreements and procedural rules that were jointly established between Mexico and seven different countries in the aftermath of the Mexican Revolution:

- **United States-Mexico, General Claims Commission** (**GCC**), established by the United States-Mexico GCC Convention (General Claims Convention between the United States of America and the United Mexican States, September 8, 1923). Claims: 3617 filed; 54 claims dismissed;

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94 awarded; 3,469 pending claims. In 1941, the pending claims were terminated with an *en bloc* agreement between the two countries

- **United States-Mexico, Special Claims Commission** (**SCC**), established by the United States-Mexico SCC Convention (Special Claims Convention between the United States of America and the United Mexican States, September 10, 1923). Claims: 3176 filed; 18 disallowed; 3,158 pending claims. In 1934, the pending claims were finally terminated with an *en bloc* agreement between the two countries
- **France-Mexico Special Claims Commission** (**SCC**), established by the France-Mexico SCC Convention (Convention Between France and Mexico, September 25, 1924). Claims: 251 filed; 108 withdrawn; 50 dismissed; 93 awarded; no claims pending.
- **Germany-Mexico Special Claims Commission** (**SCC**), established by the Germany-Mexico SCC Convention (Arrangement between Germany and Mexico, March 16, 1925). Claims: 140 filed; 68 withdrawn; 38 dismissed; 34 awarded; no claims pending.
- **Spain-Mexico Special Claims Commission** (**SCC**), established by the Spain-Mexico SCC Convention (*Convención que crea una Comision especial de Reclamaciones entre los Estados Unidos Mexicanos y España*, November 25, 1925). Claims: 1268 filed (known cases). The Commission completed its work with no claims pending.
- **Great Britain-Mexico Special Claims Commission** (**SCC**), established by the Great Britain-Mexico SCC Convention (Convention between his Majesty and the President of the United Mexican States, November 19, 1926). Claims: 128 filed; 18 withdrawn; 60 dismissed; 50 awarded; no claims pending.
- **Italy-Mexico Special Claims Commission** (**SCC**), established by the Italy-Mexico SCC Convention (Convención de Reclamaciones celebrada entre los Estados Unidos Mexicanos y el Gobierno de Italia, January 13, 1927). Claims: 157 filed; 51 withdrawn; 63 dismissed; 43 awarded; no claims pending.
- **Belgium-Mexico Administrative Arbitration Tribunal** (**ATT**), established by the Belgium-Mexico AAT Agreement (Convenio celebrado entre los Gobiernos de los Estados Unidos Mexicanos y el Reino de Bélgica, May 20, 1927). Claims 16 filed: 14 dismissed; 2 awarded; no claims pending.

While the MCCs and Mixed Arbitral Tribunals (MATs) were established following different historical events in two geographically distinct regions, remarkably, these two bodies, which both aimed to adjudicate the international claims of private citizens, coexisted during the 1920s. Despite

their differences, they faced a common challenge to international law in the early twentieth century: establishing the rules and principles that should be applied in setting the international liability of States for damage suffered within their territories by aliens. Against this background, in this chapter I will examine the differences between the MCCs and MATs in the Americas.

The roadmap for this is the following: Section 2 provides a historical background for the MCCs as one of the last types of Latin American Claims Commissions. Section 3 explains how the legitimacy of the MCCs was constructed through the use of *ex-gratia* clauses and how this differed from the legitimacy of the authority wielded by the MATs. Section 4 analyses the legal position of individuals in the two types of bodies. Finally, Section 5 provides an assessment of the legacy of the MCCs and MATs in the history of international adjudication.

2. *Historical Background and Context of the MCCs*

Between 1794, after the Jay Treaty – usually referred to as the first treaty that created a claims commission – and 1938, there were at least 409 known claims commissions established around the world.[1] Of these, 193 were Latin-American – ie, involved at least one country from the Latin American region.

The first Latin-American commissions in the 19th century were related to wars of independence and the subsequent armed conflicts that arose between new nations fighting over territories and European nations trying to assert their influence in the region. One of the first mentions of a Latin-American commission agreement can be found in the treaty between Brazil and Great Britain of 1829, which dealt with the capture of British ships in Brazilian waters.[2] Later, in 1840, the claims commission between

1 There was no central register for these earlier cases, making an historical analysis difficult. Most of the information available comes from private collections, notably: Lewis Hertslet, *A Complete Collection of the Treaties and Conventions and Reciprocal Regulations at Present Subsisting Between Great Britain and Foreign Powers and of the Laws, Decrees, Orders in Council* (Nicoll & Berrow 1827); Henri La Fontaine, *Pasicrisie internationale 1794–1900: Histoire documentaire des arbitrages internationaux* (first published 1902, Nijhoff 1997); Alexander M Stuyt, *Survey of International Arbitrations 1794–1938* (Springer-Science+Business Media 1939).

2 *Agreement between Great Britain and Brazil, relative to the settlement of British claims, signed at Rio de Janeiro, 5 May 1829. Império do Brasil Memorandum entered into between Lord Ponsonby and the Brazilian Government, relative to the Capture of British*

Argentina and France decided claims lodged after France imposed a blockade on the ports of the Province of Buenos Aires. At least 26 later commissions were exclusively related to boundary disputes between countries in the region or to damage suffered by European or US nationals that occurred during hostilities.[3]

A second cluster of Latin-American commissions appeared in the 20th century with the creation of adjudicative bodies related to crises in the internal rule of law and subsequent conflicts with foreigners. Thus, in this period, political and institutional instability becomes a guide to tracking the moments when Latin America was relevant to International Law[4]. Such commissions included the 10 different commissions established in 1903 between Venezuela and other nations after the military blockade of Venezuelan ports. These commissions ultimately decided 885 individual claims.

The 1923–34 MCCs were part of this second cluster of Latin-American commissions set up after the decade-long collapse of the Mexican State. The Mexican Revolution comprised a series of bloody armed struggles that took place from 1910 to 1920 and transformed Mexico culturally, legally, and politically. The internal conflict started in 1910 with a call to arms to overthrow the dictator Porfirio Díaz, who had been in power in Mexico since 1884.

During the following years, different factions fought for control and three presidents took office: first, the government of Francisco Madero (1911–13); then the brief term of Victoriano Huerta (1913–14); and finally, José Venustiano Carranza (1916–20).[5] Carranza, in turn, was overthrown by General Alvaro Obregón, who led a military insurrection known as the Agua Prieta rebellion in 1920. The rise of Obregón is usually considered an historical marker for the end of the Mexican Revolution because it was the last armed uprising that succeeded in overturning a government. In addition, the government of Obregón was the first since the beginning

ships in 1826 and 1827. See: La Fontaine, *Pasicrisie Internationale 1794–1900* (n 1) 91; Stuyt (n 1) 30.

3 I expand on Latin American Claims Commissions in José Gustavo Prieto Muñoz, 'Mixed Claims Commissions in Latin America during the 19th and 20th Centuries: The Development of International Law in between Caudillos and Revolutions' in Raphael Schäfer and Anne Peters (eds), *Politics and the Histories of International Law: The Quest for Knowledge and Justice* (Brill | Nijhoff 2021) 250.

4 I developed this argument in: ibid.

5 Abraham H Feller, *The Mexican Claims Commissions, 1923–1934: A Study in the Law and Procedure of International Tribunals* (Macmillan 1935) 15.

of the Revolution to obtain international recognition after the Bucareli agreement that established the first two MCCs[6].

When Obregón took power in December 1920, his government was politically weak and remained far from enjoying the power and control over Mexico that Porfirio Díaz had exercised before the Revolution. There was no political sense of unity on the internal front, and Obregón had little influence on regional military leaders.[7] He was also isolated from the international community outside of Latin-America. Several European countries and the United States refused to recognize Obregón's government unless Mexico covered the damage caused to foreigners during the revolutionary period.

3. *The Legitimacy of the MCCs and the Ex-gratia Clauses*[8]

Unlike the European Mixed Arbitral Tribunals created pursuant to the 1919 Treaty of Versailles and other post-WWI peace treaties, which included the idea of reparation but also held Germany and its allies specially accountable[9] for some of the violations of international law committed during WWI, the MCCs did not put an additional burden of shame or blame on the Mexican State or Government.

The legitimacy of the MCCs was constructed by negotiating and drafting *ex-gratia* clauses included in the respective conventions. These *ex-gratia* clauses established that Mexico agreed to pay compensation for damage to aliens incurred during the Revolution, but not because they had breached any obligation under international law. Instead, the clauses, according to Mexico, recognized a 'moral' obligation to repair damages arising from the Revolution. The political value of the clauses was that they allowed Obregón's government to present the agreement inside Mexico as a magnanimous act of a country that showed respect for international law by

6 Eric Damian Reyes, 'La política exterior de México hacia Estados Unidos: elementos generales a considerar en la relación bilateral a partir de un análisis histórico' (2017) 128 Revista de Relaciones Internacionales de la UNAM 131.

7 ibid, 139.

8 This section is based on findings from: Jose Gustavo Prieto Muñoz, 'Mexican Claims Commissions 1923–1934' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP forthcoming 2023).

9 Jakob Zollmann, 'Reparations, Claims for Damages, and the Delivery of Justice. Germany and the Mixed Arbitral Tribunals (1919–1933)' in David Deroussin (ed), *La Grande Guerre et son droit* (Lextenso Editions LGDJ 2018).

a government that had obtained international recognition and support, rather than as a compromise imposed by foreign powers.

However, the implementation of these *ex-gratia* clauses implied a series of jurisdictional challenges that complicated the work of the MCCs, such as determining what laws were applicable and establishing the standards for state responsibility. Those challenges led to friction among the different MCC Commissioners, who often held opposing views on the scope of the meaning of the *ex-gratia* clauses. In this section, I will briefly describe the drafting process of these type of clauses.

International recognition, particularly from the United States, was a priority for Obregón's government from the time he took office in 1920. However, he was met with a forceful response from the United States administration under President Wilson, who offered acknowledgment only on two conditions: first, that Mexico safeguard the diverse property rights of United States citizens and corporations, including the derogation of Article 27 of the 1917 Mexican Queretaro Constitution, which regulated and limited the property rights of foreigners; second, that Mexico resolve all pending claims by United States individuals and corporations made before and during the revolution.[10]. Both conditions were rejected by Mexico. The Obregón Administration also unsuccessfully tried to obtain recognition from several European nations, which were reluctant to reach any compromise without knowing how Mexico would settle its differences with the United States.

In 1921, Warren G Harding was elected as the 29th President of the United States, and his Secretary of State, Charles Hughes, reiterated the two conditions for recognizing Obregón's government. In addition, Secretary Hughes presented Mexico with the draft of a Treaty of Friendship, Commerce, and Navigation which included a provision involving the derogation of Article 27 of the Mexican Constitution. Mexico did not accept the treaty. During the following years of Obregón's presidency, Mexican officials led by Alberto Pani undertook several diplomatic efforts with the Harding administration and United States oil and railway companies, as well as directly with bondholders, in an attempt to achieve recognition of Mexico's post-revolutionary government.[11]

By 1923, in the final years of Obregón's presidential period, economic actors put growing pressure on the United States Government to normalize relations with Mexico. In addition, the longer the United States delayed

10 Reyes (n 6) 141.

11 Lorenzo Meyer, *La marca del nacionalismo* (1st edn, El Colegio de Mexico 2010) 42.

recognizing the Mexican Government, the more ineffective its diplomatic tools for influencing Mexico became. After three years, Obregón's government was still in office, making the lack of recognition appear a less important condition for retaining power in Mexico. Even though both the United States and Mexico had sufficient incentives to reach an agreement, lack of consensus on how to shape such an agreement prevented a mutually satisfactory solution.

A diplomatic breakthrough occurred thanks to James A Ryan, a retired United States general who was living in Mexico, and who was a friend of both Harding and Obregón.[12] In an exchange of letters during April 1923, Ryan proposed a clear-cut process to both presidents: the creation of an informal commission – formed by two delegates from each country directly appointed by each president – to negotiate a treaty to end the dispute.

On May 14, 1923, at 85 Bucareli Street in Mexico City, the four delegates began to shape the agreement that would create the United States-Mexico General and Special Claims Commission. The work of the commission was commonly known at that time as the 'Bucareli Agreements', taking the name of the street where the negotiations took place.[13] On August 15, 1923, the Bucareli delegates held their last meeting, concluding with a general understanding including three agreements:

(a) **General Claims Commission (GCC):** The text of a treaty creating a General Claims Commission to consider all individual claims made after 4 July 1876, excluding claims originating during the Revolution. The General Claims Commissions established at the US-Mexico GCC Convention aimed to resolve all types of private claims filed by citizens of either country against the other since the signing, on July 4, 1868, of the previous United States-Mexico Claims Convention. This excluded claims for damage 'growing out of the revolutionary disturbances in Mexico.'[14]

(b) **Special Claims Commission (SCC):** The text of the treaty to be ratified by the two States creating a Special Claims Commission. The SCC

12 John W Dulles, *Yesterday in Mexico: A Chronicle of the Revolution* (University of Texas Press 1961) 162–63.

13 Pablo Serrano Álvarez, *Los Tratados de Bucareli y la Rebelión delahuertista* (Instituto Nacional de Estudios Historicos de las Revoluciones de México 2012).

14 *General Claims Convention between the United States of America and the United Mexican States for the settlement of claims by the citizens of each country against the other* (Agreement signed 8 September 1923) 4 RIAA 7.

was created to resolve claims made by private citizens against Mexico for damage suffered because of violence during the Mexican revolution from 1910–1920. It was also designed to make decisions based on the 'principles of equity' rather than by applying the principles of international law.[15]

(c) **Unofficial agreements:** Political compromises regarding the specific property rights of United States individuals and companies acquired before the enactment of Article 27 of the 1917 Mexican Constitution. Those 'unofficial agreements' were not meant to be ratified by the two countries but instead consisted of promises made by the Obregón government.[16]

The most significant concession made by Mexico was to acknowledge responsibility for the damages caused to foreigners during revolutionary times. For this reason, a vital element of the wording of the Special Claims Commission (SCC) treaty was to make such concessions appear to be magnanimous acts stemming from moral duty, rather than to acknowledge responsibility under international law. This element was instrumentalized by an *ex-gratia* clause. After reaching this understanding, the United States finally recognized Álvaro Obregón as the legitimate president of Mexico on August 31, 1923.

After signing the Special and General Conventions with the United States, it became easier for Mexico to make agreements with European States, using the Special Convention text as a reference, and to expand its recognition by the international community. It is believed that Mexican officials approached at least twelve other States after 1920 but, in the end, Mexico concluded only six special conventions with European nations: France (1924), Germany (1925), Spain (1925), United Kingdom (1926), Italy (1927), Belgium (1927)[17].

The value of the *ex-gratia* clause was that it was inserted not in the preamble merely as a reason to enter into the agreements, but was includ-

15 *Special Claims Convention between the United States of America and the United Mexican States, desiring to settle and adjust amicably claims arising from losses or damages suffered by American citizens through revolutionary acts within the period from November 20, 1910, to May 31, 1920* (signed September 10, 1923) 4 RIAA 772.

16 Serrano Álvarez (n 13) 6.

17 The only European commission that differed substantially in its rules of procedure was the Belgium–Mexico Administrative Arbitration Tribunal for Belgium Claims. While its jurisdiction ranged over the same revolutionary disturbances, the countries of Mexico and Belgium decided that the number of claims did not require all the institutional apparatus of a fully-fledged claims commission.

ed as a central clause of the MCC jurisdictions. In this way, it was possible to effectively separate any political burden of shame on the part of the Mexican State for damage committed from an objective analysis of the existence of damage to foreigners. This characteristic of the very design of the MCCs differentiates them from other types of adjudicative bodies such as the MATs in Europe. The latter followed a logic that went beyond the compensation of foreigners for damage by implying that Germany and its allies were to be held accountable for violations of international law committed during the First World War.

The text of the original *ex-gratia* clause in Article 2 of the United States-Mexico Special Claims Commission Convention is the following:

> The Mexican Government desires that the claims shall be so decided because Mexico wishes that her responsibility shall not be fixed according to the generally accepted rules and principles of international law, but ex gratia feels morally bound to make full indemnification.

Almost identical *ex-gratia* clauses to the one cited above were used in later conventions established with European nations.[18] For instance Article 2 of the Great Britain-Mexico SCC Convention was drafted in the following way:

> Each member of the Commission, before entering upon his duties, shall make and subscribe to a solemn declaration in which he shall undertake to examine with care, and to judge with impartiality, in accordance with the principles of justice and equity, all claims presented, since it is the desire of Mexico ex gratia fully to compensate the injured parties, and not that her responsibility should be established in conformity with the general principles of International Law; and it is sufficient therefore that it be established that the alleged damage actually took place, and was due to any of the causes enumerated in Article 3 of this Convention, for Mexico to feel moved ex gratia to afford such compensation.

The *ex-gratia* clause had a twofold effect. First, it defined the applicable law that ought to be applied. If the clause was the recognition that Mexico was not responsible under international law, then the latter could not be

18 See: Art 2 Great Britain-Mexico SCC Convention; Art 2 Spain-Mexico SCC Convention; Art 2 Italy-Mexico SCC. A similar clause limited jurisdiction in the France and Germany Conventions, which established that the principles of equity and justice rather than international law were applicable. See: Art 2 Germany-Mexico SCC Convention and Art 2 France-Mexico SCC Convention.

used to decide cases. Instead, according to the various conventions, the special commissions needed to apply the 'principle of equity' or 'justice'. Second, it limited the subject matter jurisdiction of the Commissions only to revolutionary disturbances or acts. However, there was not enough clarity in the conventions regarding the meaning of these two elements.

None of the MCC Conventions clarified the meaning of 'equity' in the *ex-gratia* clauses, leaving it to the Commissions to determine its meaning. Two interpretations could be considered. The first interpreted the clause in a narrow sense, taking 'equity' to apply exclusively to the rules governing attribution of responsibility contained in the Special Claims conventions. The second interpreted 'equity' in a broader sense, as a principle that granted the Commissioners considerable powers to make decisions outside international law. The Commissions generally adopted a narrow interpretation of the meaning of 'equity' as simply implying a sort of *lex specialis*, with the need to strictly apply the conventions' conditions for attribution of responsibility without resorting to other sources *within* international law.[19]

The Germany-Mexico SCC, in the *Testamentaria del Señor Hugo Bell* Case, appears to be the only one that made a statement indicating a broader understanding of equity. In this case, it decided a claim in favour of the heirs of a German national killed by insurrectionists and recommended, despite the absence of negligence on the side of Mexico, payment as a matter of grace based on 'equity'.[20] The Commissioners argued that tribunals have the power to offer as 'equity' something that is not obligatory, without being constrained by any legal provision.[21]

However, a closer look at the *Hugo Bell Case,* shows that in the end the Germany-Mexico SCC did not take a decision outside international law, since it applied the conditions set down in the Germany-Mexico SCC Convention – that damage had occurred and that this damage was caused by revolutionary violence. In addition, in other cases, the same Germany-Mexico SCC relied heavily on international law in its findings.

A preliminary conclusion that can be gleaned from this section is that the design of an international adjudication body matters for its legitimacy. Despite its different origins, the *ex-gratia* clause formula described in this text allowed Obregón's government to sustain the international adju-

19 For instance, see the relaxation on equity in: *Russell (USA) v United Mexican States*, US-Mexico SCC (Award 24 April 1931) 4 RIAA 805.

20 Feller (n 5) 227.

21 *Testamentaria del Señor Hugo Bell v Mexico*, Germany-Mexico SCC, Decision no 67, quoted in Feller (n 5) 226.

dication process despite internal criticism. In this sense, this arrangement allowed for greater involvement of Mexican and Latin American jurists in the adjudication process itself, as evidenced by the heated discussions within the different MCCs. The MATs lacked this element of legitimacy. While they were designed to fulfil a reparatory function, they also took on a punitive role censoring violations of international law committed by Germany during WWI.

4. Legal Position of Individual Claimants in the MCCs and MATs

The most innovative feature attributed to the MATs was the direct standing they accorded to private individuals before the Courts.[22] In comparison, the MCCs did not grant individuals direct access to the courts but instead created a hybrid system where claims had a private origin but were controlled by the State. In this regard, the MCCs went beyond the understanding of adjudication as an extension of diplomatic protection characterizing previous claims commissions in the 19th century, recognizing the private nature of such claims. However, they still fell short of granting direct standing to private individuals as the MATs did. The following section explores the position of the individual in the MCCs and compares it to that in the MATs.

At the beginning of the 20th century, with closer contact between citizens and corporations, governments of different states had already realized the need to draft more precise rules for assessing international liability when damage had been inflicted on aliens. However, one conceptual obstacle was that of defining the legal nature of such rules within international law, a system where only states were granted rights and obligations. Since at least Vattel's time, international law had been conceived as the construction of positive law for states within the framework of the political configuration of exclusive territorial public authorities, meaning that one

22 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 Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 243; Charles Carabiber, *Les juridictions internationales de droit privé: De l'arbitrage international à l'expérience des tribunaux arbitraux mixtes et à l'institution de juridictions internationales permanentes de droit privé* (La Baconnière 1947) 241–44.

nation possessed only one exclusive public authority (state) over a defined territory, which in turn could be engaged in agreements with equals.[23]

The number and nature of claims made by private individuals after WWI and the Mexican Revolution increased the need to establish mechanisms that would elevate the position of private parties so they could directly pursue redress for grievances with states. However, that adjudicative exercise was incompatible with the Vattelian understanding of international law used at the time; how could a private individual be within an arm's length of a state without contesting the core idea of the exclusive territorial authority of a sovereign?

In the case of the MATs, the adjudicative bodies gave the individual direct standing in the legal process but there was no single criterion used to justify this. This absence of definition raised questions regarding the international nature of the MATs: they appeared to be 'international' in terms of their origin but not in terms of their function.[24] In the concrete case of the claims that arose from Article 297 of the Versailles Peace Treaty, they could thus be compared to the claims adjudicated by the MCCs, where an individual was not considered as holding the right on his own, but rather as receiving protection via the state.[25]

Nevertheless, the MCCs provided hybrid or mixed status to the individual without direct standing by granting them 'initiative' and other functions within the process undertaken by the state. In its decision on the Mexican Union Railway case, the Great Britain-Mexico Special Claims Commission provided the following distinction between power and private 'initiative' to justify the mixed or hybrid nature of such cases:

> These claims bear a mixed character. They are public claims in so far as they are presented by one Government to another Government. But they are private in so far as they aim at the granting of a financial award to an individual or to a company. The award is claimed on behalf of a person or a corporation and, in accordance therewith, the Rules of Procedure prescribe that the Memorial shall be signed by the claimant or his attorney or otherwise clearly show that the alien who suffered the damage agrees to his Government's acting in his behalf. For this reason the action of the Government cannot be regarded as an action taken independently of the wishes or the interest

23 Emer Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (Clarke 1811) lxvi.

24 Rudolf Blühdorn, quoted by Requejo and Hess (n 22) 264.

25 ibid.

> of the claimant. It is an action the initiative of which rests with the claimant.[26]

The other MCCs seem to agree with this distinction because their procedural rules provided that any claim requiring a written memorial be signed not only by the State Agent but also by the injured individual.[27] It was not expected that a State could present a claim in its own name, which made private initiative indispensable. In the *Melczer Mining Company* case, the United States-Mexico GCC reasoned that the consent and initiative of the private individual was assumed, since: 'it would be very unusual for a government to press a claim in the absence of any desire on the part of the claimant.'[28]

The *ex-gratia* clauses used in the Mexican Special Commissions strengthened the position of individuals in the process. Since the Special Commissions adjudicated claims stemming from the declared moral duty the Mexican State had assumed towards private individuals, it was expected that the latter would consent to the process.

The Case of *Emilia Marta Viuda de Giovanni Mantellero*, decided by the Italy-Mexico SCC, was illustrative of the position the *ex-gratia* clauses granted individuals in the special commissions. It is the only known case where there was express opposition by the individual concerned to filing a claim. In this case, the Italian Government demanded the payment of compensation for the murder of the Italian citizen Giovanni Mantellero by Mexican revolutionary forces during a 1919 assault on the train he was traveling on.[29] His widow, Emilia Marta, not only refused to sign the memorial of the claim, but also explicitly opposed any claim made in her name. The Italian Agent continued with the process anyway, alleging that a State could independently present a claim for any wrong committed against its nationals.

The three Commissioners of the Italy-Mexico SCC rejected the claim based on the *ex-gratia* nature of their jurisdiction, since the Commission

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26 *Great Britain v United Mexican States (Mexican Union Railway Case)* (Decision No 21, February, 1930) 5 RIAA 115–29.

27 Feller (n 5) 88.

28 *Melczer Mining Company (USA) v United Mexican States*, GCC (Award April 30, 1929) 4 RIAA 481–86.

29 The author's own translation of *Emilia Marta Viuda de Giovanni Mantellero, Italy v Mexico* (Italy-Mexico Special Claims Comission, Decision No 3) copy of the judgement available in Spanish in Luis Miguel Díaz, *México y las comisiones internacionales de reclamaciones* (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas 1983) vol 1, 1291–96.

deemed it a '*sine-qua-non* condition' that the interested party initiate the appropriate action. In this case, the Commissioners reasoned that the Agent of Italy had no other function than that of 'sponsoring the expectation or the right of his particular constituents.' Thus, while procedurally autonomous direct standing was not granted to individuals, the special MCCs saw themselves as adjudicative bodies of private rights at the international level.

In this regard, the government agents were important in the process of MCCs since they enjoyed three fundamental powers before the tribunal, granted by different rules of procedure: to bring claims, present evidence, and settle claims. Despite these broad powers conferred on the agent during the process, an individual still needed to motivate any claim presented. This led to the hybrid or mixed configuration of the process. The MATs in Europe also included a State agent, who while enjoying less powers than agents in the MCCs, was still an important figure in the process since he had the 'right to oversee' the conduct of private parties in the process, including the option to intervene directly in proceedings.[30] While his powers were significantly reduced compared to those of agents in the MCCs, this was compensated by the direct standing granted to individuals in the MATs.

5. Assessment of the Legacy of the MCCs and the MATs

The success of an international adjudication body can be analyzed in terms of two criteria. One measures its efficiency in adjudicating disputes, that is, how many cases brought before the court or commission were analyzed and resolved. The second is the impact that its decisions have had on the development of international law. The following section discusses the legacies of the MCCs and MATs for international law in terms of these two criteria.

5.1 Procedural Legacy

The first criterion is to evaluate how well MATs and MCCs fulfilled the purpose for which they were created: resolving claims. In this regard, the MATs were very efficient, constituting one of the first successful instances

30 Requejo and Hess (n 22) 252.

of mass claims adjudication in international law. For instance, it has been reported that the French-German MAT processed 23,996 cases, the Polish-German MAT 28,670 cases, and the UK-German MAT 10 000 cases in a period of about 10 years.[31]

By contrast, MCCs' success in the adjudication of claims varied widely. The more successful MCCs managed to adjudicate either the majority or all of the claims submitted. Successful MCCs included the Germany-Mexico SCC (140 processed claims), Great Britain-Mexico SCC (128 processed claims), Italy-Mexico SCC (157 processed claims), and the Belgium-Mexico AAT (16 claims). Meanwhile, the United States-Mexico GCC (148 processed claims out of 3176) and United States-Mexico SCC (processed about 20 of the submitted 3176 claims) faced several difficulties, adjudicating a considerably smaller number of claims than their European counterparts.

An explanation for the quantitative difference between the number of claims adjudicated by MATs and MCCs could be the extended nature of the damages inflicted on aliens of other nations in the respective conflicts. However, there are a couple of other features that were adopted in the procedural rules of most MATs that favoured a huge number of cases being dealt with quickly.

One of those features, of course, was the direct standing of private individuals in the process analyzed in Section 4. In the case of the MATs, private individuals had a privileged position in the process, since they did not depend on the State Agent to espouse their claims. Other important features were the use of a single 'comprehensive hearing' during the process, as the parties involved were often domiciled in different countries;[32] setting strict time limits and the power to sanction its non-compliance.[33]

5.2 Substantive Legacy

The second criterion for assessing the legacy of international tribunals is the impact their decisions have had on the development of international law. In this regard, many MATs were abruptly terminated following the 1930 Young Plan and even though their case law was discussed in the following decade,[34] the substance of their decisions has gone largely unno-

31 Otto Göppert quoted by Requejo and Hess (n 22) 247.
32 ibid, 256.
33 ibid.
34 ibid, 274.

ticed in international law in recent years. Nowadays, only a few references to decisions made by the MATs sporadically appear in specific areas, such as in investment arbitration citations.[35]

In contrast, the MCCs' decisions provided a body of precedents for the standards of treatment of aliens and the international responsibility of states that have been quoted in several international instruments over the last century.

The work and the well-argued decisions of the United States-Mexico GCC – which paradoxically resolved the least claims – impacted international law the most. For instance, the MCC's decisions provided 'argumentative choices'[36] for the drafting process of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), the base of current international adjudication. MCCs' 'argumentative choices' have also been used by 21st century lawyers arguing cases in front of international investment arbitration tribunals. For example, mentions of the *Neer* case decided by the United States-Mexico GCC can be found in at least 50 investor-state arbitration cases over the last two decades.

This surprising difference in the historical impact of MCCs and MATs on international law jurisprudence – their substantive legacy – can be, at least partially, explained by three important differences.

First, the MCCs were undisputedly considered international law bodies both in terms of origin – since they were created by treaties ratified by national parliaments – and in terms of function. While there might be some discrepancies regarding the applicable law in the case of those Special Commissions which applied equity in their decisions, the MCC understood the application of equity in the narrow sense. In other words, there was never a discrepancy concerning the international nature of the special jurisdiction MCCs. By contrast, the literature on the MATs has been divided on their national or international nature. While the MATs have an international origin, it has been argued that their function was one of 'internal civil courts' whose decisions impacted only the private individuals and states involved'.[37]

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35 For instance, see: *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v Republic of Ecuador II*, PCA Case No 2009–23, Second Partial Award on Track II, 30 August 2018, para 7.92.

36 See Jean d'Aspremont, 'The General Claims Commission (Mexico/US) and the Invention of International Responsibility' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (CUP 2019) 150.

37 Geor Geier, quoted in Requejo and Hess (n 22) 264.

The uncertainty over whether MATs should be considered as playing a national or international function is due the different ideas used to justify the standing of private individuals in the process. Nonetheless, the lack of clarity on whether its decisions were truly international, could have prevented international lawyers from using them as resources for 'international law' cases.

Second, the MCCs were able to build a legal community around the Commissions with multiple appointments of jurists to more than one Commission. In the period from 1923 to 1934, at least 32 people were appointed as commissioners to the MCCs. However, some of those commissioners had multiple appointments[38] at different times which allow them to influence the outcome of the MCCs and the coherence of their decisions. The most illustrative example was the Chilean jurist Miguel Cruchaga Tocornal who acted as president of the Germany-Mexico, Italy-Mexico and Spanish-Mexico Commissions. These three MCCs were able to operate without any significant friction, showing how one person could influence the stability and work of different MCCs.

One factor that could explain the multiple appointments in the MCCs was likely the reduced number of available jurists or diplomats with sufficient expertise to adjudicate international disputes who, at the same time, enjoyed the trust of Mexico and the other governments involved.

The MCC conventions established that each body ought to be composed of three commissioners: two selected by the States involved; the third appointed by agreement between the governments.[39] However, an important requirement was that any commissioner selected had showed commitment to the study and development of international law prior to the formation of the MCCs. Thus, even when MCC commissioners were compelled to defend the interests of their own countries in specific cases, they expressed their beliefs through elaborated arguments using all available sources of international law.

Mexico, for example, opted to appoint commissioners with a high profile in international law as adjudicators of the multiple claims that

38 The Commissioners that had multiple appointment: Fernando Gonzalez Roa (Mexico), three times; Miguel Cruchaga Tocornal (Chile) three times; Rodrigo Octavio (Brazil), three times; Genaro Fernandez de McGregor (Mexico), twice; Fred Kenelm Nielsen (United States), twice; Horacio F Alfaro (Panama), two times; Kristian Sindballe (Denmark), twice.

39 In case of disagreement, the President of the Permanent Administrative Council of the Permanent Court of Arbitration at the Hague was responsible for appointing the third commissioner.

needed to be addressed. So, even when those Mexican Commissioners felt compelled to craft reasonings that favoured Mexico, they opted for arguments constructed within the sources of International Law. The most prominent Commissioners appointed by Mexico were Genaro Fernandez Mac-Gregor[40] and Fernando Gonzalez Roa[41]. Both had been among the 1919 founders of the *Academia Mexicana de Derecho Internacional Público*, one of the first organized international law communities in Latin America. In addition, Fernandez Mac-Gregor was the director of the *Revista Mexicana de Derecho Internacional*,[42] the first known Latin American journal of international law.

In the same vein, the other commissioners selected by the United States and European States had similar backgrounds and a firm commitment to the development of international law. For instance, literature from the 1930s acknowledges the important role and quality of contributions made to MCC decisions by Leiden Professor of International Law C. van Vollenhoven, who acted as President of the United States-Mexico GCC until 1927.[43]

In stark contrast, the MATs did not have a single legal community that could consolidate a body of jurisprudence or practices. There were multiple styles of drafting decisions, customs, and rituals among the MATs adjudicators,[44] which hindered the development of a '*jurisprudence constante*.'

Finally, a third feature that allowed MCCs to articulate a series of precedents was that all MCCs shared one model of procedural rules that were considered autonomous from the procedural rules of the domestic legal systems of the States involved. The various MCC conventions stipulated that each commission should determine its own rules of proceedings. In this regard, the most influential rules were those drafted by the United

40 Who acted as Commissioner appointed by Mexico in the Great Britain-Mexico SCC and the United States-Mexico GCC.

41 Who acted as Commissioner in the France-Mexico SCC; Spain-Mexico SCC; and United States-Mexico SCC. In addition, Gonzalez Roa was also one of the Mexican representatives at the Bucareli conference that drafted the first MCCs.

42 'Acta de Instalación de la Academia Mexicana de Derecho Internacional' (1919) 1 Revista Mexicana de Derecho Internacional.

43 For instance, there are several references in the literature of the time to the influence of the Commissioner Van Vollenhoven in the quality of the decisions made by the United States-Mexico GCC. See: Jacobus Gijsbertus de Beus, *The Jurisprudence of the General Claims Commission United States and Mexico Under the Convention of September 8, 1923* (Nijhoff 1938) 2.

44 Requejo and Hess describe, for instance, the vestimentary differences among the arbitrators of the different MATs. Requejo and Hess (n 22) 255.

States-Mexico GCC in 1924 and later amended in 1926. These provided the model for the elaboration of procedural rules for other MCCs.

The important influence of United States-Mexico GCC procedural rules in the Americas can be explained, in part, because they were the first to be drafted. However, a second reason, was the 'detailed description'[45] of pleadings, including the way that memorials and their answers ought to be written by the state's agents. The MCCs that were formed after 1924 took these rules of the United States-Mexico GCC as a model for their own rules; in practice, this meant that the MCCs shared similar procedures and ways of litigating among the parties involved.

By contrast, the MATs in Europe had at least three different 'model' regulations for procedure: the French-German, Anglo-German, and Belgian-German MATs. Furthermore, even within each of these procedural 'models' there were important divergences.[46] This plurality of procedural rules could have been a factor in the lack of uniformity and may have hindered development of a single distinct form of' jurisprudence.

An additional feature that characterized the MCCs was that they upheld the principle of autonomy in order to protect their procedural rules from any interference on the part of the national legal system of the state involved. In 1926, in the *Parker* case, the United States-Mexico GCC clearly laid out the principle of procedural autonomy, establishing that regardless of their relevance, the 'technical rules of evidence' of United States or Mexico had no place in the process of the United States-Mexico Commission.[47] One of the reasons given was that the Commission did not enjoy the same powers as a local court, such as the capacity to summon witnesses.[48] This application of the principle of autonomy, later followed by other MCCs,[49] meant that a culture of litigation independent of national legal systems was developed.

45 Kenneth Smith Carlston, *The Process of International Arbitration* (CUP 1946) 22.
46 Requejo and Hess (n 22) 252.
47 *Willam A Parker(USA) v United Mexican States*, GCC (Award 31 March 1926) 4 RIAA para 5.
48 ibid.
49 See the *Ernesti H Goeldner* and Juan Andressen cases of the Germany-Mexico SCC, quoted in Abraham H Feller 'The German-Mexican Claims Commission' (1933) 27 American Journal of International Law 62.

6. Conclusion

A close look at the MCCs and MATs experience has allowed us to establish some lessons for adjudication in international law. First, the legitimacy agreements in the design of an international adjudication body have an impact on its functioning. The *ex-gratia* clauses established in the MCCs convention allowed Obregón's government to present the agreement inside Mexico as a magnanimous act and to attract jurists in the region from the beginning of the process.

Second, the MCCs and the MATs advanced the position of private individuals in international law adjudication. The MCCs did not grant individuals direct access but instead created a hybrid standing where claims were recognized as private in nature but were controlled by the state. However, the MATs went one step further and they granted standing to the individual for the first time in international law.

Finally, the MCCs and MATs had different legacies for international law. On the one hand, from the standpoint of procedural legacy, the MATs were one of the first successful instances of mass claims adjudication in international law. By contrast, the MCCs had a different experience, but in general, adjudicated a lesser number of disputes. On the other hand, the MCCs' decisions provided a body of precedents for the standards of treatment of aliens and the international responsibility of states that has lasted until today. In this regard, one of the key characteristics was the construction of a legal community around the MCCs with multiple appointments of jurists to more than one Commission. In turn, this feature contributed to the cross-fertilization of procedural rules across the different MCCs.

The MCCs and the MATs were extraordinary experiments of ad-hoc adjudication in the 1920s, with different legacies. However, there is no doubt that both set the base for the system of international adjudication for the years to come. The history of the MCCs and MATs shows that when an adjudication body has the minimum independence to carry out their tasks, even the most unpleasant conflicts can be later transformed into legal arguments.

Part II.
Identifying Rights-Holders: Post-World War I Arbitration and the Nationality of Private Persons

Chapter 4: Nationality, Property, and the Mixed Arbitral Tribunals, 1914 to c1930

Jakob Zollmann[*]

For Dieter Gosewinkel on his 65th birthday

1. Premises – War, Nationality, and Property, 1914–1918

Over the course of World War I and in its aftermath, throughout Europe and beyond, millions of people fled their homes and lost their property, were denaturalized, expelled, or chose to leave their homes in order to settle elsewhere. With the subsequent redrawing of borders and the (re)establishing of states in Central and Eastern Europe, millions of people found themselves given a new nationality. Others were required to 'opt' between different nationalities, mostly, but not always in accordance with their 'nation' understood as 'ethnicity' (judged on criteria such as 'mother tongue' or ['paternal'] origin).[1]

Also during the War, around the world hundreds of thousands of 'foreigners', hitherto legal residents but now considered and legally defined as 'enemy aliens' who happened to have the 'wrong' nationality of states against which war was waged, were believed to be a security risk and often interned.[2] Emotions ran high regarding the alleged dangers of those suddenly considered no longer part of the national fabric. For example, in July 1916, in the United Kingdom, the *Women's Social and Political Union*, otherwise engaged in fighting for women's suffrage, organized their 'Great Parade', demanding the internment of aliens and even the

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1 Dieter Gosewinkel, *Schutz und Freiheit? Staatsbürgerschaft in Europa im 20. und 21. Jahrhundert* (Suhrkamp 2016) 102.

2 Matthew Stibbe, 'Radicalização e Internacionalização: Rumo a uma história global de cativeiro militar e civil durante a primeira guerra mundial' in Pedro Oliveira (ed), *Prisoneiros de Guerras: Experiências de cativeiro no seculo XX* (Tinta da China 2019) 61–85; Arndt Bauerkämper, 'National Security and Humanity: The Internment of Civilian "Enemy Aliens" During the First World War' (2018) 40(1) Bulletin of the German Historical Institute London 61.

revocation of naturalization certificates.[3] Likewise, in Britain, (immigrant) businesses were attacked as not being 'British' (enough), no matter the British nationality of their owners. As Stephanie Seketa has shown recently with regard to Jewish businesses 'defending [their] valid citizenship during war': '[c]itizenship was more than a legal matter; it was a layered set of dynamic activities and enterprises in which corporate actions became tied to expression of loyalty.'[4]

And not only were 'enemy aliens' interned; but, starting in 1914, based on special wartime legislation, their private and corporate property was requisitioned, confiscated, sequestrated, and liquidated by belligerent governments throughout the world. Whereas prior to the war there was, in the words of Dieter Gosewinkel, across Europe a 'tendency' to treat nationals and foreigners as equals in their right to property – also based on international treaties guaranteeing reciprocity (most favoured nation clauses) -, the war resulted in a renationalisation of the property regime of all belligerent nations.[5] Furthermore, the 'time-honoured principle' that private property (personal or incorporated), irrespective of the nationality of individual proprietors or a state of war, was to be held 'inviolable' by any state,[6] was replaced by considerations of the governments involved in war that property can be turned into a central instrument for state power. By means of legislation, they made property a privilege for some, not a fundamental right for all.[7] International law was not necessarily seen as a hindrance to these policies, because 'there are no rules of international law

3 Nicoletta Gullace, *The Blood of Our Sons: Men, Women and the Renegotiation of British Citizenship during the Great War* (Palgrave 2002) 132.

4 Stephanie Seketa, 'Defining and Defending Valid Citizenship During War: Jewish Immigrant Businesses in World War I Britain' (2020) 21 Enterprise & Society 78.

5 Dieter Gosewinkel, 'Eigentum vor nationalen Grenzen. Zur Entwicklung von Eigentumsrecht und Staatsangehörigkeit in Deutschland während des 19. und 20. Jahrhunderts', in Hannes Siegrist und David Sugarman (eds), *Eigentum im internationalen Vergleich. 18.-20. Jahrhundert* (V&R 1999) 87–106, 98 sq.

6 Ignaz Seidel-Hohenveldern, *Internationales Konfiskations- und Enteignungsrecht* (Mohr 1952) 6; Art 46, Annex to IV. Hague Convention of 1907: 'Private property cannot be "confiscated".' The Hague Convention, Annex I of 1899 prohibited to 'destroy or seize the enemy's property' (Art 23g) and 'pillage' (Art 28).

7 See Edwin M Borchard, 'Enemy Private Property' (1924) 18 American Journal of International Law 523–32; Rudolf Blühdorn, 'Le fonctionnement et la jurisprudence des Tribunaux Arbitraux Mixtes créés par les traités de Paris' (1932) 41 Recueil des Cours 141–241, 141; Dieter Gosewinkel, 'Introduction : Histoire et fonctions de la propriété' (2014) 61(1) Revue d'histoire moderne et contemporaine 7–25, 24.

which state clearly under which conditions a corporation may be treated as an alien enemy by a belligerent Power.'[8]

Often justified as acts of retaliation for previous war measures of 'the other side' and hoping to weaken the economic capacity of the enemy, since 1914 national bureaucracies specifically set up for this purpose seized, controlled, confiscated, and liquidated properties and assets (factories, banks, real estate, cars, ships, infrastructure and networks, capital invested in businesses, shares, bank accounts, patents, trademarks, or personal possessions) belonging to those who were considered an enemy alien found in their respective territories.[9] Under the 'Trading with the Enemy Amendment Act 1914' the Board of Trade appointed the 'Public Trustee' to be the custodian of enemy property in England and Wales. Irrespective of the fact that the legal notion of 'corporate personhood' was established in English common law and codified at the end of the nineteenth-century, this did not suffice to guarantee the acceptance of the 'idea of the corporation being a separate entity from the people controlling it.' In 1916, the House of Lords 'proclaimed that the character and actions of the people behind a company *were* the character of the company; therefore, a legally British company could be an "enemy" per the Trading with the Enemy Act, if it was invested with enemy character through [the nationality of] its holders.'[10]

Germans in France also complained repeatedly about 'agitation against Germans' ('*Deutschenhetze*'), including calls for boycotts, and legislation since 1914 against trade with Germans and Germany, 'black lists' of companies, or sequestrations of French companies 'controlled' by Germans.[11] And indeed, neither British nor French officials were hesitant to admit

8 Ernst H Feilchenfeld, 'Foreign Corporations in International Public Law' (1926) 8(4) Journal of Comparative Legislation and International Law 260, referring to Oppenheim, *International Law*, vol II, 88.

9 See Hugo Ott, 'Kriegswirtschaft und Wirtschaftskrieg 1914–1918. Verdeutlicht an Beispielen aus dem badisch-elsässischen Raum' in Erich Hassinger, Hugo Ott (eds), *Geschichte, Wirtschaft, Gesellschaft. Festschrift für Clemens Bauer* (Duncker & Humblot 1974) 333–58, 342.

10 Seketa (n 4) 106, referring to *Daimler Co., Ltd. v. Continental Tyre and Rubber Co., Ltd*. (1916, 2 AC 307).

11 See Institut für Weltwirtschaft (ed), *Der Wirtschaftskrieg: Die Maßnahmen und Bestrebungen des feindlichen Auslandes zur Bekämpfung des deutschen Handels und zur Förderung des eigenen Wirtschaftslebens – Vierte Abteilung: Frankreich*, bearbeitet von Hermann Curth und Hans Wehberg (Fischer 1918) 18; 119–150; Antoine Pillet and Jean Paulin Niboyet, *Manuel de droit international privé* (2nd edn, Sirey 1928) 358–62.

their 'desire' to use the 'war [as] an opportunity to advance their economic agendas'.[12] English authorities and proprietors took the termination of German nationals' leases of land in England for granted to such an extent that, in 1916 the Court of Appeal had to remind them 'that by the law of England, a lease of land in England to a person, who subsequently became an enemy, is not dissolved by war, and that he may be sued for the rent, which accrued during the war under such lease.'[13]

Such calls for moderation notwithstanding, during the war, as historian Daniela Caglioti summarises, 'many writings' in Allied newspapers, pamphlets, and books presented 'Germany as a colossal octopus extending its tentacles into all vital cells of economy and society all over the world' – a 'narrative' that called for defence through the limitation of property rights and 'nostrification' measures.[14] Since the United States entry into the war in 1917, similar limitations and prohibitions also applied to Germans and their properties in the US, including the 'sale of enemy property'.[15]

In Germany, since 4 September 1914 an Imperial Ordinance 'empowered the Central State Authorities to place enemy or enemy-controlled undertakings under State supervision.'[16] Since 1916 the *Reichskommissar für die Liquidation ausländischer Unternehmungen* showed Berlin's equal intention to make maximum use of enemy property.[17] France protested vehemently – assuring its citizens that all their 'reclamations' concerning their property in 'enemy' or 'occupied territory' would be taken care of by the newly created *Office des biens et intérêts privés* in Paris.[18]

During a war that seemingly forced states to use all material and human resources available on their territory, all these measures and counter-mea-

12 Daniela Caglioti, *War and Citizenship: Enemy Aliens and National Belonging from the French Revolution to the First World War* (CUP 2021) 211 sq.

13 Cited in Paul Fredrich Simonson, *Private Property and Rights in Enemy Countries and Private Rights against Enemy Nationals and Governments under the Peace Treaties with Germany, Austria, Hungary, Bulgaria and Turkey* (Effingham 1921) 267.

14 Caglioti (n 12) 211.

15 Institut für Weltwirtschaft (ed), *Der Wirtschaftskrieg: Die Maßnahmen und Bestrebungen des feindlichen Auslandes zur Bekämpfung des deutschen Handels und zur Förderung des eigenen Wirtschaftsleben – Fünfte Abteilung: Vereinigte Staaten von Amerika*, bearbeitet von Eugen Böhler und Hans Wehberg (Fischer 1919) 513.

16 John W Scobell Armstrong, *War and Treaty Legislation: Affecting British Property in Germany and Austria, and Enemy Property in the United Kingdom* (London 1921) 6.

17 Erich Rocholl, 'Wirtschaftsfrieden von Versailles und St. Germain' in Julius Hatschek and Karl Strupp (eds), *Wörterbuch des Völkerrechts und der Diplomatie* (vol 3, De Gruyter 1929) 544–72, 571.

18 Edpiard Clunet, 'Les Biens et Intérêts Français en Pays ennemis' (1920) 47 Journal du droit international 5–17, 5.

sures of the 'economic war' ('*Wirtschaftskrieg*') deeply impacted international public and private law.[19] Over the war years, such 'nostrification' and retaliation measures that formed part of this 'economic war' enticed new legal expertise in all norms concerning 'enemy alien' private property located in national territory or private property in occupied enemy territory, on war damages and their reparations, or on contracts, debts, and credits.[20] Considering this unprecedented magnitude of the connection between the enjoyment of property rights and status of nationality created by wartime legislation, international law scholar Paul Fauchille declared after the war that the '*droits privés ont été atteints dans la guerre mondiale … plus que dans toute autre guerre*'.[21]

The individuals concerned came to realise that governments increasingly acted from the premise that during the war their rights to enjoy liberty and property – and the protection thereof – did not depend on their personal demeanour and 'loyalty' to a particular state and the politics of its government, but on the government's definition of 'enemy alien' and its opposite, the 'national/citizen' (or the citizen of a state that maintained friendly relations). As Dieter Gosewinkel has shown, the denaturalisation campaigns, especially against individuals with dual nationality in the United Kingdom and France, but also against 'ethnic Germans' in Russia (who had already been, in part, Russian citizens for generations), indicated the 'politicisation of the law of nationality during the war' and the implementation of a 'wide[ning] concept of the term "enemy"' that transcended the hitherto existing international law category of 'enemy' by including cultural and ethnic categories.[22]

An 'enemy alien' was perceived as a (potential) threat by the government and administrative agencies of the state in which he or she resided – no matter how long this residence had already lasted. Governments thus developed new definitions of nationality in order to exclude particular groups. Officials formulated and implemented all sorts of laws and decrees

19 Georges-Henri Soutou, *L'Or et le Sang: Les Buts de Guerre Économiques de la Première Guerre Mondiale* (Fayard 1989).

20 See Caglioti (n 12); David Deroussin, 'The Great War and Private Law: A Delayed Effect' (2014) 2 Comparative Legal History 184; Pieter Nicolaas Drost, *Contracts and Peace Treaties: The General Clause on Contracts in the Peace Treaties of Paris 1947 and in the Peace Treaty of Versailles 1919* (Nijhoff 1948).

21 Paul Fauchille, *Traité de droit international, Vol II: Guerre et neutralité* (Rousseau 1921) 1043.

22 Dieter Gosewinkel, *Schutz und Freiheit* (Suhrkamp 2016) 122; 126; see also Arnd Bauerkämper, *Sicherheit und Humanität im Ersten und Zweiten Weltkrieg. Der Umgang mit zivilen Feindstaatenangehörigen im Ausnahmezustand* (De Gruyter 2021).

relating to 'enemy aliens' (or aliens in general, even if they happened to be citizens) and special controls, including internment, exclusions and deportation, to prevent the mere possibility that the 'enemy alien' might act in an inimical manner that might be of advantage to his or her alleged 'home state', the 'enemy' – most of all through 'sabotage', 'espionage', and 'trading with the enemy'.[23]

On the other hand, for the warring states these 'enemy aliens' or aliens in general and their property were considered a most welcome source of additional labour and (through, 'nationalisation', confiscation, liquidation, or requisition for military purposes) national income. Yet, even if since 1914 the pre-war principles of reciprocity and equal treatment of proprietors irrespective of their nationality(ies) were turned into acts of alleged 'retorsion' and 'retaliation' against the property of 'enemy aliens' (always by means of a legal ordinance, '*Rechtsverordnung*'),[24] the effects were felt differently by the belligerents. It has been noted recently that in terms of the monetary values effected by such 'economic war' legislation and other measures between the Allies and Germany there was 'a dramatic inequality between the two sides.' Considering Germany's vulnerability of having up to 40 per cent of her national income invested abroad around the world, it 'lost at least three times as much property to confiscation as all the Allies put together lost to Germany.' This meant that in absolute terms over 'two thirds of the Reich's foreign capital stock, valued between 14 and 16 billion marks (£0.09 billion – £1.03 billion) was expropriated'[25] by the Allies.

Furthermore, these nationality and nationalisation/exclusionary policies were implemented by governments with a view to the future. They had plans for post-war developments they hoped to implement once the war was won. For example, competition policies were instrumentalised by governments to force foreign ('enemy') capital out of companies in order to make them 'purely' German, British, American, or French – and to

23 Nicholas Mulder, 'The Trading with the Enemy Acts in the Age of Expropriation, 1914–1949' (2020) 15(1) Journal of Global History 81.

24 See Arthur Curti, *Der Handelskrieg von England, Frankreich und Italien gegen Deutschland und Österreich-Ungarn* (Berlin 1917); Eberhard Schmidt, 'Die als Vergeltung auf dem Gebiete des Wirtschaftskrieges von der deutschen Reichsregierung ergriffenen gesetzgeberischen und Verordnungsmaßnahmen' in Freidrich Lenz, Eberhard Schmidt (eds), *Die deutschen Vergeltungsmaßnahmen im Wirtschaftskrieg* (Schroeder 1924) 29.

25 Nicholas Mulder, '"A Retrograde Tendency": The Expropriation of German Property in the Versailles Treaty' (2020) 20 Journal of the History of International Law 507, 513; 509; see Daniela Caglioti (n 12) 307.

secure such gains for good 'for the nation' also after the war. With regard to land tenure, in Germany the war was used to further the existing 'Germanisation-policies' in the Eastern (Polish) and Western (Alsace-Lorraine) provinces of the Empire. Thereby it was hoped to fulfil *alldeutsche* fantasies of national expansion by repressing the national minorities through 'inner colonisation' ('*innere Kolonisation*' and 'settlement policies'). This was a policy nationalist politicians and academics like Max Weber had already recommended decades earlier.[26] In 1917, in Alsace-Lorraine, German governmental liquidation measures 'clearly show the intention … to promote and secure German economic influence' at the expense of the Francophone population. This policy coexisted with private nationalist initiatives to purchase French landholdings and mortgages in order to settle Germans, especially in Lorraine, such as the *Gesellschaft zur Besiedlung der Westmark* ('Company for the Colonization of the Western Frontier Zone', 1916–18). Already several decades ago, economic historian Hugo Ott characterised this situation as a 'peculiar intertwining of Germanisation policies and the pursuit of private economic interests' ('*eigenartige Verflechtung von Germanisierungspolitik und privatwirtschaftlicher Interessenpolitik*'). Rumours of 'colonisation policies' aiming at the 'Germanisation and Protestantisation',[27] – similar to Prussian policies since the 1880s in the *Ostmark*, Prussia's Polish territories – caused outrage among Alsatian Social Democrats and Catholic Center party deputies. And indeed, during the war, the pseudo-medieval term *Westmark* was turned into a 'key concept of the [German] *Kriegszielbewegung*', whose advocates tried, through the 'colonisation' and 'Germanisation' of land, populations, and companies, to make the German dominance in *Mitteleuropa* a *fait accompli*.[28]

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26 Thomas Müller, *Imaginierter Westen. Das Konzept des 'deutschen Westraums' im völkischen Diskurs zwischen Politischer Romantik und Nationalsozialismus* (Trancript 2009) 126–180; Daniel Benedikt Stienen, *Verkauftes Vaterland. Die moralische Ökonomie des Bodenmarktes im östlichen Preußen 1886–1914* (V&R 2022); see Wolfgang J Mommsen, *Max Weber und die deutsche Politik 1890–1920* (Mohr 2004 [1959]) 41, referring to Weber's 'Freiburger Antrittsrede' 1895.

27 Ott (n 9) 343; 345; 347.

28 Thomas Müller, 'Grundzüge der Westforschung' in Ingo Haar, Michael Fahlbusch (eds), *Völkische Wissenschaften im 20. Jahrhundert. Expertise und "Neuordnung" Europas* (Schöningh 2010) 87–118 (88); for Germany's 'Eastern' provinces and the problem of competing nationalisms, see: Michel G Müller, Igor Kąkolewski, Karsten Holste, Robert Traba (eds): *Die polnisch-litauischen Länder unter der Herrschaft der Teilungsmächte (1772/1795–1914)* (Hirsemann 2020); Dietmar Müller, 'Colonization Projects and Agrarian Reforms in East-Central and

If 'property in Western society was a precondition and indivisible attribute of [an individual's] freedom', the limitation of this freedom during the war was, in the words of Daniela Caglioti, 'an unequivocal sign of the terrible crisis into which the war had thrown the liberal-democratic system'.[29] Judging not only '*les destructions organisées*' of the economic war[30], but also the enduring limitations of the enjoyment of private property by individuals based on their membership of a designated group, this 'crisis' of the liberal-democratic system continued well into the post-war era. Much to the chagrin of citizens of the defeated Central Powers, the Allied governmental 'liquidation machine[s]' kept running: 'while waiting for the outcome of the Paris Peace Conference, the victors also continued to seize and liquidate enemy property. They did so more rapidly because they feared they might not otherwise receive sufficient compensation for the losses and damage suffered in war'.[31]

2. *Reversing and Justifying Colonisation Schemes, Sequestrations, and other War Measures. Making Claims While Setting the Stage for the Mixed Arbitral Tribunals*

Europe's new political order after World War I created by the Paris peace treaties' system was based on assumptions within governments of the great powers about the advisability and desirability of nation-states, linking claims for national self-determination with territorial sovereignty.[32] Through cessions of territory and most of all the break-up of the Austrian-Hungarian Monarchy, the Russian Empire, and the Ottoman Empire, as agreed on in the Paris treaties, several 'new states' were established: Poland, Czechoslovakia, and the Kingdom of the Serbs, Croats and Slovenes, Finland, Lithuania, Latvia, Estonia, Armenia, Georgia, and

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Southeastern Europe, 1913–1950' in Liesbeth van de Grift, Amalia Ribi Forclaz (eds), *Governing the Rural in Interwar Europe* (Routledge 2018) 45.

29 Caglioti (n 12) 210, referring to Richard Pipes, *Property and Freedom* (Knopf 1999).

30 Teyssaire and de Solère, *Les Tribunaux Arbitraux Mixtes* (Éditions Internationales 1931) 17.

31 Caglioti (n 12) 215; 294; see Mulder, 'A Retrograde Tendency' (n 25) 520.

32 Jost Dülffer, 'Selbstbestimmung, Wirtschaftsinteressen und Großmachtpolitik. Grundprinzipien für die Friedensregelung nach dem Ersten Weltkrieg' in Mathias Beer (ed), *Auf dem Weg zum ethnisch reinen Nationalstaat. Europa in Geschichte und Gegenwart* (Attempto 2004) 41–67; for a general overview, see: Jörn Leonhard, *Der überforderte Frieden. Versailles und die Welt 1918–1923* (Beck 2019).

Azerbaijan. The 1918 Allied victory over the Central Powers and above all Germany not only halted German population and (re-)settlement policies. The Allies made it clear that – through cession of territories and their 'reintegration' (in the case of Alsace-Lorraine returning to France) and the 'restauration' of 'historical rights' (in the case of the Polish Republic)[33] – they were intent on using the provisions of the Paris treaties to revert these Germanisation policies (whether regarding populations, real estate, or movable properties) in Europe which had been previously implemented to the detriment of the Allied nations, their territorial sovereignty and right to national self-determination. The latter term had become, as contemporaries already assumed, 'a fashionable motto of international policy'.[34] 'Self-determination' was a 'key concept' in the propaganda and political rhetoric of the warring states and continued to hold argumentative relevance in the years following the peace treaties.[35] Thus, with regard to Poland, Article 92 of the Treaty of Versailles stipulated among others:

> The proportion and the nature of the financial liabilities of Germany and Prussia which are to be borne by Poland will be determined in accordance with Article 254 of Part IX (Financial Clauses) of the present Treaty. There shall be excluded from the share of such financial liabilities assumed by Poland that portion of the debt which, according to the finding of the Reparation Commission referred to in the abovementioned Article, arises from measures adopted by the German and Prussian Governments with a view to German colonisation in Poland.

This unmistakable language of the 'German colonisation in Poland' was not necessarily putting (pre-)war German policies in a context of illegitimate state measures. 'Colonisation' (whether 'internal' or 'overseas') was seen by most European contemporaries as a legitimate function of modern statehood – the administrative denomination of *Colonial Office*, *Ministère*

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33 Erich Kaufmann, 'Die Stellung der deutschen Ansiedler' in Sir Thomas Barclay, AAH Struycken, Erich Kaufmann, *Studien zur Lehre von der Staatensukzession. Drei Gutachten* (Abhandlungen zum Friedensvertrage, Heft 5, Vahlen 1923) 69–156, 102 sq.

34 Paul de Auer, 'Plebiscites and the League of Nations Covenant' (1920) 6 Transactions of the Grotius Society 45, 45; see Marcus M Payk, '"What We Seek Is the Reign of Law": The Legalism of the Paris Peace Settlement after the Great War' (2018) 29 European Journal of International Law 809, 818.

35 Jost Dülffer, 'Die Diskussion um das Selbstbestimmungsrecht und die Friedensregelungen nach den Weltkriegen des 20. Jahrhunderts' in Jörg Fisch (ed), *Die Verteilung der Welt. Selbstbestimmung und das Selbstbestimmungsrecht der Völker* (Oldenbourg 2011) 113–139 (117); Jörn Leonhard (n 32) 1275.

des Colonies, or *Reichskolonialamt* indicated this broad acceptance of the colonial *mission civilisatrice*.[36] Rather, the term 'colonisation' was a quotation from the self-described German 'colonisation and *Kulturarbeit* in the East'.[37] Article 92 Treaty of Versailles aimed at a clear stipulation that the newly founded Republic of Poland would not become – in the present or future – liable for any of the existing Prussian government debts in relation to pre-war publicly financed settlement schemes to buy land from Polish proprietors in order to settle Germanophone settlers.[38] In a similar vein, Article 56 Treaty of Versailles promulgated that 'France shall enter into possession of all property and estate, within the territories … [of Alsace – Lorraine], which belong to the German Empire or German States, without any payment or credit on this account to any of the States ceding the territories.'

Given the specific historical processes ('German colonisation in Poland'; 'the wrong done by Germany in 1871 ... to the rights of France') that were to be *undone*, these treaty provisions were thus a deviation from the hitherto accepted international law 'principle that finds most favour with modern jurists … that the successor state should assume the local debt of the ceded territory and discharge the local obligations legally contracted with regard to it by the predecessor state.'[39] Or, as Fauchille put it: '*L'État, au profit duquel se réalise l'annexion, doit supporter la part contributive du territoire annexé dans la dette publique de l'État cédant.*'[40]

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36 Jürgen Osterhammel, Boris Barth (eds), *Zivilisierungsmissionen. Imperiale Weltverbesserung seit dem 18. Jahrhundert* (UVK 2005); see Jakob Zollmann, '"Civilization(s)" and "Civilized Nations" – of History, Anthropology, and International Law' in Patrick Sean Morris (ed) *Transforming the Politics of International Law: The Advisory Committee of Jurists and the Formation of the World Court in the League of Nations* (Routledge 2021) 11.

37 Vejas Gabriel Liulevicius, *War Land on the Eastern Front: Culture, National Identity, and the German Occupation in World War I* (Cambridge University Press 2000).

38 Sir Thomas Barclay, 'Verträge zwischen der Deutschen Bauernbank Danzig und der preußischen Regierung. Die Frage ihrer Rechtmäßigkeit. Gutachten' in Sir Thomas Barclay, AAH Struycken, Erich Kaufmann, *Studien zur Lehre von der Staatensukzession. Drei Gutachten* (Abhandlungen zum Friedensvertrage, Heft 5, Vahlen 1923) 5–22, 13.

39 Thomas Joseph Lawrence, *The Principles of International Law* (1916) 96, 331.

40 Paul Fauchille, Henry Bonfils, *Manuel de Droit International Public* (1914) 146, both cit. in AAH Struycken, 'Die Rechtslage der staatlichen Domänenpächter in dem an Polen abgetretenen Gebiete Deutschlands' in Sir Thomas Barclay, AAH Struycken, Erich Kaufmann, *Studien zur Lehre von der Staatensukzession. Drei Gutachten* (Abhandlungen zum Friedensvertrage, H. 5, Vahlen 1923) 23–66, 27, 47.

At the same time, the peace treaties created new realities not only with regard to the drawing of borders between (new) states in Europe or (government) debts and properties. Millions of citizens of the defeated Central Powers acquired *ipso facto* or by 'option' a new nationality of the 'new states'.[41] This resulted in 35 million people being turned into new 'ethnic minorities' (9 million in Western Europe; 26 million in Eastern Europe, in particular Poland, Czechoslovakia, Yugoslavia, and Romania). Depending on their (new) nationality, individuals were given specific rights under international law – eg, through the installation of the Mixed Arbitral Tribunals (MATs) according to the peace treaties – against former Central Powers or the 'new states' that had affected (damaged, liquidated, expropriated or otherwise) their private property, including in those territories where the previous 'Germanisation' policies were to be reverted.[42] In the words of René Cassin, the atrocities committed during the Great War had made it 'impossible to remain blindly committed to the principle according to which war is exclusively a relation between states' ('*impossible de demeurer aveuglément fidèle au principe que la guerre est exclusivement une relation d'État à État*'),[43] but required reparations as an individual entitlement guaranteed under international law.

In Eastern Europe these new nationalities had to be established in the first place through domestic laws and international treaties. Also, these provisions were meant to accommodate the political interest of the new states' leadership in an ethnic unmixing and the creation of a homogeneous 'nation state' based on narrow kinship solidarity led by one dominating 'nation'. Article 91 Treaty of Versailles stipulated:

> German nationals habitually resident in territories recognised as forming part of Poland will acquire Polish nationality ipso facto and will lose their German nationality. German nationals, however, or their

41 Joseph Kunz, 'L'option de nationalité' (1930) 31 Collected Courses of the Hague Academy of International Law 107.

42 Norbert Wühler, 'Mixed Arbitral Tribunals', in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (vol 1, North Holland 1981) 142, 142; numbers in Dieter Gosewinkel (n 1) 145; Oleng Palko, Samuel Foster, 'Contested Minorities in the 'New Europe': National Identities in Interwar Eastern and Southeastern Europe' (2021) 23(4) National Identities 303.

43 René Cassin, 'L'homme, sujet de droit international et la protection des droits de l'homme dans la société universelle', in *La technique et les principes du droit public: Études en l'honneur de Georges Scelle*, vol 1 (LGDJ 1950) 67–91, 68; see Jay Winter and Antoine Prost, *René Cassin and Human Rights: From the Great War to the Universal Declaration* (CUP 2013) 19–50.

> descendants who became resident in these territories after January 1, 1908, will not acquire Polish nationality without a special authorisation from the Polish State. Within a period of two years after the coming into force of the present Treaty, German nationals over 18 years of age habitually resident in any of the territories recognised as forming part of Poland will be entitled to opt for German nationality.

Considering these provisions, German law professors like Erich Kaufmann spoke of a 'de-Germanisation' policy to which the Treaty of Versailles entitled the Polish government; however, only 'to a certain extent' ('*in gewissem Umfang*') as he emphasized (as German 'settlers' having arrived before 1908 could not be denied 'Polish nationality').[44] The respective norms by the Polish authorities followed suit and were, after 1918, 'implemented as a means of achieving ethnic homogeneity -… by prompting "[e]migration"' of ethnic Germans to Germany.[45] Poland's agrarian reform laws were used to expedite the *de facto* expropriation of land previously belonging to ethnic German farmers, especially the much-hated *Junker* (irrespective of whether they had lived on their estates already before 1908), and had thus – as historian Dietmar Müller underlines – a rather explicit 'revindicatory character'. These Polish policies were massively challenged by the German minority that by then had Polish nationality. For this they received German government support; also, through the means provided by the MAT,[46] irrespective of the fact that according to Article 278 Treaty of Versailles Germany was obliged to 'recognize any new nationality' of its former citizens and to accept that such persons have 'severed their allegiance to their country of origin'.

With regard to the effects of the 'reintegration' of Alsace-Lorraine, the Annex to Section V (Art. 51 sq) Treaty of Versailles stipulated 'As from

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44 Erich Kaufmann (n 33) 97.

45 Dieter Gosewinkel and Stefan Meyer, 'Citizenship, Property Rights and Dispossession in Postwar Poland (1918 and 1945)' (2009) 16 European Review of History 576; see id, 579.

46 Dietmar Müller, *Bodeneigentum und Nation. Rumänien, Jugoslawien und Polen im europäischen Vergleich 1918–1948* (Wallstein 2020) 323; see Dieter Gosewinkel (n 1) 150; 174 sq; Ralph Schattkowsky, 'Deutsch-polnischer Minderheitenstreit nach dem Ersten Weltkrieg' (1999) 48(4) Zeitschrift für Ostmitteleuropa-Forschung 524–54; similar provisions on the time limit (Austrians or Hungarians having settled in territories of 'new states' after 1 Jan 1910) for 'acquiring ipso facto nationality' of the 'new states' Czechoslovakia or Yugoslavia were stipulated in Arts 76–77 Treaty of St Germain (including Italian nationality) and Art 62 Treaty of Trianon.

11 November 1918, the following persons are *ipso facto* reinstated in French nationality: (1) Persons who lost French nationality by the application of the Franco-German Treaty of 10 May 1871 [and their descendants], and who have not since that date acquired any nationality other than German; …'. Around 100.000 Germans, on the other hand, living in Alsace-Lorraine and who had their origins in 'Germany' ('*Alt-Deutsche*'; '*Vieux-Allemands*') were – in part – forced to leave, because, as the law professor Georges Ripert put it in 1920: '*Le traité de paix s'est efforcé de retrouver le fond français* [in Alsace-Lorraine] *et de rejeter l'élément immigré*.'[47] However, the Treaty not only looked to rectify the past wrongs of Germanisation policies. Rather, Article 70 Treaty of Versailles clarified the *future* exclusion of German businesses: 'the French Government preserves its right to prohibit in the future in the territories … [of Alsace-Lorraine] all new German participation' in railways, navigable waterways, water works, gas works, electric power, mines and quarries, or metallurgical establishments.

In other words, – as foreseen by the Paris peace treaty system explicitly mentioning criteria such as 'race and language'[48] – in 'the aftermath of empire' the 'unmixing of peoples' had begun and was to be fixed for the future. Until 1921 more than 600 000 Germans had left Poland and 300 000–400 000 Hungarians had fled territories now forming part of Romania, Serbia, and Czechoslovkia; even though both the German and Hungarian governments in their revanchist population policies urged their compatriots to stay. The Prussian government even 'permitted' (*gestattet*) its civil servants to continue their work for the new Polish state.[49] As well

47 Georges Ripert, 'Le changement de nationalité des Alsaciens-Lorrains (1)' 47 (1920) Journal du droit international 25–45, 34; see Hermann Isay, *Die privaten Rechte und Interessen im Friedensvertrag* (Vahlen 1923) 445, 'reines Abstammungsprinzip'; Tara Zahra, 'The "Minority Problem" and National Classification in the French and Czechoslovak Borderlands' (2008) 17(2) Contemporary European History 137.

48 See Art 64 Treaty of Trianon: 'Persons possessing rights of citizenship in territory forming part of the former Austro-Hungarian Monarchy, and differing in race and language from the majority of the population of such territory, shall within six months from the coming into force of the present Treaty severally be entitled to opt for Austria, Hungary, Italy, Poland, Romania, the Serb-Croat-Slovene State, or the Czecho-Slovak State, if the majority of the population of the State selected is of the same race and language as the person exercising the right to opt. ...'; similarly Art 80 Treaty of St Germain.

49 Rogers Brubaker, 'Aftermath of Empire and the Unmixing of Peoples: Historical and Comparative Perspectives' (1995) 18(2) Ethnic and Racial Studies 189; Gunther Schulze (ed), *Protokolle des Preußischen Staatsministeriums*, vol 11/1, Nr 51 Sitzung der Staatsregierung, 8 July 1919 (Olms 2002) 95 sq.

as the political convictions that Poland could not be allowed to expel ethnic Germans, Berlin also had a pecuniary interest in lowering the numbers of Germans who had to give up their property in Poland or elsewhere. Article 297 (i) obliged 'Germany ... to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.' However, by 1933, it was estimated that properties expropriated by the Allies had merely 'obtained one billion marks, or 12 per cent of the 1914 value of their lost assets'.[50]

The newly formed states, on the other hand, encouraged, and regularly enforced, the emigration of minorities. Until 1926, around 85 per cent of ethnic Germans had left the regions of Poznan and Pomerania. Ten years after the Treaty of Versailles the German population in the territories ceded to the 'new states' was reduced by half.[51] Furthermore, those remaining faced massive assimilation policies. As John M Keynes and others had already pointed out, the French government had embarked on a rather evident 'Frenchification' policy in the internationalised Saar district, where it was allegedly hoped to be possible 'to make Frenchmen of them [600 000 Germans] in fifteen years.'[52]

The status of nationality and domicile of individuals as determined by the peace treaties had profound effects on their personal movable and immovable properties and the enjoyment of other property rights. In the Treaty of Versailles' 'longest and most complicated', Part X ('Economic Clauses'), Allied rights and benefits were stipulated concerning private law and affecting private property. At the heart of these provisions stood the principle of restitution *in specie* of private 'Allied' property affected by the war or 'adequate compensation' for the loss, or damage of property,[53] as

50 Caglioti (n 12) 308.

51 Numbers according to Marina Cattaruzza, 'Endstation Vertreibung. Minderheitenfrage und Zwangsmigrationen in Ostmitteleuropa' (2008) 6(1) Journal of Modern European History 5, 12; see Dieter Gosewinkel and Stefan Meyer (n 45) 583; Balázs Ablonczy, '"It Is an Unpatriotic Act to Flee": The Refugee Experience after the Treaty of Trianon: Between State Practices and Neglect' (2020) 9(1) Hungarian Historical Review 69; Ulf Brunnbauer, 'Introduction: Migration and East Central Europe – a Perennial but Unhappy Relationship' (2017) 6(3) Hungarian Historical Review 497; Davis R Chris, Hungarian Religion, Romanian Blood: A Minority's Struggle for National Belonging, 1920–1945 (UWP 2019).

52 John Maynard Keynes, *The Economic Consequences of the Peace* (Macmillan 1920) 77 quoting 'M. Hervé, La Victoire, May 31, 1919'.

53 Arthur Pearson Scott, *An Introduction to the Peace Treaties* (University of Chicago Press 1920) 173; Pail Fredrick Simonson (n 13) v.

clarified by Section IV 'Property, Rights and Interests' of Part X Treaty of Versailles:

> Article 297 (a): 'The exceptional war measures and measures of transfer… taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners, who shall enjoy full rights therein …

This provision was completed based on assumptions of a '*retour au respect de la propriété privée*',[54] but in turn Article 297 (b) Treaty of Versailles laid out Allied claims on German property:

> Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their [Allied] territories, colonies, possessions and protectorates including territories ceded to them by the present Treaty. The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State. ...

Through the 'asymmetry between winners and losers', this article guaranteed the continuation into the future ('final and binding') and provided '*a posteriori* legitimation' of all previous Allied war measures since 1914 such as sequestrations and liquidations of German properties within Allied power and jurisdiction. In 1921 this policy was also 'made a part of the Treaty of Berlin' between the US and Germany. Thereby, the treaties, in a clearly 'punitive' manner, made some of the nationals of the defeated nations collectively and personally liable with their property (that happened to be located in Allied territories) for the war conduct of the German authorities.[55] However, Article 297 (b) also specified that 'German nationals who acquire *ipso facto* the nationality of an Allied or Associated Power

54 Teyssaire and de Solère (n 30) 20.

55 Caglioti (n 12) 297; 299; United States Congress House Committee on Ways and Means, 'Return of Alien Property' (Government Printer 1922) 19.

in accordance with the provisions of the present Treaty will not be considered as German nationals within the meaning of this paragraph.'

John M Keynes criticised this lacking 'reciprocity' between Germany and the Allies and summarised the resulting effects of Article 297: 'the whole of the German property over a large part of the world can be expropriated, and the large properties now within the custody of the Public Trustees [in Great Britain] and similar officials in the Allied countries be retained permanently.'[56] French authors, on the other hand, could easily refer to German wartime sequestrations in occupied France as part of *occupatio bellica*, which the Germans themselves had later justified at Versailles with the argument '*Le salut privé fut sacrifié au salut public*'. In turn, it seemed only justifiable to French commentators that, after four years of German sequestration and *occupatio bellica* and after the Allied victory, German private property was 'sacrificed' for the Allied 'public welfare' through sequestrations and expropriations.[57] Angry French critics of the treaty even asked why German property (state or even private) *in Germany* could not also be liquidated for the 'benefit of the Allies'.[58]

In view of the fact that numerous 'Allied' properties requisitioned and liquidated by German authorities during the war could no longer be 'restored to their owners', Article 297 (e) gave Allied individuals a right to claim damages from the German state:

> The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer ... The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI ... This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. ...

56 Keynes (n 52) 68.

57 Teyssaire and de Solère (n 13) 17 quoting the 'mémoire allemand sur les dommages de guerre (p. 113)'.

58 Antoine Pillet, *Le traité de paix de Versailles: Conférences faites au Collège libre des sciences sociales* (Rivière 1920) 105; cf Claud Mullins, 'Private Enemy Property' (1922) 8 Transactions of the Grotius Society 89.

However, despite all these provisions, their lengthy rules of exemption, and further specification, the following years would prove that there remained numerous 'cases' and questions open for debate. As we shall see, the work of each of the 39 MATs was not limited to the mere determination and calculation of 'the total of the compensation' due to Allied nationals. In part based on the recognition of the fact that diplomats and politicians could not negotiate and then agree in treaty-form within a few months on each and every detail of the post-war order, the Paris peace treaties left the '*règlements définitifs*' of these countless and 'essential' open questions to several sorts of 'dispute resolution' fora and '*organismes contentieux*'.[59] Among these, the MATs became the most important, yet there were several other tribunals or reparation-, border-, or fact-finding-commissions of 'experts' who collected material and reported back within a limited timeframe.[60] This allowed not only to buy time in the short-term, but also to take into account possible changes in the near future. During the 1919/20 treaty negotiations, insurrections, civil strife, and outright wars continued to shake Europe and Asia from Upper Silesia to the Caucasus and beyond. Considering that the outcomes of these crises were far from clear at that time, the entire treaty-system was given an 'open-ended nature'. This applied not only to border-drawing, but also to decisions about nationality, restitutions, reparation payments, or liquidation and sequestration measures.[61]

When, in June 1919, the Chief of the British Imperial General Staff, Henry Wilson, complained to his premier, David Lloyd George,: 'The root of evil is that the Paris writ does not run,'[62] this was, on the one hand, a sober assessment of the challenges that needed to be faced to implement and enforce the norms codified in the Paris peace treaties.[63] On the other hand, given the enormous administrative apparatuses that had started being set up around the world since 1920, in particular the Clearing Offices ('*Ausgleichsämter*', according to Article 296)[64] to implement and 'run' the

59 Pierre Jaudon, 'Avant-Propos', in Teyssaire and de Solère (n 30) 10.

60 Dülffer (n 35) 123.

61 Filipe Ribeiro De Meneses, *Afonso Costa: Portugal (Makers of the Modern World)* (Haus 2010) 90; 102; see Caglioti (n 12) 298.

62 Op. cit. Marcus Payk and Roberta Pergher, 'Introduction' in Marcus Payk, Roberta Pergher (eds), *Beyond Versailles. Sovereignty, Legitimacy, and the Formation of New Polities after the Great War* (Bloomington 2019) 1.

63 Alan Sharp, 'The Enforcement of the Treaty of Versailles, 1919–1923' (2005) 16(3) Diplomacy & Statecraft 423.

64 Arthur Nussbaum, *Das Ausgleichsverfahren. Ein Beitrag zur Kritik des Versailler Vertrages und seiner Durchführung* (Mohr 1923).

more than 400 articles of the Treaty of Versailles and its counterparts agreed on in Paris, General Wilson's complaint seems premature. The history of the implementation of the institutions mentioned in the Paris peace treaty system, in particular the MATs, is thus also a reminder that international law mattered to contemporaries *in practical terms* and that – irrespective of all counter-tendencies – international cooperation was not a utopia after World War I, but rather a functioning and at times mundane reality of law- and fact-finding.[65] To give but one example, from 1920 to 1931 the British Clearing Office with its German counterpart, was faced with 382,464 private claims of which about 10 000 had to be considered by the Anglo-German MAT.[66]

With a view to reversing or justifying previous, ongoing or future population policies (especially throughout Europe's many 'borderlands' with their overlapping 'colonisation' schemes and attempts to create new borders liquidations, sequestrations and other governmental measures, national administrations began to assemble material deemed necessary to present to these international bodies, tribunals, or commissions. Similar to the argumentative patterns created during the war, after the war Allied and former Central Power authors continued to underline that whatever measures their governments had taken against 'enemy aliens', these countermeasures were mere reprisals. All the internments and sequestrations were to be understood as parallel and interwoven systems of the warring parties; a 'tit for tat' policy that allowed both sides to 'project themselves as victims acting in legitimate self-defence and the other side as the original aggressor and wrongdoers.'[67]

Notably, German officials put great hopes in this sort of 'historicist' argumentation. Already in 1915, they had assembled a collection of 135 special laws, decrees, or ordinances ('*Ausnahmegesetze*') published by the governments of Great Britain, France, and Russia that during the war negatively affected the private rights of Germans and other 'enemy aliens'

65 For an overview see Blühdorn (n 7) 141–241; for counter-tendencies: Hjalmar Falk 'Carl Schmitt and the Challenges of Interwar Internationalism: Against Weimar – Geneva – Versailles' (2020) Global Intellectual History 1.

66 Herber Leonidas Hart, 'Experiment in Legal Procedure: Mixed Arbitral Tribunals' (1931) 72 Law Journal 392.

67 Matthew Stibbe, 'Enemy Aliens and Internment', in Ute Daniel and others (eds) *1914–1918-online. International Encyclopedia of the First World War* (Freie Universität Berlin 2014–10–08); see eg Friederich Lenz-Schmidt, *Die Deutschen Vergeltungsmassnahmen im Wirtschaftskrieg: Nebst einer Gesamtbilanz des Wirtschaftskrieges 1914–1918* (Schröder 1924).

in these countries.[68] In post-war Germany, all ministries and lower administrations were asked to support the publication of a retrospective 'general description of the war economy' ('*Gesamtdarstellung der Kriegswirtschaft*') covering the years 1914–18. Again, it was intended to show that all 'liquidation and sequestration measures' were 'mere counter-measures in the context of the economic war' and that it was therefore a 'lie … that Germany had unleashed the economic war.' One official from the Imperial Ministry of the Interior openly stated that the data acquisition in the German *Länder* about sequestrations and liquidations was 'to be used first and foremost for the purpose of the Mixed Arbitral Tribunals in Paris'.[69] This German objective, or rather the demands of the post-war present on the history of the World War were thus determining the perspectives, the questions, and the mode of writing of utterly one-sided narratives with a clear legal focus that put 'us' against 'them'. Indeed, as historian Isabel Hull has stressed, after the war a 'weakened Germany aimed to use history to discredit the legal underpinnings of the [T]reaty [of Versailles] by attacking the "war guilt"'[70] allegedly expressed in Article 231 Treaty of Versailles and the reparation and property transfer regimes resulting from it. In this vein, an avalanche of publications reached German and non-German audiences arguing not only against the accusation of Germany's initial 'aggression' in July 1914 but also for the legality of German measures during the war.[71] Responding coolly to these German attempts to explain the chronology of 'counter'-measures during the war, the attorney Eugène Dreyfus merely noted that the Germans '*essaient toujours d'attribuer à leurs adversaires l'initiative des mesures de guerre auxquelles ils ont eu recours les premiers*.' Similarly, British authors reminded their readers that it was Germany that 'had determined … also to ruin [her enemies] commercially'.[72]

Most importantly, German politicians and academics accused the Allies of continuing their (economic) aggressions against Germany even after the armistice, speaking of a 'war after the war'. They listed not only the

68 Caglioti (n 12) 210.

69 Ott (n 9) 334, quoting Spiethoff to Schneider (22 April 1922).

70 Isabel V Hull, *A Scrap of Paper: Breaking and Making International Law During the Great War* (Cornell University Press 2014) 9.

71 Randall Lesaffer, 'Aggression before Versailles' (2018) 29 European Journal of International Law 773, 806.

72 Eugène Dreyfus, 'Des diverses méthodes qui ont été suivies pour la conduite de la guerre économique' 47 (1920) Journal du droit international 98–103, 102 (commenting on a translation of an article by Eberhard Schmidt, *Deutsche Juristen-Zeitung* 1919, 803 sq); Paul Frederick Simonson (n 13) v.

blockade of Germany after the armistice,[73] but the entire post-war economic order, namely the founding of the *International Chamber of Commerce* in 1920 (that did not allow German members)[74], the most-favourite-nation-clause forced upon Germany by the Treaty of Versailles (whereas Germany was excluded from its export markets),[75] and the expropriation of German (private) property around the world as well as the legalistic endorsement of such measures by the Mixed Arbitral Tribunals among the most often cited examples. Already in April 1919, Bernhard Harms, director of the *Kiel Institute for the World Economy* claimed 'that the American laws [against Imperial Germany] were characteristic of how the Entente's economic warfare had become dominated over time by the intention to systematically destroy German trade beyond the duration of the war' ('*daß die amerikanischen Kampfgesetze dafür charakteristisch sind, wie im Laufe der Zeit das Bestreben, den deutschen Handel über die Zeit des Krieges hinaus planmäßig zu zerstören, den Wirtschaftskrieg der Entente beherrschte*').[76] In line with this argumentation, a few weeks later the German Foreign Minister Brockdorff-Rantzau, faced with the draft of the peace treaty, complained about 'this temporal prolongation of war measures'[77] and argued categorically, its provisions 'mean nothing other than the complete economic annihilation of Germany.' However, modern research has clarified that the

73 Hermann J Held, 'Feind, anglo-amerikanischer Begriff', Julius Hatschek and Karl Strupp (eds), *Wörterbuch des Völkerrechts und der Diplomatie*, vol 1 (De Gruyter 1924) 301–307, 306 ; Lutz Ralph Hasswell and Suda Lorena Bane, *The Blockade of Germany after the Armistice 1918–1919. Selected Documents* (SUP 1942).

74 Jakob Zollmann, 'Wachstum, Gerechtigkeit, Frieden? Deutschland, die Internationale Handelskammer (Paris) und die Handelsschiedsgerichtsbarkeit, 1920–1935', in Andreas Braune and Michael Dreyer (eds), *Weimar und die Neuordnung der Welt* (Steiner 2020) 213–39, 216, 221.

75 Article 264 Treaty of Versailles: 'Germany undertakes that goods the produce or manufacture of any one of the Allied or Associated States imported into Germany territory, from whatsoever place arriving, shall not be subjected to other or higher duties or charges (including internal charges) than those to which the like goods the produce or manufacture of any other such State or of any other foreign country are subject. ...' See Nikolaus Wolf, Max-Stephan Schulze, Hans-Christian Heinemeyer, 'On the Economic Consequences of Peace: Trade and Borders after Versailles' (2011) 71(4) Journal of Economic History 915.

76 Bernhard Harms, 'Vorbemerkung', in *Der Wirtschaftskrieg: Die Maßnahmen und Bestrebungen des feindlichen Auslandes zur Bekämpfung des deutschen Handels und zur Förderung des eigenen Wirtschaftsleben – Fünfte Abteilung: Vereinigte Staaten von Amerika, bearbeitet von Eugen Böhler und Hans Wehberg* (Fischer 1919) vi.

77 Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, vol V, Appendix I to CF-26 German Property Abroad, German Peace Delegation, Versailles, 22 May 1919, 865–69, 866.

provisions of the Treaty of Versailles did not destroy Germany's 'economic power' and that it was even 'conceivable that Germany as Europe's most populous and economically strongest country would soon regain its position as a great power.'[78]

3. *Who can Claim 'réparations des intérêts privés'? Questions of Standing and Nationality before the Polish-German and Romano-Austrian Mixed Arbitral Tribunals*

The treaties concluding the First World War left no doubt that questions of nationality[79] and property would not diminish in legal, political, economic, and societal relevance for years to come. In 1919, the German lawyer Adolf Heilberg more or less lamented that the Treaty of Versailles 'contained many provisions that were of purely private law nature' (implying that this was a break with the tradition of European peace treaties).[80] Berlin attorney Hermann Isay, one of Germany's leading practitioners of the Treaty of Versailles and at the same time one of its foremost legal scholars, described how the Peace Treaties had 'relied on the notion of nationality to an hitherto unprecedented extent in order to regulate

78 Ulrich Herbert, *Geschichte Deutschlands im 20. Jahrhundert* (Beck 2014) 191 sq.

79 Though the English term 'citizenship' was not used by the framers of the Treaty of Versailles (Allies and Germany), six provisions mentioned the term 'citizen'; otherwise this treaty spoke of 'nationals' and 'nationality'. The authoritative French text of the Treaty of Trianon (Allies and Hungary), in contrast used the term '*indigénat* (*pertinenza*)' (translated into English as 'right of citizenship') five times (mostly in 'Section VII Clauses Relating to Nationality' – in Arts 56; 61; 62; 64; 64) and the expression 'nationals' in its 'Section VI: Protection of Minorities' (Arts 58; 59); see Szymon Rundstein, *La loi polonaise sur la nationalité et le traité de Versailles. Réponse à M A. de Lapradelle* (Paris 1924) 6; Gustav Schwartz, *Das Recht der Staatsangehörigkeit in Deutschland und im Ausland seit 1914* (Springer 1925) 114 sq; Olivier Dörr, 'Nationality' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2019): 'Nationality is a legal concept of both domestic and international law. For the purposes of the former it is often referred to as "citizenship", although as a matter of terminology, it would seem much more precise to denote the legal status of the individual as 'nationality' and the consequences of that status, ie the rights and duties under national law, as "citizenship".'; Dieter Gosewinkel, '"Staatsbürgerschaft" als interdisziplinäres Feld historischer Forschung', in Julia Angster, Dieter Gosewinkel and Christoph Gusy (eds), *Staatsbürgerschaft im 19. und 20. Jahrhundert* (Mohr 2019) 1–77, 5, 26.

80 Adolph Heilberg, *Die privatrechtlichen Bestimmungen des Friedensvertrages. Systematische Darstellung für das deutsche Zivilrecht* (De Gruyter 1919) 3.

purely private economic relations' ('*die in früher unbekanntem Umfang erfolgte Verwendung des Begriffs der Staatsangehörigkeit für die Regelung rein privatwirtschaftlicher Beziehungen*').[81] Also the French authorities on private international law, Antoine Pillet and Jean-Paulin Niboyet, emphasised that more than ever after the War questions of '*nationalité*' could at the same time touch on both private and public (international) law. In Part X (Economic Clauses) questions related to 'private interests' of Allied nationals and the attempt of their satisfaction in face of their war losses played a pivotal role.[82]

Thus with the advent of the Paris peace treaty system, the distinction between private and public international law, as well as between international and municipal law, became less clear than ever.[83] Evidently, thiswas also an effect of the way the War, in particular the 'economic war' with its laws and decrees against 'contraband' and 'enemy property' and 'trading with the enemy', was executed. As the British lawyer Claud Mullins explained, during the war it became increasingly impossible to decide based on traditional 'conceptions of what is and what is not of military value. When nations are in arms ..., there is very little difference between private property in, say, picric acid and in cotton, or even in a bank credit of £1 000.'[84] Resultantly, 'most of the litigation which came before the Mixed Arbitral Tribunals was private in nature';[85]the 'questions of fact' before them ranged from 'ocean going liners to the amount properly payable for a set of artificial teeth'.[86]

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81 Hermann Isay, 'Offene Handelsgesellschaft und Partnership im Ausgleichsverfahren. Ein Beitrag zur Frage der Staatsangehörigkeit von Gesellschaften' in Hermann Isay, Josef Partsch, Hermann Dölle, Ernst Schmitz (eds), *Studien zum Ausgleichs- und Liquidationsrecht* (Vahlen 1923) 5–50, 7; see Hermann Isay (n 47).

82 Pillet and Niboyet (n 11) 25; see: Gilbert Gidel and Henry Emile Barrault, *Le Traité de Paix avec l'Autriche du 28 Juin 1919 et les Intérêts Privés: Commentaires des Dispositions de la Partie X du Traité de Versailles* (Paris 1921); Barrault HE, 'La jurisprudence du Tribunal Arbitral Mixte' 49 (1922) Journal du Droit International 298, 300; Charles Carabiber, *Les juridictions internationales de droit privé: De l'arbitrage international aà l'expérience des tribunaux arbitraux mixtes et á l'institution de juridictions internationales permanentes de droit privé* (La Baconnière 1947).

83 Burkhard Hess, 'The Private-Public Divide in International Dispute Resolution' (2018) 388 Collected Courses of the Hague Academy of International Law 49.

84 Claud Mullins (n 58) 96.

85 Kenneth S Carlston, 'Procedural Problems in International Arbitration' (1945) 39(3) American Journal of International Law 426, 438.

86 Heber Leonidas Hart, 'Experiment in Legal Procedure: Mixed Arbitral Tribunals' (1931) 72 Law Journal 392.

Also public law provisions of the Treaty had 'massive consequences' in private law relations. Another challenge was the seeming intention of the treaty to regulate 'uniformly', ie with the 'same expressions and provisions, the legal relations in not less than 24 jurisdictions that are … different in their norms, legal institutions, and legal terminology.'[87] With regard to the MATs, other organizational, educational, and psychological challenges also had to be overcome before this 'entirely new and international institution' would succeed, as a necrology for one of the early British staff members of the MAT summarised: 'There were obvious difficulties inherent in work to be carried out jointly with ex enemies, and immediately after the war – work in which differences of legal systems, of legal training, and of national points of view abounded and were inevitable'.[88]

Irrespective of the confusing systemic novelties developed by the framers of the treaties, the defendants in the MAT cases and their government agents (mostly from Germany, Austria, Hungary, or Bulgaria) insisted that it was still to be clarified for each individual claimant claiming 'compensation' according to Article 297 (e) (or any other provision granting a right to claims in Part X of the treaty) what was meant by the adjectives 'Allied' or 'German' (for the Treaty of Versailles) in their numerous applications throughout the treaty's text. A uniform definition of the nationality of natural or legal persons was neither set out in the treaty or the rules of procedure of the individual MATs, nor discernible from customary international law. Rather, as one American commentator found, '[u]nfortunately the whole matter ['of nationality'] is regulated by municipal law, and in consequence of the diversity of regulations many conflicts have resulted' between states.[89] This was also confirmed by the cases disputed before the MATs.

The nationality status of the individuals concerned – 'Allied' or not – remained decisive for any right to submit a claim to the MAT for certain acts during the war. Both the jurisdiction of the specific MAT requested by the claimant and the admissibility of the claim depended on the nationality of

87 Adolf Heilberg (n 80) 3; 4.

88 'Nécrologie' [for Harold John Hastings Russel] (1929) 9 Recueil TAM 1.

89 Cora Luella Getty, 'The Effects of Changes of Sovereignty on Nationality' (1927) 21(2) American Journal of International Law 268–78, 268; similar Pillet and Niboyet (n 11) 30 referring to the PCIJ (1923); see Gosewinkel (n 1) 168; Walter Trendtel, *Die virtuelle Staatsangehörigkeit und ihre Auswirkung vor der Schiedssprechung* (diss iur Würzburg 1932) 44; Heinrich Triepel, *Virtuelle Staatsangehörigkeit: Ein Beitrag zur Kritik der Rechtsprechung des Französisch-Deutschen Gemischten Schiedsgerichtshofs* (Vahlen 1921) 6.

the claimant. Claimants before the MAT had to be nationals of the MAT to which they submitted their claims (eg, the 'French-German MAT only had jurisdiction over disputes involving German and French nationals' or French nationals and the German state;[90] the same rule applied to any other of the 39 MATs respectively). Furthermore, claimants still had to have this nationality when this MAT rendered its award. Otherwise, the MAT was no longer competent as claimants had lost their standing before the MAT.[91]

The relationship between the time the damage claimed occurred and the claimant's nationality status at that moment or any potential change of nationality thereafter remained much disputed. As Berlin law professor Heinrich Triepel, an unmistakable critic of the Paris Peace Treaties, put it acidly:

> In any case, it could not have been the intention of the Versailles Treaty to have the German Reich compensate [the] losses suffered by a German or a Swiss [or a Dutch or another neutral] who had acquired the French, English or Italian nationality only after the end of the war. (*Es war doch natürlich nicht die Absicht des [Versailler] Vertrages, daß das Deutsche Reich einem Deutschen oder einem Schweizer [oder einem Holländer oder einem anderen Neutralen], der erst nach dem Kriege … die französische oder englische oder italienische Staatsangehörigkeit erwerben würde, … [einen] Verlust vergüten solle*).[92]

Furthermore, the character of the damage had to be, Germany argued, specifically inflicted on the individual *because* of his or her status as an '*Allied* national'. After all, German scholars asked: did the claimants – if they were 'Allied nationals' at all – suffer 'exceptional war measures' ('*außerordentliche Kriegsmaßnahme*') according to Article 297 (e) Treaty of Versailles against 'enemy' property – ie property of 'nationals of Allied and Associated Powers'?; or did they suffer merely the general war measures of the German authorities everyone in Germany, German nationals, 'enemy aliens', or neutrals, had to bear? It was by using these factual 'historical'

90 Patrick Dumberry, *State Succession to International Responsibility* (Nijhoff 2007) 373.

91 Isay (n 47) 435; cf Walter Schätzel, 'Die Gemischten Schiedsgerichte der Friedenverträge' (1930) Jahrbuch für Öffentliches Recht 378, 426–30.

92 Triepel (n 89) 6.

elucidations that the German authorities hoped to convince the three MAT arbitrators to reject the claims.[93]

On the other hand, it was undisputed among the Allied framers of the Paris treaties, to not accept and apply in the provisions of the treaties referring to nationality notions of the principle of 'continuous nationality' (yet the MAT-arbitrators later made decisive exceptions that are discussed below). In the context of state succession and the creation of 'new states' following the armistice(s) in late 1918, this principle – deriving from the rule of 'diplomatic protection' of nationals by their own states – would have required that each individual submitting a claim to a MAT had to have the nationality of the state having ratified the Treaty of Versailles, St. Germain, Trianon, Neuilly, or Sèvres respectively already *at the moment* the damage occurred. Since the 'new states' did not exist as subjects of international law during the war (when the damage to be determined by the MATs occurred) and the individuals were nationals of either Germany, the Russian, Ottoman, or Austrian-Hungarian Empires, the application of any notion of 'continuous nationality' would have resulted in the complete exclusion of any claims by nationals of the 'new states' – an outcome that would have been unacceptable to their governments. The 'new states' were therefore, as 'Allied and Associated Powers', made signatories of the Paris peace treaties in 1919/20, irrespective of the fact that Poland or any other 'new state' had not been at war with the Central Powers from 1914 to 1918. According to Patrick Dumberry, the 'consistent case law adopted by the different MATs established under the Versailles Treaty was that a person should be considered a "national of the Allied and Associated Powers" if at the time of the *entry into force of the Versailles Treaty* (January 1920) he/she had acquired such nationality.'[94]

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93 ibid, 9; see Ernst Isay, *Der Begriff der "außerordentlichen Massnahmen" im Friedensvertrag von Versailles* (A Marcus 1922) 13; 4 criticizing the Franco-German MAT for its award *Huret c Allemagne* (1921) 1 Recueil TAM 98; Bolte, 'Zum Begriff der ausserordentlichen Kriegsmaßnahmen im Friedensvertrag' (1921) 15–16 Deutsche Juristen Zeitung 526; Jean-Paulin Niboyet, 'Les Tribunaux Arbitraux Mixtes organisés en exécution des traités de paix' (1922) 7 Bulletin de l'Institut Intermédiaire International 215–41; 228; Karl Strupp, 'The Competence of the Mixed Arbitral Courts of the Treaty of Versailles' (1923) 17 American Journal of International Law 661, 669; Christian Tomuschat, 'Heinrich Triepel (1868–1946)', in *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin: Geschichte, Gegenwart und Zukunft* (De Gruyter 2010) 497–521.

94 Patrick Dumberry (n 90) 374; see John Dugard, 'Continuous Nationality' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008); Matthew S Duchesne, 'The Continuous-Nationality-of-Claims Principle:

Yet, despite this evident accommodation of Allied interests also for the 'new states' in Eastern and Central Europe, the issue of standing remained pressing for potential claimants among the millions who were turned into 'minorities'. They experienced – through domestic laws following the peace treaties – what it meant as international law continued to 'recognise the right of the State to prescribe the conditions on which its nationality shall be enjoyed by particular individuals'; Thus, governments claimed their 'liberty' to exclude those who were deemed undesirables, like ethnic minorities, despite the so-called 'Minority Treaties' of 1919/20 attempting to force the 'new states' to respect their rights.[95] Considering the particularly harsh disputes about the German minority in Poland during the 1920s, it should, on the other hand, not be forgotten that the Treaty of Versailles did provide for some property protection for Germans – whether understood as an ethnic/linguistic group or nationals of the German state – in particular in the 'new state' of Poland.

The Polish-German MAT differed from other MATs with the Western Allies in so far as the provisions of the Treaty of Versailles stipulated several rights of action for Germans and it thus also protected German property interests. For example, Article 92 (4) Treaty of Versailles on the liquidation of 'the property, rights, and interests of German nationals' in former German territories in Poland – the '*Entdeutschungsliquidation*' (de-Germanization liquidation), as Erich Kaufmann called it – granted a right of action against Poland, if 'the conditions of the sale or measures taken by the Polish Government outside its general legislation were unfairly prejudicial to the price obtained' for the liquidated property of 'German nationals' and, importantly: '[t]he proceeds of the liquidation shall be paid direct to the [German] owner'. It was, however, for the claimant to prove this prejudice before the MAT, for instance if the seller had based the item for sale on an incorrect value (eg, złoty instead of mark).[96]

Its Historical Development and Current Relevance to Investor-State Investment Disputes' (2004) 36 George Washington International Law Review 783, 792 sq.

95 Erwin Loewenfeld, 'Status of Stateless Persons' (1941) 27 Transactions of the Grotius Society 59, 60; see Walter Napier, 'Nationality in the Succession States of Austria-Hungary' (1932) 18 Transactions of the Grotius Society 1, 5; Dieter Gosewinkel (n 1) 145–50; Dietmar Müller, 'Staatsbürgerschaft und Minderheitenschutz im Völkerrecht und den internationalen Beziehungen. "Managing diversity" im östlichen und westlichen Europa, in Jóhann Páll Árnason, Petr Hlaváček and Stefan Troebst (eds), *Mitteleuropa? Zwischen Realität, Chimäre und Konzept* (Filosofia 2015) 47–60.

96 Erich Kaufmann, *Deutsche Hypothekenforderungen in Polen* (Vahlen 1922) 10;67; see AAH Struycken (n 40) 56.

In addition, Article 305 Treaty of Versailles entitled German *and* Polish nationals to dispute before the MAT the legality – ie the consistency with the provisions of Part X of the Treaty of Versailles – of decisions made by the *Polish* liquidation commissions or any other Polish court or administrative body as the '*tribunal compétent*'.[97] Making the MATs 'a kind of second instance court', the principle on which Article 305 Treaty of Versailles was based can be described with the words of advocate Charles Carabiber: '*Légalité interne, légalité internationale, ce sont en dernière analyse deux panneaux du même diptyque*.'[98] Evidently, the Polish government argued before the MAT that, if an ethnic German had become *ipso facto* a Polish national, the claim against liquidation measures was inadmissible before the Polish-*German* MAT as the claimant had the 'wrong' nationality – he or she was Polish since 1919. The MAT, however, did not consistently accept this argument that it had no competence in this constellation of a Polish national making claims against his Polish government.[99] Thus, an innovation found its way into public international law: The formation of the 'new state' of Poland and its population policies, which undoubtedly aimed at a reduction of the German percentage of its population[100], opened a window towards the possibility of giving individual nationals, as the Polish councillor Simon Rundstein put it, a 'direct right of access' to international tribunals with private claims against their *own* government in case of a violation of international law to which this government had bound itself.[101]

Considering these principles and the case law of the Polish-German MAT, it is not entirely correct to argue that 'the [Paris] treaties denied the property rights of the subjects of the defeated countries' and to limit their hopes 'to obtain partial compensation from their own national state'.[102] If it is undisputable that Article 297 (a) and (b) Treaty of Versailles did

97 Hermann Isay (n 47) 221.

98 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, Burkard Hess and Helene Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 239–276, 244; Carabiber (n 82) 41.

99 See German–Polish MAT, *Kunkel c Etat polonais* (2 December 1925) 6 Recueil TAM 974.

100 Schattkowsky (n 46) 528: '*Politik der Entdeutschung in Polen*'.

101 Szymon Rundstein, 'L'arbitrage international en matière privée' (1928) 23 Collected Courses of the Hague Academy of International Law 349: '*Les particuliers y sont munis d'une action directe*'. ibid, 384–86.

102 Caglioti (n 12) 301.

not create a post-war property regime based on 'reciprocity' between the defeated and Allied nationals with regard to claims for damages, or property 'restitution', or expropriation,[103] Articles 92 (4) Treaty of Versailles clearly indicates that the treaty's answer to the question: '[w]ho can claim' (property) damages was *not* uniformly: 'Allied nationals exclusively'. A professor of international law in Warsaw, Julian Makowski, went so far to describe the Polish-German MAT as '*un organe polono-allemand pouvant être considéré en cette qualité par les ressortissants polonais et allemands comme leur tribunal national*', which even applied German and Polish domestic laws.[104] These *German* rights to claim needed to be seen, as Erich Kaufmann highlighted, in the immediate context of Article 93 Treaty of Versailles obliging Poland 'to protect the interests of inhabitants of Poland who differ from the majority of the population in race, language, or religion'. This provision was added, or as Polish delegation members might have said, forced, into the text of the treaty, right at the end of the negotiations in Paris and also served as models for the other Peace treaties.[105] However, in all these arbitration cases there remained the fact of the 'inequality of the parties to the dispute' – as Charles Carabiber put it in 1950: '*La faiblesse de l'individu face à l'État est manifeste*.'[106]

As the entitlements pursuant to Article 297 (a) Treaty of Versailles (or its equivalents in the other treaties) were in any case more attractive than those pursuant to Article 92 (4) Treaty of Versailles, it was regularly, though not always, beneficial for nationals of the Central Powers to become, *ipso facto* or otherwise, nationals of the 'new states' in order to enjoy the property status and the procedures for the restitution of 'enemy property' sequestered or liquidated during the war. However, the willingness of governments, especially of the 'new states' but also of Romania or France in the case of Alsace-Lorraine, to instrumentalise nationality laws (and related to it the right to property-restitution or to claim for damage to property provided by the MATs) as a political tool to include some

103 Keynes (n 52) 68.

104 Julien Makowski, 'L'arbitrage international entre gouvernements et particuliers' (1931) 36 Collected Courses of the Hague Academy of International Law 298; cf Blühdorn (n 7) 144; 230; on the debate of the 'nature of the MATs'–'national or international tribunals', see Requejo Isidro and Hess (n 98) 263.

105 Marcus M Payk, *Frieden durch Recht? Der Aufstieg des modernen Völkerrechts und der Friedensschluss nach dem Ersten Weltkrieg* (De Gruyter 2018) 638; see Kaufmann (n 33) 99; cf Rundstein (n 79).

106 Charles Carabiber, 'L'arbitrage international entre gouvernements et particuliers' (1950) 76 Collected Courses of the Hague Academy of International Law 221.

and exclude other population groups, attested to the fact that, as Dieter Gosewinkel and Stefan Meyer put it, 'in building a nation-state, a connection is established between property rights and nationality status'.[107] It remained a matter of dispute, for instance, whether or not those individuals who had become 'Allied' nationals (of the new states or not) only after the signing and/or entry into force of the peace treaties were entitled to submit their claims to the MAT.[108]

This was a practical question for the Romano-Austrian MAT faced with Jewish claimants from Romania. They had pre-war claims against Austrian debtors or war-related claims against the Austrian state. However, they had – by virtue of Romania's discriminatory laws of nationality – not become Romanian nationals before the Allies urged Romania into the Minority Treaty of December 1919 and hesitantly executed by the Romanian administration. So dire was the claimants' situation that. despite the Austrian argument that these claimants lacked standing as non-Romanians at the time of the damage or requisition and that Austria could not be held responsible for Romanian legislation, the MAT nevertheless decided to admit their claims. The tribunal argued that given the 'historical conditions of Jews' in Romania and the fact that European powers since the Treaty of Berlin (1879) had considered the Jews of Romania as Romanian nationals, it would be unjust to grant a right to a Christian Romanian and deny it to the '*Israélites indigènes de Roumanie*'; even more so since nothing in the Treaty of Saint-Germain indicated the intentions of the same powers that had signed the Treaty of Berlin to exclude Jews from the benefits of the peace treaty or to deny their Romanian nationality.[109]

Yet throughout the 1920s members of minorities were not only forced to change their nationality or refused a nationality that would have allowed them (to continue) to enjoy their property or even to pursue their claims before the MAT, but hundreds of thousands even lost theirs through denaturalisation or otherwise, without receiving a new nationality. In effect, they became 'stateless' ('*apatride*'). Stateless persons, however,

107 Dieter Gosewinkel and Stefan Meyer (n 45) 576; see Antoine Périer, *Séquestre des biens allemands en Alsace Lorraine* (Sirey 1925) 158.

108 See Dumberry (n 90) 375.

109 *Kahane c Etat autrichien* (19 March 1929) 8 Recueil TAM 943, 960; cf Rudolf Blühdorn (n 7) 213; on the European dimension of the Jews in newly founded Romania 1875–9 see: Fritz Stern, *Gold and Iron: Bismarck, Bleichröder, and the Building of the German Empire* (Vintage 1977) 351–92.

were lost in a 'legal no-man's land'.[110] Whatever their claims and whatever their losses due to the war, they could not raise any of these – not even before the MAT.

A further dimension complicated the legal situation concerning the standing of potential claimants. Similar to the legislation since 1914 related to the 'economic war', again not only natural but also legal persons (companies etc.) had to be defined as either 'Allied' or 'German', no matter how entangled their factual situation was. Considering the possibility of liquidation of 'German' properties, rights and interests the mere adjective could have massive consequences for the future of their proprietor(s) and shareholders and the state wherein that legal person was registered/incorporated. Critics like Jean-P. Niboyet insisted that '*les sociétés n'ont pas de nationalité*'. But they too had to concede that this '*abus de langage*', creating an erroneous notion of what a company is, was related to the war (referring to state-measures against 'enemy property') – and that this notion had 'taken root' in public usage.[111] Therefore, lawyers working within the framework of the peace treaty system were required to find arguments on how to determine the legal situation towards a particular state not only of natural persons, but also of companies or any other legal entity: was the place of a company's incorporation ('*siège social*') determinative of its 'nationality' or other criteria, eg the nationality of the (majority of) its controlling shareholders, as Article 297 (b) Treaty of Versailles seemed to imply ('companies controlled by them', German nationals)?[112] Resultantly, in the inter-war period, the topic of 'nationality'/'citizenship' was hotly debated among legal scholars, causing 'an upswing in legal literature' on nationality laws, from dissertations to the *Recueil des cours* of the Hague Academy.[113]

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110 Dieter Gosewinkel and Stefan Meyer (n 1) 163; see Marc Vichniac, 'Le statut international de apatrides' 43(1) (1933) Recueil des Cours 147; Ivan Soubbotich, *Effets de la dissolution de l'Autriche-Hongrie sur la nationalité de ses ressortissants* (Rousseau 1926); Blühdorn (n 7) 212; Mira L Siegelberg, *Statelessness: A Modern History* (Harvard University Press 2020); Caglioti (n 12) 303, 308; Dzovinar Kévonian, *Réfugiés et diplomatie humanitaire. Les acteurs européens et la scène proche-orientale pendant l'entre-deux-guerres* (PUS 2003) 195–261.

111 Pillet and Niboyet (n 11) 65; cf Feilchenfeld (n 8) 260.

112 Ernst Rabel, *Rechtsvergleichung vor den Gemischten Schiedsgerichtshöfen* (Vahlen 1923) 6; Jean-Paulin Niboyet, 'Existe-t-il vraiment une nationalité des societés' (1927) Revue de droit internatioal privé 402.

113 Dieter Gosewinkel (n 79) 14, fn 23, referring to Hellmuth Hecker, *Bibliographie zum Staatsangehörigkeitsrecht in Deutschland in Vergangenheit und Gegenwart* (Verlag für Standesamtswesen 1976); see: Karl Neumeyer, 'Staatsangehörigkeit

It was in particular the connection between the '*ipso facto*' acquisition/loss of 'nationality' (eg Article 91 Treaty of Versailles; Article 61 Treaty of Trianon) and the property regimes of these treaties that made

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der juristischen Personen' (1918) 2 Mitteilungen der deutschen Gesellschaft für Völkerrecht 149–65; Geroges Ripert, 'Le changement de nationalité des Alsaciens-Lorrains (I)' (1920) 47 Journal du droit international 25–45; part II, id, 431; Eugène Audinet, 'De l'effet du mariage sur la nationalité de la femme' (1920) 47 Journal du droit international 17–25; Georg Bruns V, *Staatsangehörigkeitswechsel und Option nach dem Friedensvertrag (besonders in Beziehung auf Polen)* (De Gruyter 1921); Max Kollenscher, *Die polnische Staatsangehorigkeit: Ihr Erwerb und Inhalt fiir Einzelpersonen und Minderheiten dargestellt auf Grund des zwischen den alliierten und assoziierten Hauptmächten und Polen geschlossenen Staatsvertrags vom* 28. *Juni 1919* (Vahlen 1921); Walter Schätzel, *Der Wechsel der Staatsangehörigkeit infolge der deutschen Gebietsabtretungen. Erläuterung der den Staatsangehörigkeitswechsel regelnden Artikel des Versailler Vertrages, nebst Abdruck der einschlägigen Vertrags- und Gesetzesbestimmungen* (Stilke 1921); Nachtrag 1922: *Der Wechsel der Staatsangehörigkeit infolge der deutschen Gebietsabtretungen: Erläuterung der den Staatsangehörigkeitswechsel regelnden Artikel des Versailler Vertrags nebst Abdruck der einschlägigen Vertrags- und Gesetzesbestimmungen. Nachtrag enthaltend eine Zusammenstellung und Erläuterung der neuen Staatsangehörigkeitsbestimmungen für das Saargebiet, Oberschlesien, Danzig und Nordschleswig, sowie einen Ueberblick über die Staatsangehörigkeitsregelung der anderen Friedensverträge des Weltkrieges*; Eurgene Audinet, 'Les changements de nationalité résultant des récents Traités de Paix' (1921) 48 Journal du droit international 379; Julien Pillaut, 'Les questions de nationalité dans les Traités de paix' (1921) Revue de droit international privé et de droit pénal international 1; Jean-Paulin Niboyet, 'La nationalité d'après les traités de paix qui ont fini la grande guerre de 1914–1918' (1921) 2(1) Revue de droit international et de la législation comparée 285–319; Engeström, *Les changements de nationalité d'après les traités de paix* (Pedone 1923); Ernst Isay, 'De la nationalité' (1924) 5 *Collected Courses of the Hague Academy of International Law* 425–472; Karl Neumeyer, 'Staatsangehörigkeit als Anknüpfungspunkt im internationalen Verwaltungsrecht' (1924) 4 Mitteilungen der deutschen Gesellschaft für Völkerrecht 54–69; Schwartz (n 79); Walter Schätzel, *Die Regelung der Staatsangehörigkeit nach dem Weltkrieg: Eine Materialsammlung* (Stilke 1927); Walther Schätzel, *Das deutsche Staatsangehörigkeitsrecht* (De Gruyter 1928); Pillet and Niboyet (n 11) 22–30; 63–102; Karl Ehrlich, *Über Staatsangehörigkeit, zugleich ein Beitrag zur Theorie des öffentlich-rechtlichen Vertrages und der subjektiven öffentlichen Rechte* (Sauerländer 1930); Maurice Travers, 'La nationalité des sociétés commerciales' (1930) 33 Collected Courses of the Hague Academy of International Law, 1; Robert Redslob, 'Le principe des nationalités' (1931) 37 Collected Courses of the Hague Academy of International Law 1; Walter Napier (n 95) 1; Curt Rühland, 'Le problème des personnes morales en droit international privé' (1933) 45 Collected Courses of the Hague Academy of International Law vol 45; William O'Sullivan Molony, *Nationality and Peace Treaties* (London 1934); Pierre Louis-Lucas, 'Les conflits de nationalités' (1938) 64 Collected Courses of the Hague Academy of International Law 1.

these provisions so pertinent not only for the individuals concerned, but also for the governments involved. Since 1919, both the German, Austrian, Hungarian or Bulgarian authorities and their Allied counterparts had known that the above-mentioned massive financial sums made 'reparations an excruciatingly tangled thicket'. However, they also knew that, with the future awards of the MATs regarding private Allied war-damages, the former Central Powers would be faced with massive *additional* payment obligations. These were, as Jean-Paulin Niboyet stated in 1922, yet other '*modes de réparation des intérêts privés*'.[114] As Alan Sharp puts it succinctly: 'The economics and technicalities of reparations probably defeated the ability of most politicians to understand them; what they all grasped was the enormous potential political fall-out from such a highly contentious and charged question.'[115] These details of the enforcement of the Paris treaties' arbitration provisions were not wholly controlled by Allied governments and administered independently from the state-to-state reparation payments. Especially for war-ravaged France and Belgium, but also for smaller Allies like Romania or Portugal, any additional income from German property liquidations in accordance with MAT-awards was considered highly desirable given their reconstruction costs in the war zones Allied populations were able to see that through German reparations and liquidations of German property the victors could 'spread the pain of undoing the damage done.'[116]

In this individual, private, and direct entitlement under public international law to claim damages from a state, contemporary lawyers recognized the new and 'most radical characteristic' (compared to other international tribunals) of the MATs. Given 'that not only States but also private individuals may appear before the … [MAT] as parties',[117] the entire set-up of the claims system of the Paris peace treaty system broke with the traditional notions of 'diplomatic protection' in international law. Contrary to the MAT principle of granting individuals direct access to international

114 Filipe Ribeiro De Meneses, *Afonso Costa* 90; 102; Niboyet (n 93) 215; see: Dumberry (n 90) 373, fn 149.

115 Alan Sharp, 'The Enforcement of the Treaty of Versailles 1919–1923' (2005)16(3) Diplomacy & Statecraft 423, 434; on the disputes between politicians and lawyers in the drafting process of the treaties, see: Marcus Payk (n 105) 318–55.

116 Sally Marks, 'Smoke and Mirrors: In Smoke-Filled Rooms and the Galerie des Glaces', in Manfred F Boemeke, Gerald D Feldman, Elisabeth Glaser (eds), *The Treaty of Versailles: A Reassessment after 75 Years* (CUP 1998) 337, 338.

117 Paul de Auer, 'The Competency of Mixed Arbitral Tribunals' (1927) 13 Transactions of the Grotius Society xvii, who adds '[n]o example of this has existed before'.

tribunals, 'diplomatic protection' provided that an injury to an individual by a foreign state was (exclusively) actionable by that individual's state of origin. Hans Kelsen, then professor of international law in Cologne, noted a growing 'tendency [in international law] to consent rights and obligations to individuals' ('*Tendenz [in international law] zu unmittelbarer Berechtigung und Verpflichtung der Individuen*'). For him, this 'tendency' was most palpable in the 'establishment of central organs for the creation and and implementation of legal norms' ('*Ausbildung von Zentralorganen zur Erzeugung und Vollziehung der Rechtsnormen*').[118] The international tribunals of the Paris Peace Treaty system were prime examples of these phenomena in the interwar period. More recent research has similarly come to the conclusion that granting individuals standing to uphold their subjective rights under (public) international law through individual complaints procedures were the 'most prominent and innovative feature' of the MATs.[119]

4. *Reading the 'Spirit of the Text'. Claiming and Disputing ('Virtual') Nationality before the Franco-German Mixed Arbitral Tribunal*

Right from the beginning of claims being submitted to the MATs in the mid-1920 it became evident that disputes about nationality would play a central role in the case law of the MATs. Given that both the jurisdiction of the MAT and the admissibility of the claim were, as mentioned above, dependent on the 'correct' MAT chosen by the claimant and the 'correct' provisions of the peace treaty being referred to in the statement of claim, the defendant's party (mostly the governments of either Germany, Austria, Hungary, or Bulgaria) regularly chose to deny the admissibility of the claim by arguing that the claimant had in fact another nationality than she or he (or the company) claimed to have. This formal argument that the claimant lacked standing was, as recently underlined by Requejo Isidro and Hess, 'often the most promising (or even the only) defence available (especially in the context of Article 297 VPT)'.[120]

Such relevance of the nationality of parties in international arbitration cases was, in one way or the other, neither new to international arbitrators nor surprising given the historical circumstances of the changing borders and the creation of 'new states' after World War I. Already during previ-

118 Hans Kelsen, *Reine Rechtslehre. Studienausgabe* (Mohr 2008 [1934]) 143.
119 Requejo Isidro and Hess (n 98) 243; see Dumberry (n 90) 373.
120 Requejo Isidro and Hess (n 98) 268, referring to Walter Schätzel (n 91) 424.

ous decades, in cases like the Deserters *of* Casablanca (1908) the dispute about the significance of nationality (here: the German deserters from the French Foreign Legion), was central.[121] Also earlier arbitration tribunals, for instance the one on claims of *Italian nationals in Peru* (1901), were requested to clarify the applicable international norms on nationality.[122] In parallel to the MAT awards and special tribunals,[123] the Permanent Court of International Justice also handed down advisory opinions[124] or decisions[125] on questions of nationality during the 1920s and 30s. What they all had in common was the tenet that nationality constitutes the link between a state and natural and legal persons and that it is regulated by the domestic law of the state granting the nationality.

Among the early MAT cases on the question of '*détermination de la nationalité des sociétés*', or the nationality of legal persons, were the claims of *Charbonnage Frédéric Henri SA c Germany* (1921).[126] Deciding on the claims for damages of a company claiming to be French (located in Alsace) and incorporated before the war under German law, the Franco-German MAT underlined that corporations per se do not possess nationality but – much to the chagrin of German lawyers and the German government – found the nationality of the shareholders determined the control over the corporation. Referring to the text of the Treaty of Versailles, as well as the facts of the case, the MAT-award made a quasi-historical argument by pointing out that it:

> *(…)* ought to regard as relevant the manner in which ... [Germany's] exceptional war measures dealt with in Article 297 (e) were applied [by

121 *Affaire de Casablanca* (Allemagne, France, 1909) 11 RIAA 119 (PCA Case No. 1908–02).

122 *Affaire des réclamations des sujets italiens résidant au Pérou* (Italie, Pérou, 1901) 15 RIAA 389; eg 402: '*[le] Tribunal Arbitral, lequel décide conformément aux principes du droit international; et qu'un de ces principes, universellement admis, étant que l'enfant légitime acquiert, à l'instant de sa naissance, la nationalité que possède le père à ce moment*'.

123 *Deutsche Amerikanische Petroleum Gesellschaft Oil Tanker* (US, Reparation Commission, 1926) 2 RIAA 777.

124 *Nationality Decrees Issued in Tunis and Morocco* [French Zone] [Advisory Opinion, 1923] PCIJ Series B No 4; *Acquisition of Polish Nationality* [Advisory Opinion, 1923] PCIJ Series B No 7, 16.

125 *Affaire entre l'Allemagne et la Lithuanie concernant la nationalité de diverses personnes* (Allemagne, Lithuanie, 1937) 3 RIAA 1719–64; for further case law see Dumberry (n 90) 367–70.

126 1 Recueil TAM 422–33; *Charbonnage Frédéric Henri SA v Germany* (1923) 50 Journal du droit international 600.

> German authorities] to corporations during the war. It appeared, as a matter of fact, that they were applied having regard rather to the composition of the company than to its *siège social* (which in this case was Germany). Thus the German ordinance ... laid down, in regard to the liquidation of British (and other) businesses, that those undertakings should be liquidated of which the greater part of the capital belonged to British nationals.[127]

Focussing not on German legal practices during the war, – which indeed had begun to consider the 'economic belonging' ('*wirtschaftliche Zugehörigkeit*') rather than the formal nationality of companies to determine its 'enemy character'[128] – but in a similar vein on the controlling capital, in *Société du Chemin de fer de Damas-Hamah c Compagnie de Chemin de fer de Bagdad* (1921) the Franco-German MAT defined the 'nationality' of two companies. In this case, both the claimant, in Beirut, and the defendant, in Constantinople, were companies incorporated in the Ottoman Empire. Consequently, the German Clearing Office disputed that the defendant company was a national resident in Germany, as required by Article 296 Treaty of Versailles (debts). Arguing that the claimant company was not French and the defendant company was not German, the jurisdiction of the tribunal was challenged. However, following the 'control-theory' – which it saw as having been accepted by the framers of the treaty -, the MAT held that it had jurisdiction because the claimant company was French-controlled and the defendant company, the Baghdad Railway,[129] was evidently German-controlled. The tribunal was convinced that the purpose of these treaty provisions was to benefit Allied nationals and to 'safeguard' Allied property and interests irrespective of its legal 'form' and thus argued:

> [I]t is thoroughly in accord with the spirit of the Peace Treaty to pay less attention to questions purely formal than to palpable economic realities; consequently, when the nationality of a corporation is to be determined more weight must be given to the interests represented therein than to the outward appearance which may conceal such inter-

127 Translated in: Arnold D McNair, Hersch Lauterpacht (eds) (1929) 1 Annual Digest of Public International Law Cases 1919–1922, 228.

128 Ernst Marburg, *Staatsangehörigkeit und feindlicher Charakter juristischer Personen unter besonderer Berücksichtigung der Rechtsprechung der Gemischten Schiedsgerichte* (Vahlen 1927) 1 sq.

129 Sean McMeekin, *The Berlin-Baghdad Express: The Ottoman Empire and Germany's Bid for World Power* (Harvard University Press 2010).

> ests. In the present case the circumstance that both corporations are described as Ottoman and that their charter seat is in Turkey must be considered as purely formal and not of decisive importance.[130]

According to a summary of a number of MAT-cases from 1921 until 1925 by Umpire Edwin Parker of the US-German Mixed Claims Commission, the 'Mixed Arbitral Tribunals to which France is a party have uniformly held that the nationality of the claim must be determined by the nationality of the beneficiary and have carried this rule to the extent of applying it to corporations, rejecting the juridical theory of the impenetrability of corporations for the purpose of determining the true nationality encased in the corporate shell [according to its *siège social*]'.[131] However, this alleged uniformity in the MAT-jurisprudence on the control of moral persons by shareholders was not universally acknowledged, either by legal scholars, or by other MATs. In 1926, the German-born US lawyer Ernst H Feilchenfeld underlined that the decisions of the Franco-German MATs on the determination of the nationality of a corporation '[we]re severely criticize[d]' by experts on the law of nationality like Karl Neumeyer and were not used as precedents by, for instance, the Anglo-German MAT. Feilchenfeld insisted with regard to these criticized awards 'that the control theory does not become international law merely because it has been adopted by one of the Mixed [Arbitral] Tribunals.'[132] Instead, as Niboyet had already remarked earlier, the MAT case law on corporations was contradictory. 'Some MATs applied the incorporation theory, others the control theory'.[133]

However, German scholars were not only malcontent with the Franco-German MAT. In 1923, Ernst Rabel, professor of comparative law in Munich and from 1921 to 1927 and arbitrator in the German-Italian Mixed Arbitral Tribunal, listed a number of erroneous legal assumptions of the MATs regarding 'corporate nationality'. He therefore called for a thorough and better application of the 'science' of comparative law

130 1 Recueil TAM 401–407; (1923) 50 Journal du droit international 595–99; see Georg Schwarzenberger, *International Law* (vol 1, Stevens & Sons 1957) 398.

131 *Henry Cachard and H. Herman Harjes v Executors of the Estate of Medora de Mores* (United States, Germany, 1925) 7 RIAA (Mixed Claims Commission, United States and Germany, 1 November 1923–30 October 1939) 292–94, 293.

132 Ernest H Feilchenfeld, 'Foreign Corporations in International Public Law' 262; see Isay (n 47) 44 sq.; Karl Neumeyer, *Die Staatsangehörigkeit juristischer Personen und das Gemischte deutsch-französische Schiedsgericht* (Kern 1922); Ernst Marburg, *Staatsangehörigkeit und feindlicher Charakter* 35.

133 Requejo Isidro and Hess (n 98) 268, referring to Schätzel (n 91) 429; see Niboyet (n 93) 238, fn 2.

('*Rechtsvergleichung*') by the tribunals. Rabel pointed out how MAT awards misinterpreted German (or English and French) laws when determining the 'nationality of a legal person' or the definition of legal terms – thereby revealing that the requirements of the MAT's tasks were hard to fulfil: cutting across national jurisdictions in order to serve justice for the claimants:

> The German-English Mixed Arbitral Tribunal explained flatly that the German *offene Handelsgesellschaft* does not have a nationality in the sense of Art 296 VPT, because it is not a legal person. Independently of the latter issue, the former assertion is clearly wrong. German legal practice and doctrine have come to the opposite conclusion for quite some time now. The German *offene Handelsgesellschaft* does have a nationality in the same sense as that one refers to when speaking of actual legal persons. (*Der Deutsch-Englische Gemischte Schiedsgerichtshof erklärte kurzweg, die deutsche offene Handelsgesellschaft habe keine Zugehörigkeit zu einem Staate im Sinne von Art. 296 VV., weil sie keine juristische Person sei. Das letztere dahingestellt, ist das erstere bestimmt unrichtig. Die deutsche Praxis und Literatur lehrt längst das Gegenteil. Die deutsche offene Handelsgesellschaft hat eine Staatsangehörigkeit in dem gleichen Sinne, wie man von Staatsangehörigkeit wirklicher juristischer Personen spricht*).[134]

Faced with the requirements of the Paris peace treaties and with what they saw as patently unjust uses of international law, German and Austrian legal scholars in their publications began to highlight their own perspective, 'stressing the independence of the continental European tradition of international law from the Anglo-American version of the law'.[135] Given their dissatisfaction with the argumentation and the conclusions of many awards, they also questioned the possibilty of a revision of those MAT awards (which were stated to be 'final and conclusive' according to Article. 304 g Treaty of Versailles) that were considered to be 'faulty' or even an *excès de pouvoir*. The latter was regularly debated by German legal scholars.[136]

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134 Rabel (n 112) 6.

135 Mark Swatek-Evenstein, *A History of Humanitarian Intervention* (CUP 2020) 38, referring to Karl Strupp, 'Vorwort', in: Karl Strupp (ed), *Wörterbuch des Völkerrechts und der Diplomatie*, vol 1 (De Gruyter 1924) v–vi.

136 See Walter Schätzel, *Rechtskraft und Anfechtung von Entscheidungen internationaler Gerichte* (Noske 1928); Walter Schätzel (n 91) 416.

Though it is still stated in modern scholarship that 'corporate nationality is far more complex than natural persons' nationality',[137] the case law of the MATs indicates that also historical disputes before these tribunals concerning the latter could lead to unanticipated and complex argumentations and awards that stirred emotions. Two cases that early on earned dubious reputations – among German jurists – as 'notorious'[138] and 'deplorable misjudgements' by the Franco-German MAT (Section 1, headed by Swiss law professor André Mercier) came from 'reintegrated' Alsace: the claims of *Auguste Chamant c État Allemand* (23 June 1921) and *Veuve Heim c État Allemand* (30 June 1921).[139]

Were the claims of Alsatians to the Franco – German MAT admissible when the damage in question occurred *before* the 'reintegration' of Alsace-Lorraine to France on 11 November 1918 and thus also before those who had been French nationals before 1871 (and their descendants) were '*ipso facto* reinstated in French nationality' pursuant to the Annex to Article 51 Treaty of Versailles? Or did these Alsatians lack standing because, irrespective of their French origins or ethnicity, they had 'lost French nationality'-as the Annex to Article 51 Treaty of Versailles put it – and had been instead German nationals between 1871 and 11 November 1918 when Alsace-Lorraine was under the sovereignty of the German Empire?[140]

In *Chamant* the claimant, a wine trader from Strasbourg, submitted a claim to the Franco-German MAT pursuant to Article 302 (2) Treaty of Versailles

> 'If a judgment in respect to any dispute which may have arisen has been given during the war by a German Court against a national of an Allied or Associated State in a case in which he was not able to make his defence, the Allied and Associated national who has suffered prejudice thereby shall be entitled to recover compensation, to be taxed by the Mixed Arbitral Tribunal provided for in Section VI'.

137 Seline Trevisanut, 'Nationality Cases before International Courts and Tribunals' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008).

138 Strupp (n 93) 670.

139 Franco-German MAT, *Auguste Chamant c État Allemand* (23 June and 25 August 1921) 1 Recueil TAM 361; Franco-German MAT, *Veuve Heim c État Allemand* (30 June and 19 August 1921) 1 Recueil TAM 381; both reprinted in: Heinrich Triepel (n 89) Anhang I 63–81; for the quote 'bedauerliche Fehlsprüche' 61.

140 See Walter Schätzel, *Die elsaß-lothringische Staatsangehörigkeitsregelung und das Völkerrecht* (Stilke 1929).

Having left Strasbourg for France on 31 July 1914, claimant could not make his defence in a Strasbourg court case against him in October 1914 and had subsequently suffered prejudice by the court's decision to auction off his 200 barrels of wine. This auction was not an 'exceptional war measure'. Defendant Germany argued that the Franco-German MAT did not have jurisdiction over this claim, as in October 1914 the claimant was not 'a national of an Allied state' as required by Article 302 (2) Treaty of Versailles. Germany insisted that Chamant had been a German national, not a French national (This was a major difference to the subsequent claims by a Romanian who had been denied Romanian citizenship because of her Jewish faith and who had, because of this policy, no citizenship at all). The MAT, however, decided that it had jurisdiction, because the Treaty of Versailles considered the Alsatians and Lorrainers '*comme revêtus d'un indigénat distinct*' and, moreover, during the 'German' period between the Peace of Francfort (1871) and the armistice (1918) they remained '*en quelque sorte comme virtuellement français*'. The Treaty of Versailles, the tribunal stated, would not want this population (who had since 'regained' French nationality – not the ethnic Germans who had settled in Alsace-Lorraine after 1871 and had to leave after 1919) to be taken as German nationals. To the contrary, the Treaty wants individuals of French extraction from Alsace-Lorraine to 'benefit' from all provisions, including Article 302 Treaty of Versailles, that are '*en faveur des ressortissants français*' and wants to put them on par with all other '*citoyen français vis-à-vis de l'Allemagne*'. Therefore, the claimant had standing to claim compensation and the tribunal subsequently awarded him damages.[141]

In *Heim c État Allemand* the claimant demanded 'compensation' (Article 297 (e) Treaty of Versailles) for the confiscation of her goods in Strasbourg by the German authorities during the war. Germany again stated that claimant was a German national at the time of the 'war measure' and that, as a German in Alsace-Lorraine before the armistice, she was not 'in an enemy country', as required by Article 297 (e) Treaty of Versailles. It was further argued that this 'war measure', the confiscation of bedding and metals, was not an '*exceptional* war measures' according to Article 297 (e) Treaty of Versailles against 'enemy' property – ie property of 'nationals of Allied and Associated Powers' -, but a general war measure of the German authorities everyone, German nationals, 'enemy aliens', or neutrals, had to forbear. Yet, the MAT again concluded that it had jurisdiction over this case and used the same arguments and similar wording as in *Chamant*

141 Cited in: Triepel (n 89) Anhang I 63–81; 67.

– to which it referred – to substantiate its award: Individuals from Alsace-Lorraine had an '*indigénat distinct*'. The peace treaty considered them not as Germans but '*comme des citoyens français à l'état virtuel*' and wanted to grant them all benefits of the French nationality stipulated in its provisions. After all, it would be 'neither rational nor equitable' if a French national from Lyon was entitled to war damages in Alsace and an Alsatian were not.[142]

Already in a previous award the Franco-German MAT, that is the neutral MAT president and the French arbitrator, had underlined its conviction that 'it is clear that the treaty [of Versailles] intended to make the competence of the [MATs] as wide ranging as possible'.[143] In both Alsatian cases, in a manner surprising to the Germans, the MAT used this 'wide' competence to resurrect and creatively adapt the principle of 'continuous nationality' if this worked in favour of 'French' claimants from Alsace-Lorraine; thereby ensuring the continuous French nationality of the claim: making it 'French' at the time of (1) the 'damage or injury inflicted upon the [Allied] property' (Art. 297 [e] Treaty of Versailles) in respect of which the claim was submitted and (2) at the time the claim wa submitted and (3) at the time of the award.

Evidently, the French government welcomed the MAT's interpretation of 'virtual nationality' in respect of French-speaking Alsace-Lorrainers enabling them to submit their claims – though the government's interpretation of the status of the population of Alsace-Lorraine during the war was, at the instigation of legal scholar Louis Renault, far more cautious and abstained from using the tribunal's terminology. Heinrich Triepel, in his angry reply to the award, sarcastically entitled *Virtuelle Staatsangehörigkeit* (1921), repeatedly pointed out the terminological and historical contradictions caused by a French policy that tried to uphold a legal fiction (*comme … l'état virtuel*) without implementing it into the laws of the land.[144] The Austrian councillor Blühdorn saw the notion of '*nationalité "virtuelle"*' as a mere adherence to a 'point de vue sentimental' that was then couched in '*langage juridique*'.[145] Karl Strupp characterised 'this conception [of "virtual

142 Cited in: ibid, Anhang I 63–81, 79; see Isay (n 93) 9; Strupp (n 93) 678.

143 *Société Vinicole c Mumm* (4 March 1921), transl in: Strupp (n 93) 663.

144 Triepel (n 89) 34, 36, 43; see the positive review of Arrigo Cavaglieri, Review: Heinrich Triepel, 'Virtuelle Staatsangehörigkeit' (1922) 2(2) Rivista Internazionale di Filosofia del Diritto 167; Trendtel (n 89) 3–25; Isay (n 47) 449.

145 Blühdorn (n 7) 210.

nationality" for an American audience as]... a monstrosity from the juridical point of view'.[146]

As so often during the 1920s, the 'clauses [of the Treaty of Versailles on reparation and restitution] meant, sometimes accidentally, sometimes deliberately, different things to the different parties involved.'[147] Though the argument in *Chamant* about the reality of a French 'virtual nationality' was not endorsed in subsequent cases decided by the Franco-German MAT, the tribunal evidently continued to assume its juridiction over claims for compensation from Alsace-Lorraine, irrespective of the fact that at the time the damage occurred the claimants were not 'Allied nationals' but German nationals. Commenting on the above-cited award *Charbonnage Frédéric Henri* (1921) the *Journal du droit international* noted with satisfaction that the '*principe*' of *Chamant* had also found its application in the determination of French corporate nationality: '*d'adapter simplement les dispositions prévues en faveur des Français, aux Alsaciens-Lorrains*' in conformity with the 'spirit of the text'.[148] As a result of *Chamant* and *Heim*, more than 20 000 claims from Alsace-Lorraine were filed with the Franco – German MAT, whose first 'division' (*section*, see Art. 304 [c]) was exclusively tasked with claims from Alsace-Lorraine.[149] Given these staggering numbers, Germans in turn complained that the French authorities had heavily advertised the possibility to lodge claims against Germany and that claims had been systematically collected by 'French agents' in order to increase the total number of claimants.[150]

On the other hand, in 1927 Hungarian lawyer Paul de Auer reminded his readers on a basic truth about those who tried to submit their claims to the tribunals and – often after helpless bureaucratic struggles with state administrations – 'for whom the Mixed Arbitral Tribunals are the last

146 Karl Strupp (n 93) 670; for the German attempts to specifically target American audiences in their 'struggle against Versailles', see: Isabel V Hull (n 70) 8 sq.

147 Alan Sharp, 'The Enforcement of the Treaty of Versailles, 1919–1923' (2005) 16(3) Diplomacy & Statecraft 423, 423.

148 Henry Emile Barrault, 'Note–*Charbonnage Frédéric Henri SA c Germany*' (1923) 50 Journal du droit international 609–611, 610.

149 See Dumberry (n 90) 373; Trendtel (n 89) 31–35; 37; Gidel and Barrault (n 82) 330.

150 Requejo Isidro and Hess (n 98) 268, referring to Schätzel (n 91) 425 sq; see Rabel (n 112) 77 quoting the *Lothringer Volkszeitung*, no 236 (13 October 1922), and referring to the association *Incarcerés et Internés politiques* in Metz that 'painstakingly' informed the French members of the MAT.

straw to which in their final desperation they can cling and from which they hope at least reparation for the injuries to their private property.'[151]

5. Conclusion

The Mixed Arbitral Tribunals are to be understood as part of a *ius post bellum*. Not only were these tribunals part of the Paris peace treaties (Article 304 Treaty of Versailles), but in their own case law they established rules that massively affected the lives of tens of thousands living in post-war societies. And as this chapter has shown, questions of nationality and property were paramount for those who tried to address the MATs throughout the 1920s.

Post-war developments matter for both the victorious and vanquished nations. As the history of the drafting process of the Treaty of Versailles also shows, 'the aftermath of war is crucial to the justice of the war itself', for contemporaries – politicians, scholars, journalists – invoke post-war developments to justify or condemn the war just won or lost.[152] This became particularly evident in 1918/9 when the evocation of a 'just' peace that was worth the war, was based on the Allied side's claim that this war had been fought to re-establish and lastingly defend the 'reign of law' (Woodrow Wilson). Ending the war was therefore far more than the demobilization of troops, the return of prisoners of war, and establishing a lump-sum to be paid by the vanquished. Guided by a strong belief in the advantages of an internationalist legalism for the community of nations, to the framers of the Paris peace treaties this 'reign of law' had to be built into the treaties' provisions in order to be implemented for a future without war. As historian Markus Payk has shown, 'all demands and interests [after the war] could only be expressed through a language of legality, by referring to precedents in international law and by invoking justice as the main objective of the Allied nations.'[153]

The central role of arbitration in the reparation regime of *private* damages was thus not incidental. For decades prior to the war, high hopes connected to this instrument of law and its alleged practicability to solve

151 de Auer (n 117) xxix.

152 Gary J Bass, 'Ius post bellum' (2004) 32(4) Philosophy & Public Affairs 384, 384, quoting 'Peace at Any Price' *The New Republic* (24 May 1919) 101.

153 Marcus M Payk, '"What We Seek Is the Reign of Law": The Legalism of the Paris Peace Settlement after the Great War' (2018) 29 European Journal of International Law 809, 818.

interstate and private disputes for good.[154] After having learnt about the practice of the MATs, including the undeniable difficulties to deliver awards on questions of nationality and property, the chairman of the *Grotius Society* in a meeting in London in 1927 declared: 'The substitution of arbitration for force was vital for the peace of the world.'[155] The framers of the treaties hoped that international law and its practical implementation by the MATs and other bodies created by the peace treaties would be instrumental to secure justice for states as well as for the individual. It is not surprising that Allied scholars assessed the work of the MATs in a generally positive light. Henry Barrault lauded the advent of the MATs as '*un grand événement de l'histoire du droit international*'.[156] And the French *agent général* for the MATs, Pierre Jaudon, did not hide his overall satisfaction with the results of the MATs, when he summarized the tribunals' achievements and their '*sagesse*'.[157]

However, what the victors saw as a demand of justice in the face of an urgent need for economic reconstruction, was for the German side an immoral exploitation of Germany's weakness by triumphant states. Such 'imperialist' abuse of the rhetoric of international law and justice, for example, entitled the Allies to continue with liquidation of German property all over the world even in times of peace and prevented the former belligerents from returning to the pre-war principle of equality and reciprocity of property rights across national borders in order to allow for the Allied reconstruction at the expense of the German economy. To the great disappointment of Germany, the Allied claims for 'justice' and law after the war included the future and the past and, as they learnt from the Allies in May 1919, 'reparation for wrongs inflicted [in the past] is of the essence of justice.'[158] Related to the downfall of the Weimar Republic, whose democratic politicians bore the stigma of fulfilment ('*Erfüllungspolitik*') of the conditions set by 'Versailles', 'reparations have acquired a stigma of vindictiveness'.[159] The Treaty of Versailles was, also

154 Jakob Zollmann, 'Théorie et pratique de l'arbitrage international avant la Première Guerre mondiale', in Rémi Fabre, Thierry Bonzon, Jean-Michel Guieu, Elisa Marcobelli and Michel Rapoport (eds), *Les défenseurs de la paix, 1899–1917* (PUR 2018) 111–126.

155 Quotation in: de Auer (n 117) xxix.

156 Henry E Barrault, 'La jurisprudence du Tribunal Arbitral Mixte' (1922) Journal du Droit International 298, 311.

157 Pierre Jaudon, 'Avant-Propos' in Teyssaire and de Solère (n 30) 8.

158 Quotation in Hull (n 70) 10.

159 Bass (n 152) 410; see on 'Erfüllungspolitik': Peter Krüger, *Die Außenpolitik der Republik von Weimar* (Wissenschaftliche Buchgesellschaft 1985) 132.

by later historians, regularly depicted 'as disaster of the first rank.'[160] Yet modern research contends that the Treaty of Versailles was 'better than its reputation.'[161] More specifically, the MATs are by now also seen in a 'positive perspective', given the central role they gave to the individual in international law, their 'efficient and fair' handling of 'mass claims', and the adaptation and modernization of the rules of procedure for the use of international arbitration.[162]

The above-quoted contemporary criticism of MAT awards speaks a clear language of a different interpretation and reading of the Paris peace treaty system. Contempt and anger at the principles created at Versailles and their one-sided application by the non-German arbitrators dominated the German and Austrian debate on the MATs. As Fritz Morstein Marx, a young scholar in Albrecht Mendelssohn Bartholdy's liberal Hamburg *Institut für Auswärtige Politik* (Institute for Foreign Policy) and future expert of public administration, put it harshly in a review: 'The wartime legislation and the case law of the Mixed Tribunals … were … to a large extent created as means to an end. This end was not that of perfecting the law, but rather the *sacro egoismo* and the necessities of war. They should be judged accordingly. From the point of view of legal science, they constitute material of rather dubious value.' ('*Die Kriegsgesetzgebung und die Rechtsprechung der Gemischten Schiedsgerichte … sind … in hohem Maße Zweckschöpfungen, nicht im Sinne der Vervollkommnung des Rechts, sondern im Sinne des sacro egoismo und der Kriegsnot. Sie wollen so gewürdigt werden. Damit sind sie vom Standpunkt der Rechtswissenschaft ein Material von recht zweifelhaftem Wert*').[163] When modern research confirms that in 'the era of the two world wars both nationality law and property law increasingly became an object and instrument of state intervention in society',[164] contemporary German and Austrian scholars castigated the MATs for not being able to frustrate this instrumentalisation of municipal law with the

160 Gerald D Feldman, *The Great Disorder: Politics, Economics and Society in the German Inflation, 1924–1924* (OUP 1997) 148.

161 Marcus M Payk, 'Die Urschrift. Zur Originalurkunde des Versailler Vertrages von 1919' (2019) 16(2) Zeithistorische Forschungen/*Studies in Contemporary History* 342, 352.

162 Requejo Isidro and Hess (n 98) 276.

163 Fritz Morstein Marx, 'Review of: Ernst Marburg, Staatsangehörigkeit und feindlicher Charakter' (1928) 52 Archiv des öffentlichen Rechts 151–152; see Margit Seckelmann, 'Mit Feuereifer für die öffentliche Verwaltung: Fritz Morstein Marx – Die frühen Jahre (1900–1933)' (2013) 66 Die öffentliche Verwaltung 401, 406.

164 Dieter Gosewinkel and Stefan Meyer (n 45) 588.

tools of international law. This inability came at the expense of the former ruling nations who had been turned into 'minorities' and who should have been protected from the ongoing liquidations of their property. On the other hand, by handing out thousands of awards enabling individuals to claim and receive damages from (foreign) governments, the MATs' work anchored and strengthened the position of the individual in (public) international law to a hitherto unprecedented degree. This achievement in itself, as part of the development in the history of international law, was, as contemporaries have already argued in retrospect, at the same time 'brilliant and comforting'.[165]

165 Carabiber (n 82) 42: '*l'éclatante et réconfortante confirmation*'.

Chapter 5: The Mixed Arbitral Tribunals and the Nationality of Legal Persons: The Uncertain First Steps of an Evolving Concept

Emanuel Castellarin[*]

Nationality was an important procedural issue before the Mixed Arbitral Tribunals (MATs) set up by the post-World War I peace treaties. The jurisdiction *ratione personae* of each MAT and the admissibility of claims were defined by the nationality of claimants, who had to be nationals of the Allied Power party to the relevant peace treaty. In addition, some claims, such as those relating to contracts concluded before the entry into force of the treaties, could only be brought against nationals of the defeated power party to the relevant peace treaty.[1]

Therefore, nationality was crucial, regarding both individuals and legal persons.[2] Among the relevant issues, some were not specific to legal persons. In fact, the moment at which the nationality requirement had to be met was mainly discussed concerning individuals.[3] This chapter analyses the content and the implications of MATs' case law on issues specifically related to the nationality of legal persons.

Section 1 explains the historical legal context. The nationality of legal corporations had already been debated for decades as an issue of corporate law or private international law, and occasionally in the framework of diplomatic protection. MATs were the first international tribunals that

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1 Art 304(b) Treaty of Versailles, and analogous provisions of other peace treaties.

2 Awards also used the expression 'juridical persons', the more general expression 'moral beings' and more specific terms (company, corporation, partnership, etc).

3 For legal persons, the date at which nationality was assessed was generally the date of entry into force of the applicable peace treaty: French–German MAT, *Mercier et Cie c Etat allemand* (27 October 1923) 3 Recueil TAM 686, referring to *d'Escuvilley*, of the same date, which set the same rule for individuals (3 Recueil TAM 689); Franco–Austrian MAT, *Léon Goldwasser c Böhmische Industriebank et Etat autrichien* (28 December 1923) 3 Recueil TAM 951; Anglo–German MAT, *in re Gebrüder Adt AG v Scottish Co-op Wholesale Society, Limited* (4 and 30 November 1927) 7 Recueil TAM 473. Unless otherwise stated, case law references are those of the *Recueil des Décisions des Tribunaux Arbitraux Mixtes* (Recueil TAM).

settled disputes on a large scale in this field. Section 2 shows that MATs contributed, albeit in a limited way, to the conceptual clarification of the concept of corporate nationality. In particular, they contributed to establishing the idea that legal persons have a nationality. Section 3 analyses the criteria followed for the determination of corporate nationality. Without a clear common methodology, MATs alternatively chose three different criteria: the place of the *siège social*, the place of incorporation, and the theory of control, ie the nationality of the persons in control of the corporation. Section 4 addresses the admissibility of claims by shareholders. This issue is not an aspect of corporate nationality *stricto sensu*, but it shows that MATs had diverging approaches regarding whether or not to pierce the corporate veil for procedural purposes. Section 5 concludes by taking stock of the legacy of MATs' case law on the nationality of legal persons. In spite of some original features, its contribution to the development of international law was limited, especially due to a lack of consistency.

1. *MATs' Case Law on the Nationality of Legal Persons in its Historical Context*

Issues of nationality of legal corporations are at the confluence of public international law and domestic law. In principle, the (lack of) corporate nationality is an issue of domestic law. However, legal persons are also usually said to have a nationality under public international law. In this legal order, nationality is intended as 'the result of a functional attribution of the person to a State, which is necessary for applying certain rules of international law, rather than a personal bond giving rise to a formal status'.[4] Before MATs, the main applicable sources were theoretically the peace treaties and the relevant norms of domestic law (including private international law). However, the interplay between these two sources was not clear, and some issues were not explicitly covered by either of them.

In the interwar period, issues related to the nationality of legal persons were still mainly debated by private law scholars with a conflict of laws background,[5] and it was even doubted that rules of public international

4 Oliver Dörr, 'Nationality', in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2019), para 24.

5 Eg, Karl Neumeyer, 'Die Staatsangehörigkeit juristischer Personen und das Gemischte deutsch-französische Schiedsgericht' (1923) 12(3) Zeitschrift für Völkerrecht 201.

law existed in this field.[6] Case law and scholarship had dealt with these issues at the domestic and comparative level at least since the 19th century.[7] In international practice, the nationality of legal persons was often referred to in order to determine the applicability of treaties or to identify the State entitled to exercise diplomatic protection through inter-State arbitration or mixed claims commissions. However, the scholarship was far from unanimous on the very existence of nationality of legal persons as a concept of public international law. For some authors, such as Hilton Young, the only legally relevant concept was the personal law of the legal person (*lex societatis*), ie the law governing the private status of corporations: their formation, representation, dissolution, liability for debts of their predecessors, etc. Thus, according to this view, the concept of nationality of legal corporations only implied political consequences.[8] Other authors, such as Travers, were in favour of the concept of nationality of legal persons, and controversies continued after World War I.[9] In fact, the nationality of legal persons is not known to all domestic legal systems even nowadays.[10] Irre-

6 Henry Wheaton and Arthur B Keith, *Elements* of *International Law*, (6th edn, Stevens 1929), part 2, 321, quoted by Maurice Travers, 'La nationalité des sociétés commerciales' (1930) 33 Recueil des cours de l'Académie de droit international 1, 7–8.

7 Eg, Henri Fromageot, *De la double nationalité des individus et des sociétés* (Rousseau 1892); Maurice Leven, *De la nationalité des sociétés et ses effets juridiques* (Rousseau 1900); Pierre Arminjon, *Nationalité des personnes morales* (Pedone 1902); Ernst Isay, *Die Staatsangehörigkeit der juristischen Personen* (Mohr 1907); Edward Hilton Young, 'The Nationality of a Juristic Person' (1908) 22(1) Harvard Law Review 1; Paul Ruegger, *Die Staatsangehörigkeit der juristischen Personen: die völkerrechtlichen Grundlagen* (Füssli 1918); Alexandre Martin-Achard, *La nationalité des societés anonymes* (Füssli 1918); André Pepy, *La nationalité des sociétés* (Sirey 1920); John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35(6) Yale Law Journal 655.

8 Hilton Young (n 7), 2.

9 Travers (n 6), 11–26.

10 *Report of the International Law Commission on the work of its fiftieth session* (doc. A/53/10, *Yearbook of the ILC*, 1998, II, para 461). This observation led the International Law Commission, when it dealt with nationality in relation to the succession of States, to consider the idea of examining 'similar concepts on the basis of which the existence of a link analogous to that of nationality was usually established' (ibid). The 1999 Draft Articles on Nationality of Natural Persons in relation to the Succession of States do not apply to legal persons (*Yearbook of the ILC*, 1999, vol. II, Part II, Commentaries, para 1). In a comparative perspective, see Matthias Pannier, 'Nationality of Corporations under Domestic Law: A Comparative Perspective', in Federico Ortino and others (eds), *Investment Treaty Law: Current Issues II* (British Institute of International and Comparative Law 2007), 1.

spective of the existence and nature of corporate nationality, the criteria to determine it (or to determine the *lex societatis*) were even more controversial. Until World War I, domestic legislation, courts and scholarship had adopted different tests. The place of incorporation was preferred in the United States and, to some extent, in England. Different forms of domicile (intended as the centre of administrative business, as the main place of business, or as the seat fixed once and for all by the constitutive documents), were predominant in continental Europe, while a part of French doctrine proposed the nationality of the majority of shareholders.[11]

These debates implicitly influenced MATs' awards. However, MATs did not address the issue of nationality of legal persons from the point of view of a given domestic legal order. Thus, they developed their own approaches, which were not clearly based on public international law. While the applicable peace treaty was an obvious starting point, international custom played a very limited role, in the sense that MATs did not look for practice and *opinio juris*. MATs' case law can be seen as a laboratory of general principles of law, which had just been recognised as a source of international law in Article 38(1)(c) of the 1920 Statute of the Permanent Court of International Justice. However, the comparative dimension of MATs' awards was rarely explicit. It is more correct to state that they had a transnational dimension, reflecting the quest for some kind of natural law supposedly applicable across legal orders, irrespective of positive comparative law. Interestingly, interwar scholarship mainly analysed MATs' case law on the nationality of legal persons, not in isolation, but alongside domestic case law on similar issues, to argue in favour of a harmonised approach from the point of view of conflict of laws.

An overall analysis of MATs' case law is made difficult by the fact that several awards are elliptic and contingent on case-specific facts so that they can be interpreted in different ways. Although MATs referred to their own and other MATs' precedents, their case law was often inconsistent, even on essential issues and within the case law of each MAT. Inconsistencies can be partially explained by the specificity of the measures at the origin of disputes, ie extraordinary war measures.[12] However, it must also be noted that MATs often had different approaches to similarly drafted provisions.

11 For an overview, Hilton Young (n 7); Travers (n 6), 49–100.

12 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, Burkard Hess and Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 239, 268.

Moreover, to some extent, different linguistic versions hinder a fully harmonious interpretation of awards.[13] Nonetheless, MATs did contribute to the consolidation of the conceptual framework of the nationality of legal persons, which was still fragile at that time.

2. *The Contribution of MATs' Case Law to the Conceptual Clarification of the Nationality of Legal Persons*

Overall, MATs' case law contributed to establishing the very concept of nationality of legal persons at the international level and to the clarification of its essential features, at a time when only a few international cases had already done so. With some exceptions,[14] most awards unambiguously accepted that legal persons may have a nationality. Strengthening pre-World War I practice, MATs' case law predominantly shows that the granting of political rights is neither a condition for, nor a necessary consequence of, the existence of nationality. Hence, the nationality of legal persons can be conceived differently from that of individuals. MATs clarified that corporate nationality requires domestic legal personality (2.1) and addressed the underexplored issue of change of corporate nationality as a consequence of State succession (2.2).

2.1. Domestic Legal Personality as a Necessary Condition for Nationality

Some MATs' awards are based on the assumption that domestic legal personality is a necessary (although not sufficient) condition for nationality under international law. This was clearly explained by the Belgo-German MAT in the case *Caisse d'assurances des Glaceries c Etat allemand*. The Caisse d'assurances des Glaceries acknowledged that it did not have legal personality under Belgian law, but claimed to have legal personality (and thus *locus standi*) based on natural law as an organism capable of acting and exercising rights. The Tribunal rejected this view. It judged that moral beings are not purely sociological and organic entities: a recognition under

13 Eg, the term 'partnership' was used for different forms of *sociétés de personnes*, irrespective of their status under domestic law; 'main place of business' was mainly used as the translation of '*siège social*', but was occasionally distinguished from 'seat'; 'branch' was mainly used as the translation of '*succursale*', but occasionally also as the translation of '*filiale*', etc.

14 See below, Section 3.3.2.

positive domestic law is needed for them to legally come into existence. Thus, a corporation can only exist as such, with its rights and obligations, because a domestic legal system has recognized it.[15] Absent such recognition, a corporation can have no rights or obligations in any legal system. The MAT concluded that the Caisse d'assurances des Glaceries could not be considered a national of an Allied or Associated power under the terms of the Treaty of Versailles.

This idea is confirmed *a contrario* by two cases of the French-German MAT. In *Mercier et Cie c Etat allemand*, a claim was brought by a French individual regarding the situation of a joint-name partnership (*société en nom collectif*) registered under German law, active in France and placed in liquidation in 1917 in Germany. Partners were Alsace-Lorrainers that had been reinstated in the French nationality since 11 November 1918. The Tribunal held that 'a joint-name partnership made up of partners having all the same nationality cannot have a nationality different from theirs'. The Tribunal added that '(w)hile according to the jurisprudence of the M.A.T. the location of principal place of business is not sufficient to determine the nationality of capital-stock companies, it cannot a fortiori confer to a company of persons, such as joint-partnership, a nationality differing from that of the partners'.[16] In this case, all partners were French at the date of the entry into force of the Treaty of Versailles. As a result, all parties to the dispute were French nationals, so the Tribunal had no jurisdiction. These statements must be read in the light of the case law of the French-German MAT on the 'theory of control', which is equally based on piercing the corporate veil. However, this line of reasoning can be primarily explained by the lack of legal personality of joint-name partnerships.

This outcome was confirmed in *Wernlé et Cie c Etat allemand*, regarding a *société en commandite* established in Germany, whose partners were Austrian (for the majority of the shares) and French. As explicitly recalled in this case, *sociétés en commandite* had no legal personality under German law (unlike under French law).[17] The conclusion that partnerships have no nationality is coherent with the idea, shared at least implicitly by all MATs, that domestic legal personality is a necessary condition for nationality. The drafting of the award in *Mercier* indeed suggests that partnerships have no

15 Belgo–German MAT, *Caisse d'assurances des Glaceries c Etat allemand* (13 March 1923) 3 Recueil TAM 261, 265.

16 *Mercier* (n 3).

17 French–German MAT, *Wernlé et Cie c Etat allemand* (25 June 1927) 7 Recueil TAM 608, 612.

proper and separate nationality but do have a nationality, which is the same as that of partners if all partners have the same nationality. In fact, the Tribunal's approach is pragmatic and case-specific: as the partnership was placed in liquidation, the Tribunal first analysed the nationality of partners. It turned to the issue of the nationality of the partnership only to confirm that no German nationals were involved in the dispute.[18] It can be safely inferred from these cases that, for MATs, the nationality of legal persons was not established by the international legal order, but that the international legal order simply drew legal consequences from the existence of a legal person under domestic law.

On this basis, MATs' case law also contributed to the distinction of branches and subsidiaries. In the case of *Alice Sedgewick Baroness Ludlow v Disconto-Gesellschaft*, the Anglo-German MAT found that branches of a corporation have no nationality. The main house of the Disconto-Gesellschaft in Berlin and its London branch were found to be one and the same legal person. Thus, the British claimant could bring claims under the procedure provided for in Article 296 of the Treaty of Versailles regarding pre-war contracts concluded by the London branch, as the debtor was of German nationality.[19] The distinction between branches and subsidiaries was presented in an even clearer way in *Blanchet et Gosselin et al. c la Société Badische Anilin et Soda Fabrik, la succursale de cette société sise à Neuville-sur-Saône, la Compagnie Parisienne de Couleurs d'Aniline et la Société Farbwerke vorm. Meister Lucius et Bruning*, a case equally based on claims under Article 296 of the Treaty of Versailles for damages for non-performance of pre-war contracts. The Belgo-German MAT distinguished the French branch and the French subsidiary of a German corporation. In spite of its independent accounting, the branch was legally 'an integral part of the principal place of business' of the German corporation, which was the only debtor of contractual obligations. On the contrary, the subsidiary (incorporated in France and with its *siège social* in Paris) was a separate legal entity, although the capital was held by the German parent company and the two companies constituted a single economic unit. The subsidiary's contracts were not binding on the parent company. Thus, claims regarding the subsidiary were dismissed.[20]

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18 *Mercier* (n 3), 689.

19 Anglo–German MAT, *Alice Sedgewick Baroness Ludlow v Disconto-Gesellschaft* (27 March and 5 April 1922) 1 Recueil TAM 869.

20 Belgo–German MAT, *Blanchet et Gosselin et al c la Société Badische Anilin et Soda Fabrik, la succursale de cette société sise à Neuville-sur-Saône, la Compagnie Parisienne*

2.2. Corporate Nationality and State Succession

MATs also contributed, although with some ambiguity, to the issue of the nationality of legal persons in case of State succession. In *Léon Goldwasser c Böhmische Industriebank et Etat autrichien*, the defendant bank was considered as a Czechoslovakian national, although it had been created before the war as an Austrian corporation.[21] This solution is based on Article 263 of the Treaty of Saint-Germain, which referred to situations in which, as a general rule, individuals and juridical persons previously nationals of the former Austrian Empire, acquired *ipso facto* the nationality of an Allied or Associated Power by virtue of the Treaty. However, some peace treaties also required the recognition of the new nationality by the successor State as a condition for the change of nationality. Most notably, Article 75 of the Treaty of Saint Germain, regarding nationals of the former Austrian Empire in territories acquired by Italy, stated that '[j]uridical persons established in the territories transferred to Italy shall be considered Italian if they are recognised as such either by the Italian administrative authorities or by an Italian judicial decision'. Similarly, under Article 74(3) of the Treaty of Versailles, '[j]uridical persons will also have the status of Alsace-Lorrainers as shall have been recognized as possessing this quality, whether by the French administrative authorities or by a judicial decision'.[22]

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de Couleurs d'Aniline et la Société Farbwerke vorm. Meister Lucius et Bruning (30 July 1921) 1 Recueil TAM 328.

21 Goldwasser (n 3).

22 Legal persons were not covered by the mechanism of reinstatement in French nationality set by the annex to section V of part III of the Treaty of Versailles, regarding Alsace-Lorraine. This mechanism gave rise to significant controversies. While para. 1 of the Annex provided for reinstatement in French nationality as from 11 November 1918, para. 4 provided that '[t]he French Government shall determine the procedure by which reinstatement in French nationality as of right shall be effected, and the conditions under which decisions shall be given upon claims to such nationality'. According to the French government, Alsace-Lorrainers eligible for reinstatement in French nationality had a 'virtual French nationality'. Although contested by the German government and by several German scholars (eg, Heinrich Triepel, *Virtuelle Staatsangehörigkeit: ein Beitrag zur Kritik der Rechtsprechung des französisch-deutschen gemischten Schiedsgerichtshofs* (Vahlen, 1921, also published in French)), this thesis was accepted by the French–German MAT (eg, *Chamant v Germany* (23 June and 25 August 1921) 1 Recueil TAM 361), which allowed the filing of more than 20 000 claims by Alsace-Lorrainers under art 296 Treaty of Versailles (Requejo Isidro and Hess (n 12), 269). In turn, by virtue of the case law of the French–German MAT on the criterion of control (see

In the case of the *Böhmische Industriebank*, the MAT reached its conclusion on the basis of two facts: the seat of the corporation was in Prague at the time of the entry into force of the treaty and the corporation had been recognised by Czechoslovakia as one of its nationals. The respective weight of each factor is not explained by the MAT. On the one hand, according to Rühland, this award showed that the recognition by the successor State of a legal person as a national was required based on general practice, even when the applicable treaty did not include any specific provisions to that effect.[23] In support of this thesis, it can be observed by analogy that the automatic acquisition of the nationality of the successor State, although often practised until World War I, had been replaced by more complex systems also regarding individuals.[24] On the other hand, the award may also imply that legal persons do not automatically lose their nationality in case of State succession. Although the Böhmische Industriebank only owed its legal existence to the law of the Austrian Empire, the fact that this State ceased to exercise its sovereignty in the territory where the corporation had its seat did entail the loss of Austrian nationality, but not the loss of all nationalities, or *a fortiori* the legal disappearance of the corporation. While statelessness of individuals was a widespread phenomenon in the interwar period, there seems to be no evidence of statelessness of legal persons. Arguably, this concept was even more problematic than the concept of nationality of legal persons.[25] However, given the lack of any details in this respect in the reasoning of the MAT, it would be speculative to argue that this solution could have been applied in all cases of State succession. The fact that the Austrian Empire was dissolved may have played a role, but the reasoning could have been different for other kinds of State succession.

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below, Section 3.3.2), this allowed a broad interpretation of the jurisdiction of the MAT for claims regarding legal persons controlled by Alsace-Lorrainers.

23 Curt Rühland, 'Le problème des personnes morales en droit international privé' (1933) 45 Recueil des cours de l'Académie de droit international 387, 440.

24 For an overview of issues of nationality of individuals in the wake of post-World War I peace treaties, Rudolf Graupner, 'Nationality and State Succession' (1946) 32 Transactions of the Grotius Society 87.

25 The 1930 Protocol relating to a Certain Case of Statelessness, like the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, was only applicable to individuals, and does not even mention its inapplicability to other legal persons.

3. The Uncertain Criteria of Nationality: Siège Social, Incorporation or Control?

Once the general idea that legal persons have a nationality had been admitted, MATs faced the need to determine the nationality of a given legal person. Case law was not consistent in this respect: different approaches and criteria were used. Overall, there was no uniform method to navigate a potentially complex set of norms and approaches of domestic, comparative and international law (3.1). Some MATs resorted to the criteria of *siège social* and place of incorporation, now well-established under general international law (3.2). The most original criterion, mainly applied by the French-German MAT, was control, ie the nationality of controlling shareholders. However, this criterion turned out to be controversial and, ultimately, not very influential in the history of international law (3.3).

3.1. Methodological Ambiguity

The choice of the legal system of reference to determine the nationality of a legal person is an issue of theoretical interest. It implies two overlapping questions: whether an entity is a legal person in a given legal system, and to which domestic legal system the legal person must be attached in terms of nationality. From a conflict of laws perspective, two options are theoretically available to answer both of these questions: a reasoning *lege fori*, ie following the rules of the legal system of the Tribunal, or a reasoning *lege causae*, ie following the rules of the relevant legal system. In principle, conflicts of competence, ie diverging outcomes following the application of the rules of several relevant legal systems, cannot be excluded.

One might expect that the question of whether an entity is a legal person in a given legal system must be answered *lege causae* by reference to the legal order pertaining to the alleged nationality. The basic legal qualification in this respect would depend on claims by the parties to the dispute, without any objective criteria set by MATs. The procedural framework of MATs encouraged this approach: depending on applicable provisions of the peace treaties, parties to each dispute necessarily had to show that a given entity was a national of one of the two States that had established the tribunal. Theoretically, the same method could be followed for the determination of the domestic legal system to which the legal person is attached in terms of nationality: nationality would be the corollary of the existence of the legal person in the domestic legal order of a given State. The most general statement in this direction was made

the Anglo-Bulgarian MAT, according to which '(a) Company is assumed by the Treaty of Neuilly-sur-Seine to be the national of the Power to the laws of which it owe(d) its existence'.[26] In a similar vein, the US-Germany Claims Commission held, although only on the basis of US domestic law, that:

> [i]t is a settled general rule in America that regardless of the place of residence or citizenship of the incorporators or shareholders, the sovereignty by which a corporation was created, or under whose laws it was organized, determines its national character.[27]

This approach is compatible with the current state of public international law. As underlined by the International Court of Justice ('ICJ')in the *Barcelona Traction* case, regarding the determination of the nationality of a legal person, 'international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction'.[28]

However, this approach was not systematically followed by MATs. Although incidental references to the law of the relevant domestic systems can be found in several awards, MATs choose between competing claims by the parties on the basis of their interpretation of the peace treaties and of comparative law. One of the difficulties of the situation faced by the MATs was due to the adoption by almost all belligerents of measures by which they unilaterally considered some corporations as enemy companies, even if the State of the alleged nationality did not recognise those corporations as its nationals. Moreover, the application of objective rules neutrally applicable to companies of any nationality implied the recognition of some equivalence between legal orders, which could have been difficult to reconcile with some provisions of the peace treaties, whose asymmetrical drafting specifically referred either to nationals of Allied Powers or to nationals of defeated countries.

MATs did not set a clear methodology and most awards remained ambiguous on the respective role of domestic law, comparative law, natural law and public international law. In this context, it is difficult to draw any conclusion on the general self-perception of MATs as full-fledged interna-

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26 Anglo–Bulgarian MAT, *James Dawson and son v Balkanische Handels und Industrie AG* (18 October 1923) 3 Recueil TAM 534.

27 US–Germany Claims Commission, *Agency of Canadian Car and Foundry Company v Germany* (30 October 1939) 7 RIAA 460, 466.

28 ICJ, *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, 3, para 38.

tional courts or joint tribunals of two States. The award in *James Dawson and son v Balkanische Handels und Industrie A.G.* is a good example of a pragmatic approach. Although explicit on the need to rely on domestic law to determine whether a legal person may be a national of a State, the Anglo-Bulgarian MAT combined domestic, comparative and natural law to interpret the Treaty of Neuilly. It started from the observation that Article 176 of the Treaty implied the existence of corporate nationality, and continued:

> It being therefore clear that a company may be a Bulgarian national, the question arises as to the test to be applied for the purpose of determining whether any particular company is to be considered a Bulgarian national within the meaning of the Treaty. According to English law the nationality of a corporate body is determined by reference to the law under which it is constituted; and it has not been suggested that the law of Bulgaria is different in this respect. Moreover, in the view of the Tribunal, the balance of convenience as well as of the weight of juridical opinion is in favour of the adoption of this criterion. Having regard to these considerations, as well as to the ordinary use of language, the Tribunal thinks that, if no indication of the intention of the High Contracting Parties could be found in the Treaty itself, it would be natural and reasonable to assume that they had intended that this test should be adopted in applying the provisions of the Treaty.[29]

In spite of nominal reliance on it, the Tribunal did not apply Bulgarian domestic law. Instead, the reasoning was based on the Treaty, as interpreted in the light of the law of the two States which had established the Tribunal (but not of other parties to the Treaty) and of 'juridical opinion'. In this case, this approach led to the conclusion that the place of incorporation was the relevant criterion of nationality. The defendant company was considered Bulgarian, although its directors and the majority of its shareholders were non-Bulgarians of different nationalities.[30] Overall, MATs did not focus on the international legal effects of domestic legal personality, but rather on the determination of the criteria of nationality.

29 *Dawson* (n 26), 535.
30 ibid, 537.

3.2. *Siège social and Incorporation*

Several MATs chose two main criteria to determine the nationality of legal persons: the *siège social* and/or the place of incorporation. The *siège social* was explicitly considered as the relevant criterion by the Belgo-German MAT. In *Compagnie Internationale des Wagons-Lits* and *La Suédoise*, the Tribunal held that nationality, '*aux yeux de la jurisprudence traditionnelle de tous les pays, résulte du lieu où est établi le siège social, du moment que cet établissement n'est pas purement nominal*'.[31] Thus, the Tribunal considered that other criteria were not decisive: in *Compagnie Internationale des Wagons-Lits*, the presence of a technical and commercial direction and an administrative seat in Paris; in *La Suédoise*, the fact that all shareholders and directors were French and that the administrative seat of the corporation was in France. In both cases, the claimants were considered Belgian. However, the Tribunal's position raises doubts. Firstly, it seems to imply that, when the *siège social* is purely nominal, other criteria must be preferred, perhaps a global assessment of the dominant links with a State. Secondly, the outcome seems to be based on comparative law, even if at that time domestic legal systems were far from identifying a single nationality test for legal persons, and *a fortiori* from converging on the choice of the *siège social*. Such convergence could only be observed assuming that both the *siège social* and the place of incorporation were in the same State.[32] This seems to explain why *La Suédoise* was later quoted as an example of a close correlation between *siège social* and the place of incorporation as criteria of corporate nationality.[33] Nonetheless, the criterion of the *siège social* had been traditionally followed in both Belgian and French law, which were the two relevant legal systems in this case.

Converging rules of the relevant domestic legal systems, or converging views expressed by their governments, seem the main factor to explain several awards, even when they apparently reflect inconsistencies in the case law of a single MAT. In *Chamberlain & Hookham v Solar Zahlerwerke GmbH*, regarding a claim for debts under Article 296 of the Treaty of Versailles, the Anglo-German MAT chose the place of incorporation as the relevant criterion for corporate nationality. This conclusion was reached on the basis of convergent declarations made by Great Britain and Ger-

31 Belgo–German MAT, *Compagnie Internationale des Wagons-Lits* and *La Suédoise Grammont c Roller* (24 June 1922) 3 Recueil TAM 570, 573.

32 See above, Section 3.1.

33 International Law Commission, *Fourth Report on Diplomatic Protection, by Mr John Dugard, Special Rapporteur*, doc A/CN.4/530, 2003, para 33, note 95.

many.[34] Thus, a company with limited liability incorporated in Germany according to German law was considered German, even though its whole capital was owned by British nationals (including the claimant, a company incorporated under English law). However, the place of residence was also relevant under Article 296 of the Treaty of Versailles, regarding debts 'due by a national of one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory'. The case *in re Gebrüder Adt AG v Scottish Co-op Wholesale Society, Limited* concerned a company with its seat in Lorraine, incorporated under German law before the war, placed into liquidation by French authorities and transferred to Germany in 1919, before the entry into force of the Treaty of Versailles. The British and the German governments expressed diverging views on the place of residence of the company: for the former, it was at the place where it had its seat; for the latter, it coincided with the centre of the company's economic activities. The Anglo-German MAT did not consider it necessary to decide on this issue, as both places were in Germany. The Tribunal added that the German nationality of the corporation appeared 'in the special circumstances of the present case to be confirmed by Article 54 of the Treaty, according to which companies in Alsace and Lorraine acquired French nationality only if they had been recognised as possessing such quality either by the French Administrative Authorities or by a judicial decision',[35] which was not the case.

In spite of uncertainties on positive criteria for the determination of nationality, MATs' awards mainly avoided requiring an effective or genuine link with the relevant State: the timid reference to the 'not purely nominal' *siège social* in the case law of the Belgo-German MAT seems isolated. As they only chose between competing criteria for the determination of nationality, without setting a more general methodology, MATs also refrained from addressing the potential multiple nationalities of legal persons. Consequently, they did not test the predominant nationality, which they did for individuals.[36] On these issues, case law is in accordance with post-World War II public international law. Unlike for the nationality of

34 Anglo–German MAT, *Chamberlain & Hookham v Solar Zahlerwerke GmbH* (6 February 1922) 1 Recueil TAM 722, 725.

35 *in re Gebrüder* (n 3), 478–79.

36 Anglo–German MAT, *Hein* (26 April and 10 May 1922) 1 Annual Digest of Public International Law cases, case no 148, 216; French–German MAT, *Blumenthal* (24 April 1923) 3 Recueil TAM 616; *de Montfort* (10 July 1926) 3 Annual Digest of Public International Law Cases, case no 206, 279.

individuals,[37] the ICJ did not request any genuine link as a condition for the nationality of legal persons to produce effects at the international level[38] and did not suggest that legal persons may have multiple nationalities. Nonetheless, absent a coherent approach, MATs had little influence on subsequent developments on the role of the *siège social* and the place and incorporation as criteria of the nationality of legal persons. Their case law is not crucial in the 1927 *Report on the nationality of commercial corporations and their diplomatic protection*, in which a committee of experts of the League of Nations proposed to determine the nationality of a commercial company by the law of the State under whose law it was formed and by the establishment of the actual seat of the company in the territory of the State in which the company was formed.[39] Similarly, when the ICJ had to clarify the customary rules in this field in *Barcelona Traction*, it held that '[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office'.[40] Whereas in *Barcelona Traction* these two criteria were cumulative, MATs' awards applied them alternatively, even if they were generally cumulatively met in the facts of each case.

3.3. The Theory of Control

A different criterion to determine corporate nationality was the nationality of the persons who effectively controlled the corporation. The control test was introduced in some provisions of the peace treaties following its

37 In *Nottebohm*, the ICJ required a genuine connection with the State to establish nationality as a condition of admissibility of diplomatic protection claims (*Nottebohm Case* (*second phase*), Judgment of 6 April 1955, ICJ Reports 1955, 4, 22–23). Although mentioned in oral pleadings, the case law of MATs was not quoted in the judgment.

38 ICJ, *Barcelona Traction* (n 28), para 70. In the oral pleadings of the case, it was argued that in *Agency of Canadian Car and Foundry Company v Germany*, the USA-Germany Claims Commission took the effectiveness of the link to the United States to conclude that the company was a US company (*Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)*, Verbatim record 1964/2, Plaidoirie de M. Sauser-Hall, 577). However, the Court did not include any reference to the case law of the MATs in the judgments in this case.

39 League of Nations Committee of Experts for the Progressive Codification of International Law, *Nationality of commercial corporations and their diplomatic protection* (League of Nations, 1927, V, 12).

40 See ICJ, *Barcelona Traction* (n 28), para 70.

widespread application under domestic law during World War I (3.3.1). The test was mainly applied, with some inconsistencies, by the French-German MAT (3.3.2). It was often criticised by other MATs and scholars, at least as a criterion of corporate nationality, so that it was progressively abandoned in domestic and international practice (3.3.3).

3.3.1. Control of Companies in Domestic Law and Peace Treaties

The control test emerged during the First World War in most belligerent countries. Although with some nuances[41] and with the notable exception of the USA,[42] ordinary rules to determine the nationality of legal persons were abandoned; the nationality of corporations, or at least their enemy character for the purposes of war measures, was determined on the basis of the nationality of the controlling directors or shareholders. Some provisions of the peace treaties were inspired by wartime domestic practice. Article 297(b) of the Treaty of Versailles assimilated 'companies controlled by Germany' with 'German nationals' for the purposes of retention and liquidation of property.[43] In the Treaty of Versailles, this assimilation was also set in Article 74(1) regarding Alsace-Lorraine.[44] Under Article 297(a),

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41 In France, a corporation '*doit être assimilée aux sujets de nationalité ennemie dès que notoirement sa direction ou ses capitaux sont en totalité on en majeure partie entre les mains de sujets ennemis*' (Circulaire du Garde des sceaux (France) relative à la loi du 22 janvier 1916 (19 February 1916), quoted by Vaughan Williams and Matthew Chrussachi, 'The Nationality of Corporations' (1933) 49 Law Quarterly Review, 334, 337–38). Germany adopted a similar approach. In England, the enemy character in time of war was determined not by nationality but by voluntary residence among the enemy, so that even a British national could be considered as an enemy (ibid, 338–39). The authors also observe that the control test, which resulted from alarm from German economic penetration into Allied countries, 'was really the converse of the pre-War problem of companies incorporated abroad when it was held that they should have been incorporated at home, which had led to the formulation of the *siège social effectif* theory' (ibid, 337).

42 The United States adopted the criterion of incorporation also in special legislation to determine the enemy character of corporations (Williams and Chrussachi (n 41) 339–40).

43 The provision reads as follows: 'The Allied and Associated Powers reserve the right to retain and liquidate all property, rights or interests belonging on the date of the coming into force of the present Treaty to German nationals or companies controlled by them'.

44 The provision reads as follows: 'The French Government reserves the right to retain and liquidate all the property, rights and interests which German nationals

> [t]he exceptional war measures and measures of transfer ... taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, *including companies and associations in which they are interested*, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners (emphasis added).

Under Article 297(e),

> The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, *including any company or association in which they are interested*, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer (emphasis added).

Similar provisions were contained in other peace treaties.[45] Interpreted literally, each of these provisions sees moral beings from a different perspective. Article 297(b) explicitly refers to 'control', which can be intended to be independent of the nationality and the *lex societatis*. This provision only refers to 'companies', which suggests that only moral beings with legal personality are covered. Articles 297(a) and (e) have in common the reference to 'interest', seemingly irrespectively of control (and *a fortiori* of nationality and *lex societatis*), and cover both companies and associations, ie all moral beings, irrespective of legal personality. In Article 297(e), it is clear that companies and associations are presented as a category of 'property, rights or interests'. Coherently, the Italo-German MAT decided that the right to make direct claims under Article 297(e) does not belong to the corporations or associations themselves, but only to individuals.[46] The different word order of Article 297(a) makes it also possible to consider that companies and associations are presented as a category of 'nationals of Allied or Associated Powers', but the text is ambiguous. The other linguistic versions of the Treaty replicate this ambiguity.[47]

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or societies controlled by Germany possessed in the territories referred to in Article 51 on November 11, 1918, subject to the conditions laid down in the last paragraph of Article 53 above'.

45 Art 249(a), (b) and (e) Treaty of Saint-Germain; art 232 (a), (b) and (e) Treaty of Trianon; art 177 (a), (b) and (e) Treaty of Neuilly.

46 Italo-German MAT, *Fratelli Giulini v Germany* (29 April 1924) 4 Recueil TAM 506.

47 The lack of a comma in the German version of art 297(a) suggests that companies and associations are a category of 'nationals of Allied or Associated Pow-

3.3.2. The Theory of Control in the Case Law of the French-German MAT

The French-German MAT quickly started to use control as the relevant criterion to determine the nationality of corporations. Partnerships were not subject to the control test, as they had no legal personality.[48] In the leading case *Société du Chemin de fer de Damas-Hamah c la Compagnie du Chemin de fer de Bagdad*, both the plaintiff and the defendant companies had their seat and principal place of business in the Ottoman Empire, where they had been incorporated. The Tribunal found these facts to be 'mere formal circumstances without any real importance'. The relevant criterion was control, defined as 'effective preponderance apart from all considerations of absolute majority'. As the companies were controlled respectively by French and German nationals, they were considered respectively French and German. Accordingly, the Tribunal considered that it had jurisdiction to hear claims on a pre-War contract between the two companies, under Article 304(2) of the Treaty.[49]

This reasoning was unambiguously based on the assumption that corporations had a nationality. The Tribunal did not rely on considerations of conflicts of law or comparative law, even if it could have been argued that, at that time, the control test was widely used under domestic law. The outcome was presented as the result of the combination of literal, contextual and teleological interpretation of treaty provisions:

> With regard to the determination of the nationality of Joint-stock Companies, the Treaty of Versailles (art. 74, par. 1 and 297, litt. b) has formally consecrated the system of the predominance of the interests represented, called the 'control' system.
> While the provisions made in this respect cannot be considered as special or exceptional and as applying only to the hypothetic cases mentioned in regard thereto, it should be admitted that the same theory is to be applied whenever a claim made by a Company is the consequence of its determined nationality.

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ers': '*betreffend die Güter, Rechte und Interessen von Staatsangehörigen der alliierten oder assoziierten Mächte einschließlich der Gesellschaften und Vereine, an denen diese Staatangehörigen beteiligt waren*'. The relevant part of art 297(e) reads as follows: '*Gütern, Rechten und Interessen, einschließlich der Gesellschaften oder Vereinigungen, an denen sie beteiligt sind*'. However, only the French and English texts of the Treaty of Versailles are authentic (art 440(3)).

48 See above, Section 2.1.

49 French–German MAT, *Société du Chemin de fer de Damas-Hamah c la Compagnie du Chemin de fer de Bagdad* (31 August 1921) 1 Recueil TAM 401.

> Besides, it is quite conformable to the spirit of the Treaty to take a greater account of the real economic circumstances than of the merely outward circumstances, and therefore to determine the nationality of the Companies according to the importance of the interests therein represented rather than to the apparent label of said interests such as, in the present instance, the name of the firm and the place of business.[50]

This case was quoted in *Elmores Metall AG c Grunberg*, where a corporation had its principal place of business in Germany, but with English managers and a majority of English shareholders.[51] The theory of control was confirmed in *Société des Salines du Haras c Deutsche Bank*, regarding a 'company having its principal business in Alsace-Lorraine but who, having regard not only to the distribution of capital stock but to the composition of its Board of Directors, was undeniably controlled by French interest'.[52] The French-Bulgarian MAT also applied the control test, on the basis of the predominant interests in a corporation's capital. In *Régie générale des chemins de fer et travaux publics et Chemin de fer jonction Salonique-Constantinople c Etat Bulgare*, it refused an exception for incompetence based on the allegation that the applicant companies were not French, as they had been organized according to Ottoman law. For the Tribunal, the nationality of companies was to be determined, in view of liquidation under the Treaty of Neuilly, not by the law under which companies were constituted or by their principal place of business, but by the interests controlling them. Given the prevalence of French funds, the claimant companies were considered French.[53]

The controlling persons could be not only individuals, but also other corporations. In *Société Anonyme "La Providence" à Rehon c Roheisenverband GmbH*, the French-German MAT considered the branch of a company whose *siège social* was in Belgium as Belgian, as the mother company had financial and administrative control over it.[54] This case shows that, when

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50 ibid, 402.

51 French–German MAT, *Elmores Metall AG c Grunberg* (13 May 1924) 5 Recueil TAM 777.

52 French–German MAT, *Salines du Haras c Deutsche Bank* (24 July 1926) 6 Recueil TAM 859.

53 French–Bulgarian MAT, *Régie générale des chemins de fer et travaux publics et Chemin de fer jonction Salonique-Constantinople c Etat Bulgare* (12 November 1923) 3 Recueil TAM 954, 954–55.

54 Interestingly, the French version of the award used both the term '*filiale*' and the term '*succursale*' to describe the company seated in France: French–German MAT,

applied to complex corporate structures, the control test could potentially entail a difficult search for ultimate individual interests behind several corporate veils. For the sake of consistency, it must be supposed that in this case, the individuals controlling the mother company were also Belgian. Already in *Société du Chemin de fer*, the Tribunal made clear that control could exist even absent an absolute majority of shares and of posts of director.[55] This was further clarified in *De Neuflize c Etat allemand et Deutsche Bank*: 'what must be considered is not only the nationality of the persons owning the majority of the shares but also all the administrative, financial and other elements which are liable to ensure the control of a company to the nationals of a certain Power'.[56] In this case, there was neither a majority of French shareholders nor a French majority in the management and administration, which led to an absence of French nationality.

However, blatant inconsistencies can be found in the case law of the French-German MAT, which cannot be explained by the facts of each case or by the drafting of Treaty provisions. In *Charbonnages Frédéric-Henri c Etat allemand*, the Tribunal was confronted with a claim by a joint-stock company (*société anonyme*) composed mostly of French shareholders but having its principal place of business in Germany and constituted under German law. The Tribunal had to determine whether the company had an enemy character for the purposes of Article 297(a) and (e) of the Treaty of Versailles, regarding damage or injury inflicted by German exceptional war measures. It considered that the relevant criterion was the national law of the majority of shareholders, and not the principal place of business.[57] As such, this position is possible to reconcile with the reasoning of *Société du Chemin de fer*, rendered only a month earlier. Whilst it is true that control and the majority of shareholders are not perfectly equivalent, there was no doubt that French shareholders controlled the company. After all, the reference to the majority of shareholders in *Charbonnages Frédéric-Henri* resulted from the parties' arguments, presented in pleadings before the award in *Société du Chemin de fer*. Moreover, specific requirements for the determination of the enemy character of corporations regarding exceptional war measures under Article 297(a) and (e) of the Treaty of Versailles

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Société Anonyme "La Providence" à Rehon c Roheisenverband GmbH (13 June 1924) 5 Recueil TAM 780, 780–81.

55 ibid.

56 French–German MAT, *De Neuflize c Etat allemand et Deutsche Bank* (2–5 June 1928) 8 Recueil TAM 158.

57 French–German MAT, *Charbonnages Frédéric-Henri c Etat allemand* (30 September 1921) 1 Recueil TAM 422.

did not necessarily call into question the criteria for the determination of nationality in general, which could be used for other provisions of the Treaty.

Nevertheless, in a rare example of detailed theoretical development, the Tribunal explicitly rejected the very concept of nationality of corporations, on grounds that seem at odds not only with the case law of other MATs, but also with other cases of the French-German MAT:

> *'les sociétés anonymes n'ont pas de nationalité proprement dite, puisqu'une telle nationalité, d'une part, confère des droits (tels que le droit de vote, le droit d'être nommé à des fonctions publiques, la protection contre l'extradition. etc.) et, d'autre part, impose des obligations (telles que le service militaire) qui ne peuvent s'appliquer qu'aux personnes physiques'.*[58]

This position was not rare in contemporary scholarship, but it is not totally persuasive. While it is undisputed that nationality has different legal effects for individuals and for legal persons, this fact does not necessarily imply that corporations cannot have a nationality. Moreover, most of the rights and obligations mentioned in the *dictum* were and are not consubstantial to nationals, but reserved to some categories of nationals. The Tribunal justified its position by the distinction between the *lex societatis* and nationality. Regarding the determination of the *lex societatis*, the Tribunal expressed its preference for the criterion of the *siège social*, but suggested that it could only operate in conjunction with the place of incorporation:

> *les sociétés anonymes, nées d'un contrat entre des personnes physiques (les fondateurs), doivent leur existence comme personnes morales à une fiction légale;*
> *... les lois, en créant cette fiction, ont établi des règles pour la formation des sociétés, les pouvoirs de leurs organes, la répartition de leurs bénéfices, leur dissolution, etc., règles de droit privé visant les relations des sociétés avec leurs actionnaires, avec leurs administrateurs et avec les tiers;*
> *... la loi régissant cette matière est la loi de l'Etat où la société a été formée, où elle a son siège social et où elle a été enregistrée;*

58 Excerpts quoted in French were not translated *in extenso* in the summary, which was published in French, English, and Italian. Unofficial translation: '*sociétés anonymes* do not have a nationality as such, since such a nationality, on the one hand, confers rights (such as the right to vote, the right to be appointed to public office, protection against extradition, etc) and, on the other hand, imposes obligations (such as military service) which can only be applied to natural persons'.

> *... il en résulte qu'une société anonyme est, au point de vue du droit privé, soumise aux dispositions de tel code ou de telle loi spéciale en vigueur dans le pays où elle a son siège social sans qu'elle ait obtenu la nationalité de ce pays.*[59]

The Tribunal did not contest that, under the *lex societatis*, corporations had a legal personality. However, regarding the issue of nationality, merely intended as a condition for the jurisdiction of the tribunal and the admissibility of claims, the Tribunal only focused on shareholders:

> *en dehors de la personnalité juridique, représentée par la société même, il faut considérer les actionnaires, c'est-à-dire les personnes qui, en possédant les actions, participent aux bénéfices et après la dissolution de la société au solde de la liquidation, tandis que réunis en assemblée générale, ils exercent le pouvoir suprême et contrôlent la gestion du conseil d'administration;*
> *... ces actionnaires étant des personnes physiques, peuvent avoir une nationalité;*
> *... la nationalité de la majorité des actionnaires détermine le caractère de l'entreprise qui forme l'objet de la société anonyme;*
> *... au regard de ces faits la question est de savoir si, aux termes de l'article 297, e du Traité de paix de Versailles, la recevabilité de la demande doit être jugée d'après la loi du siège de la société ou bien d'après la loi nationale de la majorité des actionnaires.*[60]

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59 *Charbonnages Frédéric-Henri* (n 57) 427–28. Unofficial translation: 'public limited companies, born of a contract between natural persons (the founders), owe their existence as legal persons to a legal fiction;
... the laws, in creating this fiction, have established rules for the formation of companies, the powers of their organs, the distribution of their profits, their dissolution, etc, rules of private law relating to the relations of companies with their shareholders, with their directors and with third parties;
... the law governing this matter is the law of the State where the company was formed, where it has its registered office and where it has been registered;
... it follows that a *société anonyme* is, from the point of view of private law, subject to the provisions of such and such a code or special law in force in the country where it has its registered office without having obtained the nationality of that country'.

60 ibid. Unofficial translation: 'apart from the legal personality, represented by the company itself, we must consider the shareholders, ie the persons who, by owning the shares, participate in the profits and, after the dissolution of the company, in the balance of the liquidation, when meeting in a general assembly exercise the supreme power and control the management of the board of directors;
... these shareholders being natural persons, may have a nationality;

This excerpt is particularly significant because the Tribunal could have analyzed the admissibility of claims under Article 297(a) and (e) of the Treaty as a specific issue, separate from that of nationality. This reasoning was reproduced *in extenso* in *Jordaan et Cie c. Etat allemand*, a case that shows that the aim of this approach was not to systematically broaden the jurisdiction of the Tribunal. The case concerned a *société en commandite* having its principal place of business in France. The Tribunal recalled that, under French law, the company had its own legal personality.[61] However, as the capital was held mainly by Dutch nationals, the Tribunal had no jurisdiction. Interestingly, this case referred to the majority of capital, a criterion which is much more economically relevant for capital companies than the majority of shareholders.

Contemporary scholars assessed this approach in diverging ways. While Travers criticised the distinction between public and private law concepts as arbitrary,[62] Lipstein praised the distinction between nationality and *lex societatis*: in his view, other approaches wrongly conflated these two concepts.[63] Be that as it may, the distinction between these two concepts only accounts for part of the case law of the French-German MAT. *Société du Chemin de fer* and *Charbonnages Frédéric-Henri* reflect two different ways of piercing the corporate veil. They differ on the theoretically crucial issue of the existence of nationality of corporations and on the test applicable to the jurisdiction of the Tribunal and the admissibility of claims (control or the majority of shareholder, or of capital). Although they are different, both approaches are centred on shareholders rather than the corporation and imply a limitation of international legal effects of the legal personality of corporations. The 'spirit of the Treaty' mentioned in *Société du Chemin*

... the nationality of the majority of the shareholders determines the character of the business which forms the object of the *société anonyme*;
... in the light of these facts the question is whether, under the terms of Article 297(e) e of the Versailles Peace Treaty, the admissibility of the claim must be judged according to the law of the company's seat or according to the national law of the majority of the shareholders'.

61 French–German MAT, *Jordaan et Cie c Etat allemand* (30 November 1923) 3 Recueil TAM 889, 892.

62 Travers (n 6) 21.

63 Kurt Lipstein, 'Conflict of Laws before International Tribunals (A Study in the Relation between International Law and Conflict of Laws)' (1941) 27 Transactions of the Grotius Society 142, 162. In general terms, the distinction is also approved by Ernst Marburg, *Staatsangehörigkeit und feindlicher Charakter juristischer Personen unter besonderer Berücksichtigung der Rechtsprechung der Gemischten Schiedsgerichte* (Vahlen 1927) 12.

de fer is the will to ensure effective reparation to the affected individuals. This will corresponded to the rationale of the adoption of the control test under domestic law during the war, according to which '*derrière la fiction du droit privé se dissimule la personnalité ennemie elle-même vivante et agissante*'.[64] It is, therefore, logical that, in *Charbonnages Frédéric-Henri*, the French-German MAT found that:

> [m]easures taken against Joint-stock Companies having their principal place of business in Germany and whose shareholders are mostly alien subjects are not to be excepted from the exceptional war measures taken by Germany against alien property.

After all, this statement, which was coherent with German law at the time of the adoption of these measures, shows that the application of the theory of control at the international level was the direct continuation of war measures at the domestic level.

3.3.3. The Rejection of Control as a General Criterion of Corporate Nationality

The piercing of the corporate veil for the purposes of public international law was met with almost unanimous criticism. Several other MATs rejected the control test. In *Chamberlain and Hookham Limited v Solar Zahlerwerke*, the Anglo-German MAT acknowledged that:

> the opinion formerly generally adopted and which attributed to a juridical person the nationality of the State under whose laws it is created and in whose territory it has its seat, has been much shaken during the war and that good reasons may be urged for taking into consideration, at any rate during war time, what might be called the human substance of a juridical person, considering as such either the corporators or those who control the company's affairs.

However, the Tribunal dismissed the control test, invoked by the defendant on the basis of an explicit reference to *Société du Chemin de fer*.[65] So did, implicitly, the Belgo-German MAT in *La Suédoise*, where the defendants had argued that all shareholders were French.[66] The Italo-German

64 Circulaire du Garde des sceaux (France) relative à la loi du 22 janvier 1916 (19 February 1916) quoted by Williams and Chrussachi (n 41) 338.

65 Anglo–German MAT, *Chamberlain & Hookham v Solar Zahlerwerke GmbH* (6 February 1922) 1 Recueil TAM 722, 724.

66 *La Suédoise* (n 31) 572.

MAT also clarified that its interpretation of Article 297(e) of the Treaty of Versailles in *Fratelli Giulini* was not based on the control test.[67] The rejection of the control test was particularly explicit in *Dawson*, where the Anglo-Bulgarian MAT held that the Treaty of Neuilly:

> nowhere recognises that the interest in the capital of a company of individual nationals of Powers other than that Power in accordance with the laws of which the company is constituted, or the control by such nationals of the affairs of a company, affords any test as to the nationality of the company itself.[68]

The position of these MATs can be explained by the assumption that the control test was only relevant to apply Article 297(b) of the Treaty of Versailles (and equivalent provisions in other peace treaties), which explicitly referred to it regarding the seizure and liquidation of property. For all other issues, it was intended that corporate nationality must be determined in accordance with pre-war criteria.

The difficulty to reconcile the reasoning of all awards is manifest in *Van Peteghem c. Staackmann, Horschitz et Tielecke*, where the Belgo-German MAT adopted an original position. In this case, a partnership (*société en nom collectif*) whose principal place of business was in Belgium was considered as German concerning the application of Article 299 of the Treaty of Versailles.[69] Two of the three partners had been recognized as Germans. At first sight, this outcome can be explained by the lack of legal personality of the partnership, which allows a consistent interpretation of the case law of the Belgo-German MAT and the French-German MAT.[70] However, the Tribunal's decision is based on a more complex combination of international law and domestic law, which seems inconsistent with the approaches later followed in *Caisse d'assurances des Glaceries*. The Tribunal started distinguishing the issue of nationality and the issue of the determination of the enemy character of legal persons:

> *pour l'application de la section V du Traité, on doit laisser de côté les théories traditionnelles sur la nationalité des sociétés et se demander simple-*

67 Italo–German MAT, *Fratelli Giulini v Germany* (29 April 1924) 4 Recueil TAM 506, 509.

68 *Dawson* (n 26) 537.

69 Belgo–German MAT, *Van Peteghem c Staackmann, Horschitz et Tielecke* (29 July 1922) 2 Recueil TAM 374.

70 See above, Section 2.1.

> *ment si les personnes parties à un contrat doivent être "considérées comme ennemies" au sens du Traité*'.[71]

This position is not incompatible with the reasoning followed in *Compagnie Internationale des Wagons-Lits* and *La Suédoise*, which could in no way be considered enemy corporations. To determine the nationality of the partnership, the Tribunal applied the control test, but only after having determined that the partnership was an enemy person vis-à-vis the claimant, whose situation was not assessed on the basis of its nationality, but on the basis of its residence:

> *d'après le paragraphe 1 de l'annexe A la section V, elles [les personnes parties à un contrat] sont considérées comme ennemies dès le jour où le commerce a été interdit par la loi à laquelle ne fût-ce qu'une des parties était soumise;*
> *... en 1'espèce, le requérant ayant résidé en Angleterre pendant la guerre, il était soumis aux proclamations anglaises des 9 septembre 1914 et 16 février 1915, qui interdisaient aux personnes résidant en Angleterre de faire le commerce avec des personnes résidant en pays ennemi ou en pays occupé;*
> *... à son égard la Socité Staackmann, Horschitz et Cie était par conséquent une société ennemie;*
> *... comme société ennemie, elle doit être qualifiée de société allemande, vu la nationalité de la majorité des associés qui la composent.*[72]

However, the Tribunal followed a slightly different approach in *Peeters van Haute et Duyver c Trommer et Gruber*. A partnership having its registered office and principal place of business in Belgium had been considered

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71 *Van Peteghem* (n 69) 777. Unofficial translation: 'for the application of Section V of the Treaty, one must set aside traditional theories of corporate nationality and simply ask whether persons who are parties to a contract are to be "considered enemies" within the meaning of the Treaty'.

72 ibid, 777–78. Unofficial translation: 'according to paragraph 1 of Annex A, Section V, they [the parties to a contract] are considered to be enemies from the day on which trade was prohibited by the law to which even one of the parties was subject;
... in the present case, as the applicant was resident in England during the war, he was subject to the English proclamations of 9 September 1914 and 16 February 1915, which prohibited persons resident in England from trading with persons resident in enemy or occupied countries;
... in its respect the company Staackmann, Horschitz et Cie was consequently an enemy company;
... as an enemy company, it must be qualified as a German company, in view of the nationality of the majority of its members'.

as Belgian according to Belgian law in force at the date of the litigious contract in June 1914, notwithstanding the German nationality of one of the partners. Later on, the partnership was placed under sequestration in Belgium according to a Belgian law of 10 November 1918. For the Tribunal, under Article 297(b) of the Treaty of Versailles, the company must be considered as German in every respect connected with its liquidation.[73] The main line of reasoning consists in applying the Belgian legislation at the relevant time. The choice of the Belgian legal order to determine the enemy character of the corporation makes sense, as the decision to liquidate the company was adopted under Belgian law, which was, therefore, applied not as *lex societatis*, but as *lex causae* of the relevant operation, ie liquidation. Interestingly, the Tribunal did not exclude that, in some cases, domestic law may not be applicable because of its 'arbitrary' character:

> *on ne saurait objecter que ce refus de reconnaître le caractère belge de la défenderesse constitue, de la part de la Belgique, un acte arbitraire qui ne lie pas une juridiction telle que le T.A.M., Tribunal international constitué conjointement par les deux gouvernements.*[74]

The criteria that would have allowed the qualification of domestic law as 'arbitrary' were not explained, but international law is relevant in this respect:

> *lesdites lois belges sont conformes, en effet, à l'art. 297 du Traité de paix, qui, dans sa lettre b, permet aux puissances alliées de liquider les biens des ressortissants allemands, ainsi que des sociétés "contrôlées par eux" sur le territoire de ces puissances.*[75]

Only then did the Tribunal address the issue of nationality from the point of view of the Treaty of Versailles in general. Regarding the liquidation, determining the enemy character of the company amounted to establishing irreversibly its German nationality:

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73 Belgo–German MAT, *Peeters van Haute et Duyver c Trommer et Gruber* (20 October 1922) 2 Recueil TAM 384.

74 ibid, 388. Unofficial translation: 'it cannot be objected that this refusal to recognise the Belgian character of the defendant constitutes, on the part of Belgium, an arbitrary act which is not binding on a court such as the M.A.T., an international tribunal set up jointly by the two governments'.

75 ibid. Unofficial translation: 'the said Belgian laws are indeed in conformity with Art. 297 of the Peace Treaty, which, in its letter b, allows the Allied Powers to liquidate the property of German nationals, as well as companies "controlled by them" on the territory of these Powers'.

on pourrait néanmoins prétendre que le Traité de paix n'attribue pas la nationalité allemande aux sociétés contrô1ées par des Allemands, mais se borne à les assimiler aux ressortissants allemands quant aux droits de rétention et de liquidation conférés aux puissances allies, sans toucher à leur nationalité qui reste déterminante à tous autres égards;
... cette objection est, elle aussi, sans portée;
... traiter une société comme allemande au point de vue de sa liquidation et la liquider, c'est-à-dire la faire disparaître, équivaut en effet à la transformer définitivement en société allemande;
... à ne s'en tenir même qu'au texte du Traité de paix, on ne voit pas comment on expliquerait la lettre b de l'art. 297 autrement que par l'attribution du caractère ennemi aux sociétés contrôlées par des ressortissants ennemis;
... une dernière objection peut être opposée, c'est que l'article 297 ne modifie pas d'une manière générale les règles ordinaires sur la nationalité des sociétés, mais qu'il se contente de considérer certaines sociétés des pays belligérants comme sociétés ennemies pour autant que l'exige leur liquidation et le règlement des mesures de guerre, mais que, dans l'application des art. 299 et 304 b du Traité, c'est-à-dire pour les différends tels que le présent litige, relatifs aux contrats conclus avant la ratification du Traité de paix, la prépondérance des intérêts ennemis ne suffit pas à modifier la nationalité d'une société;
... cette théorie pourrait, semble-t-il, être défendue avec succès s'il s'agissait d'une société qui, après avoir été traitée comme ennemie pendant la guerre, aurait repris aujourd'hui sa vie de société nationale, par exemple d'une société allemande mise sous séquestre en Allemagne et aujourd'hui libre du séquestre en application de l'art. 297 a du Traité;
... en l'espèce, tout au contraire, la Société Trommer et Gruber n'existe plus que pour sa liquidation et ... le seul moyen d'éviter le risque de décisions contradictoires el de conflits de compétence est, de reconnaître à cette société une seule et unique nationalité pour tout ce qui se rapporte à sa liquidation, qu'elle soit opérée par le séquestre belge ou par l'associé allemand établi maintenant en Allemagne;
... il convient, en résumé, de considérer la Société Trommer et Gruber, mise sous séquestre comme société allemande en Belgique, où elle a son siège, comme société allemande pour tout ce qui concerne sa liquidation, et notamment pour le présent procès, qui n'est qu'un épisode de cette liquidation.[76]

76 ibid, 389. Unofficial translation: 'it could be argued, however, that the Peace Treaty does not confer German nationality on German-controlled companies, but merely assimilates them to German nationals with regard to the right of

This particular way to make sense of Article 297(b) of the Treaty of Versailles while maintaining the theoretical distinction between nationality and enemy character is persuasive. However, it differs not only from the position of other MATs but also from *Van Peteghem c Staackmann, Horschitz et Tielecke*.

Given these disparate approaches, it is not surprising that the Permanent Court of International Justice ('PCIJ') avoided endorsing the control test from the point of view of general international law. In cautious terms, it suggested that, while this test could be chosen for specific purposes in treaty provisions, it could not be assumed to be the criterion of corporate nationality:

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retention and liquidation conferred on the Allied Powers, without affecting their nationality, which remains decisive in all other respects;
... this objection is also irrelevant;
... to treat a company as German from the point of view of its liquidation and to liquidate it, that is to say to make it disappear, is in fact equivalent to transforming it definitively into a German company;
... even if one were to confine oneself to the text of the Peace Treaty, it is difficult to see how letter b of Art. 297 could be explained other than by the attribution of enemy status to companies controlled by enemy nationals;
... a final objection may be raised, namely that Article 297 does not modify in a general way the ordinary rules on the nationality of companies, but merely considers certain companies of the belligerent countries as enemy companies in so far as their liquidation and the settlement of war measures require, but that, in the application of Arts. 299 and 304(b) of the Treaty, ie for disputes such as the present one, relating to contracts concluded before the ratification of the Peace Treaty, the preponderance of enemy interests is not sufficient to change the nationality of a company;
... this theory could, it would seem, be successfully defended in the case of a company which, after having been treated as an enemy during the war, would today have resumed its life as a national company, for example a German company placed in receivership in Germany and now free from receivership pursuant to Art. 297(a) of the Treaty;
... in the present case, on the contrary, the Trommer & Gruber company exists only for its liquidation and ... the only way to avoid the risk of contradictory decisions and conflicts of jurisdiction is to recognise that this company has a single nationality for all matters relating to its liquidation, whether it is carried out by the Belgian receiver or by the German partner now established in Germany;
... it is appropriate, in short, to consider the company Trommer & Gruber, placed in receivership as a German company in Belgium, where it has its registered office, as a German company for all matters relating to its liquidation, and in particular for the present lawsuit, which is only one episode in this liquidation'.

> The Geneva Convention [of 15 May 1922 between Germany and Poland regarding Upper Silesia] has adopted, as regards the expropriation regime and in so far as companies are concerned, the criterion of control; this, however, does not prevent other criteria which might be applicable in respect of the nationality of juristic persons from possessing importance in international relations, from other standpoints, for instance, from the standpoint of the right of protection.[77]

Contemporary scholars (from both Allied Powers and defeated countries) generally disapproved of the use of the control test as a corporate nationality test. Rühland argued that the Treaty of Versailles itself distinguished nationality and control, so that the latter was only relevant for specific purposes.[78] Even beyond treaty interpretation, authors did not have the same assessment of what constituted 'mere formal circumstances without any real importance' as the French-German MAT in *Société du Chemin de fer*. For Marburg and Travers, nationality and control should have been clearly distinct: the former is stable throughout the life of the corporation, while the latter depends on contingencies and is therefore temporary.[79] Similarly, Lipstein considered the control test dangerous, unreliable and inaccurate, as it could lead to heavy fluctuations in corporate nationality.[80] Vaughan Williams and Chrussachi shared this opinion and observed that the test could only be used in practice because the outbreak of the war had crystallized the then existing state of things.[81] Marburg seems to be the only author who defined as 'progressive' ('*fortschrittlich*') the adoption of the control test in the domestic law of several States during the war.[82] This caused criticism by Morstein Marx, who considered the case law of the French-German MAT as an 'opportunistic creation' ('*Zweckschöpfung*')

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77 PCIJ, *Certain German Interests in Polish Upper Silesia (Merits)*, 25 May 1926, Series A, n 7, para 240

78 Rühland (n 23) 418–19. Art 244, annex 3, para 3 Treaty of Versailles mentions '(t)he ships and boats mentioned in paragraph 1 include all ships and boats which (a) fly, or may be entitled to fly, the German merchant flag; or (b) are owned by any German national, company or corporation or by any company or corporation belonging to a country other than an Allied or Associated country and under the control or direction of German nationals'. Article 288, annex, para 5 refers to 'a company incorporated in an Allied or Associated State had rights in common with a company controlled by it and incorporated in Germany'.

79 Marburg (n 63) 107; Travers (n 6), 58–60, 83–84, and 98–99.

80 Lipstein (n 63) 163.

81 Williams and Chrussachi (n 41) 342.

82 Marburg (n 63) 41.

justified by egoism and the necessity of war ('*sacro egoismo und Kriegsnot*').[83] Overall, the control test was perceived as an unfortunate but ephemeral consequence of the war.[84]

After World War II, Paul de Visscher retrospectively considered that the control test did not reflect customary international law of the interwar period and in no way influenced subsequent customary law.[85] The fate of the control test at the international level was also affected by the fact that it was abandoned at the domestic level some years after the end of the War. For example, the French Cour de cassation reverted to the traditional criterion of *siège social* to determine corporate nationality in some judgments starting from 1928, and even more clearly after World War II.[86] Seizure and liquidation measures were revived during World War II, but in the drafting and the application of post-World War II treaties, it was clear that the control test only applied to seizure and liquidation of enemy property, not to the determination of corporate nationality.[87] Although MATs' case law on corporate nationality once again attracted some attention immediately after World War II,[88] the control test became a tool of the past.

4. *The Unstable Interplay between Corporate Nationality and Shareholders' Rights*

Shareholders' claims are by definition distinct from claims by corporations. However, MATs' case law in this respect is relevant to analyse corpo-

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83 Fritz Morstein Marx, book review (1928) 53(1) Archiv des öffentlichen Rechts 151, 152.

84 Joseph Charles Witenberg, 'La recevabilité des réclamations devant les juridictions internationales' (1932) 41 Recueil des cours de l'Académie de droit international 1, 75. However, the author considered the admissibility of shareholders' claims a '*tendance [qui] semble mieux correspondre aux aspirations modernes*' (ibid).

85 Christian Dominicé, *La notion du caractère ennemi des biens privés dans la guerre sur terre* (Droz 1961), 148–49; Paul De Visscher, 'La protection diplomatique des personnes morales' (1961) 102 Recueil des cours de l'Académie de droit international 395, 444.

86 Yvon Loussouarn, 'La condition des personnes morales en droit international privé' (1959) 96 Recueil des cours de l'Académie de droit international 443, 464–71.

87 De Visscher (n 85) 448 and 456–57.

88 Pieter N Drost, *Contracts and Peace Treaties* (Nijhoff, 1948), 40–58; John Hanna, 'Nationality and War Claims' (1945) 45(3) Columbia Law Review 301, 323–39.

rate nationality, as solutions were inspired by different conceptions of the corporate veil. Unsurprisingly, this led to diverging approaches.

Some MATs refused to pierce the corporate veil for the determination of the nationality of the corporation, so that they considered that they had no jurisdiction to hear claims by shareholders. In *Magyar Altalanos Hitelbank (Banque générale de crédit hongroise) c Etat SHS*, the Hungaro-Yugoslav MAT found that shareholders may not act on behalf of their company.[89] The shareholders were Hungarian, but the company had its *siège social* and its main place of business in Germany, which led the Tribunal to conclude that the company was of German nationality. This case was quoted with approval in the award in *Österreichische Credit Anstalt für Handel und Gewerbe et Wiener BankVerein, réquerantes, Deutsche Industrie gesellschaft AG intervenante, c Etat SHS*.[90] Claims were brought, under Article 249(b) of the Treaty of Saint-Germain, on the liquidation of the property of nationals of the former Austrian Empire, by Austrian shareholders of a German company. They invoked the Austrian control of the company and intended to enforce the claims of the company against the defendant State. The Tribunal considered that it had no jurisdiction under the Treaty of Saint-Germain: the company, created under German law and having its principal office in Germany, was of German nationality. Other arbitral tribunals had already adopted the same approach in diplomatic protection cases before the war.[91]

On the contrary, in some cases, the French-German MAT considered that it had jurisdiction to settle disputes brought by French shareholders. In *Huta Bankowa c Etat allemand*, the Tribunal admitted claims by shareholders of a corporation based on their right to obtain the reparation of damage arising from the alleged decrease in the value of their shares.[92] There is no contradiction with the distinction between the shareholders and the corporation: the Tribunal clarified that shareholders may not individually avail themselves of the rights of their company, which is a separate

89 Hungaro–Yugoslav MAT, *Magyar Altalanos Hitelbank (Banque générale de crédit hongroise) c Etat SHS* (2 April 1927).

90 Austro–Yugoslav MAT, *Österreichische Credit Anstalt für Handel und Gewerbe et Wiener BankVerein, réquerantes, Deutsche Industrie gesellschaft AG intervenante, c Etat SHS* (8 September 1927) 7 Recueil TAM 794.

91 French–Chilean Arbitral Tribunal, *Guano Case* (5 July 1901) 15 RIAA 125, 318; Netherlands–Venezuela Mixed Claims Commission, *JM Henriquez* (1903) 10 RIAA 714; *Baasch et Römer* (1903) 10 RIAA 723.

92 Franco–German MAT, *Huta Bankowa c Etat allemand* (7 December 1922) 3 Recueil TAM 325.

legal entity. This line of reasoning had already been implicitly adopted in pre-war diplomatic protection cases[93] and was later confirmed in the ICJ's case law.[94]

In *Wenz et Cie c Etat allemand*, claims were brought by a new partnership including only French partners of a former French-German partnership. Claims were found admissible, but only up to the amount of the interests of French partners, while claims regarding the interests of former German partners were found inadmissible.[95] This award is coherent with the rest of the case law of the French-German MAT on partnerships. As in *Mercier*,[96] the new partnership did not have a separate legal personality and thus a nationality different from that of partners. Thus, it was considered French for the purposes of Article 292 of the Treaty of Versailles. Moreover, the exclusion of German partners of the former partnership during the war was adopted by a French legal decision. Under these circumstances, the creation of a new French partnership was not the result of a choice of the partners and intervened before the entry into force of the Treaty of Versailles: even modern-day concepts like abuse of corporate nationality[97] would be inapplicable.

The Tribunal highlighted further consequences of the crucial role of the nationality of partners in *Wernlé et Cie c Etat allemand*,[98] which explicitly refers to *Wenz*. Claims were brought by French partners in proportion to their share in the capital of a partnership established in Germany without legal personality. Even these claims were considered admissible, which can be explained by the lack of any corporate veil. The Tribunal explicitly observed that the partnership, a *société en commandite*, lacked a separate legal personality and that the theory of control was not applicable. This line of reasoning was not new either. Already in *Hargous v Mexico*, the umpire awarded a US individual reparation of damage suffered by a partnership

93 *Ruden (United States v Peru)* (1870) 2 Moore's Arbitrations 1653; *Delagoa Bay Company (United States v Portugal)* (29 March 1900) 2 Moore's Arbitrations 1853; *El Triunfo (United States v El Salvador)* (8 May 1902) 15 RIAA 467; *Cerruti (Italy v Colombia)* (6 July 1911) 11 RIAA 377; *Alsop (United States v Chile)* (15 July 1911) 11 RIAA 349. See P De Visscher (n 85) 469–70.

94 *Ahmadou Sadio Diallo*, Preliminary Objections, Judgment of 24 May 2007, ICJ Reports 2007, 582, para 64.

95 Franco–German MAT, *Wenz et Cie c Etat allemand* (22 December 1922) 2 Recueil TAM 780.

96 See above, *Mercier* (n 3).

97 See eg Zongnan Wu, 'Abuse of Rights in the Context of Corporate Nationality Planning' (2019) 4(1) *European Investment Law and Arbitration Review Online* 1.

98 Franco–German MAT (25 June 1927) 7 Recueil TAM 612.

(without legal personality) in proportion to his shares (two-thirds of the capital, while the remaining third was owned by a German).[99]

The admissibility of shareholder claims was also partially accepted in US-German relations.[100] In *Standard Oil v Germany, Sun Oil v Germany and Pierce Oil Corporation v Germany*, the US-German Claims Commission found that claims were admissible, but that the shareholders had already been compensated, through their company, for the damage that they had suffered. The case concerned seven ships owned by a British corporation and sunk by Germany. The claimants were the American shareholders of the British corporation, who argued that they had been 'indirectly damaged'. The Commission considered the claim admissible but found that the shareholder had been indirectly compensated, as Great Britain had paid the British corporation the value of the ships.[101]

The *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers (USA v Reparation Commission)* case suggested that shareholders' claims were potentially admissible regarding a dissolved corporation. The case regarded a seizure of oil tankers by the German government to a German company, which was a subsidiary of an American company (Standard Oil). After the Allied Reparation Commission had rejected Standard Oil's claim for compensation, the US Government, acting in diplomatic protection, argued that the company was entitled to reparation for the seizure, as it had the 'beneficial ownership' of the tankers. With the approval of the US Government, the Reparation Commission set up an arbitral tribunal to settle the dispute. The Tribunal rejected the US Government's claim: the German company was the sole owner of the seized vessels, as 'the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets, other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholder'.[102] However, the Tribunal also acknowledged that shareholders have 'the right to share

99 *Hargous v Mexico* (Edward Thornton, Umpire, under the convention of July 4, 1868, between the United States and Mexico) 3 Moore's Arbitrations 2327.

100 The United States did not ratify the Treaty of Versailles, but concluded the Treaty of Berlin of 1921 and a subsequent agreement in 1922. On the US–German Mixed Commission, see: Arthur Burchard, 'The Mixed Claims Commission and German Property in the United States of America' (1927) 21(3) American Journal of International Law 472.

101 US–German Claims Commission, *Standard Oil v Germany, Sun Oil v Germany and Pierce Oil Corporation v Germany* (21 April 1926) 7 RIAA 301.

102 *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers (USA v Reparation Commission)* (5 August 1926) 2 RIAA 777, 787.

in the division of the assets of the company when dissolved',[103] which can be interpreted as the recognition of the admissibility of claims by shareholders of dissolved companies. In other words, if the German company had been dissolved, claims on behalf of Standard Oil would have been admissible. Curiously, this case was quoted by the ILC in support of Article 11(b) of the 2006 ILC Draft Articles of Diplomatic Protection, regarding the incorporation in the State allegedly responsible for causing an injury, as a precondition to doing business there.[104] However, this aspect is not discussed in the award. The case is much more relevant for Article 11(a), which codifies well-established case law which spans, with some nuances, from the *Delagoa Bay Railway* case to ECHR cases, through *Barcelona Traction*.[105] In any case, all forms of shareholder protection which can be found in MATs' case law are far from fully-fledged protection of controlled companies 'by substitution', as can be found in several investment treaties.[106]

5. *Taking Stock: The Legacy of MATs' Case Law on the Nationality of Legal Persons*

As shown by these examples, some MATs awards can be retrospectively seen as a step in a relatively coherent line of cases. All in all, MATs' case law contributed in a non-negligible (albeit not decisive) way to the emerging concept of corporate nationality and to its determination, even if the most original feature, the control test, turned out to be ephemeral. Interestingly, it was only in relatively recent years that the MATs' case law was retrospectively seen as a subsidiary means to determining customary norms. Nowadays, issues of corporate nationality are mainly dealt with

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103 ibid, 787 and 791. See Gabriel Bottini, *Admissibility of Shareholder Claims under Investment Treaties* (Cambridge University Press 2020) 106.

104 Commentaries, doc. A/61/10, *Yearbook of the International Law Commission*, 2006, vol II, Part Two, 41, note 136.

105 Art 11 Draft Articles of Diplomatic Protection reads as follows: 'A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless: (a) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or (b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there' (Commentaries, doc. A/61/10, Yearbook of the International Law Commission, 2006, vol II, Part Two, 40–41).

106 Eg 2012 US Model BIT, Article 24(1)(b); CETA, 8.23(1)(b).

through treaty provisions, whose conception does not seem to have been significantly inspired by the experience of MATs. Firstly, Article 54 of the Treaty on the Functioning of the European Union provides for an obligation of equal treatment of European companies, following a version of the cumulative requirement of the place of incorporation and the *siège social* set by the ICJ in the *Barcelona Traction* case, whereas MATs generally used these criteria alternatively.[107] Secondly, the rationale of the theory of control makes it very difficult to consider it as an ancestor of the control test currently enshrined in investment treaties, unless at a very abstract level. The corporate veil is pierced for very different reasons. War measures extended the legal regime of enemy property to corporations, based on the assumption that all nationals of enemy States were enemies. On the contrary, in international investment law, the control test is a form of protection (or promotion) based on the fact that investors are sometimes required (or may wish) to incorporate an entity in the host State as a vehicle for their investment activity. Thus, several investment treaties define the nationals of each State party as also including legal persons directly or indirectly controlled by nationals of that State.[108] The rationale of the theory of control of the French-German MAT is perhaps closer to the role of control within denial of benefits clauses, especially when they refer to the absence of diplomatic relations or issues of peace and security.[109] However, even in such situations, the control test is a necessary, but not

107 The provision reads as follows: 'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States'.

108 Eg under Article 8.1 of the Comprehensive Economic and Trade Agreement between Canada and the European Union, 'investor means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party; For the purposes of this definition, an enterprise of a Party is:
(a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or
(b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a)'. See also Article 25(2)(b) of the ICSID Convention'. Some investment treaties further clarify what is meant by 'control': according to UNCTAD's Investment Policy Hub, 273 treaties (209 of which are in force) contain provisions to this effect.

109 Eg under Article 8.17 of the 2012 US Model BIT: '1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of

a sufficient condition for the applicability of these provisions. Moreover, if the conditions of these provisions are met, investment tribunals have no jurisdiction, investors' claims are inadmissible or substantive benefits based on the treaty are denied to investors. Overall, these legal effects are the opposite of those of the theory of control in respect of peace treaties.

However, MATs' case law on corporate nationality did modestly contribute to the determination of international procedural law as a coherent set of rules, alongside decisions by other international courts and tribunals, especially in ILC commentaries and in some scholarly writings.[110] Significantly, the ICJ did not contribute to this trend. The mainstreaming of MATs' case law on the nationality of legal persons shows that the assessment of this historical experience has evolved over time. The relatively recent inclusion of MATs' case law in the mainstream of public international law on corporate nationality may seem surprising. Subsequent case law has clearly helped find consistency which cannot be found in MATs' case law as such. Different MATs had different approaches to the same issues, and the case law of some MATs was even characterised by internal inconsistencies, which perhaps can only be explained by the different

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such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:
(a) does not maintain diplomatic relations with the non-Party; or
(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.
2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise'. Under art 8.16 of the Comprehensive Economic and Trade Agreement between Canada and the European Union: 'A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:
(a) an investor of a third country owns or controls the enterprise; and
(b) the denying Party adopts or maintains a measure with respect to the third country that:
(i) relates to the maintenance of international peace and security; and
(ii) prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments'.

110 Carlo Santulli, *Droit du contentieux international* (2nd edn, LGDJ 2015) esp. 246–47 on the theory of control.

composition of each tribunal in different cases.[111] As has been shown, ambiguity was not only dependent on the drafting of peace treaties, but also on diverging views on more general issues. MATs' awards often featured an intrinsic methodological ambiguity, which resulted in diverse combinations of domestic, comparative and international law. Under these conditions, it is not surprising that MATs' case law was controversial in its time. At least, MATs settled a significant number of cases, not all of which were published, often corresponding to complex factual situations which show just how dense transnational relations affected by World War I were.

Apart from technical considerations, the historical reputation of MATs' case law certainly suffered from the context in which it emerged. To some extent, MATs could have been seen as a step towards more effective reparation for individuals. However, they were also based on the asymmetrically drafted provisions of the peace treaties,[112] of which they multiplied the vindictive and punitive dimensions.[113] Although, as has been shown, awards did not systematically tend to broaden their jurisdiction, MATs had difficulty in departing from a form of victors' justice. The fate of the theory of control is a symptom of this phenomenon: it did not go down in history as a tool that eased access to international justice, but as an unwelcome heritage of the war. Regarding issues of corporate nationality, MATs can certainly be considered as an experiment in the adjudication of private rights beyond the legal order of each State, but it would be difficult to conclude that the experiment was completely successful.

111 Eg in *Société du Chemin de fer*, the members of the French–German MAT were Botella (president), Serbuys, Scholz, Sirey, Simon, while in *Charbonnage Frédéric-Henri*, the members were Asser (president), Bondi, Gandolphe, Simon, Sirey. In *Peeters van Haute et Duyver c Trommer et Gruber*, the members of the Belgo–German MATs were Moriaud (president), Fauquel, Hoene, Steven, Uppenkamp, while in *Van Peteghem c Staackmann, Horschitz et Tielecke*, they were Moriaud (president), Hoene, Rolin, Steven, Simon.

112 Walter Schätzel, 'Die Gemischten Schiedsgerichte der Friedensverträge' (1930) 18 Jahrbuch des öffentlichen Rechts der Gegenwart 378, 453.

113 On the ambivalence of the Treaty of Versailles, see, Michel Erpelding, 'Introduction: Versailles and the Broadening of "Peace Through Law"', in Michel Erpelding, Burkhard Hess, and Hélène Ruiz Fabri (n 12) 11; Emanuel Castellarin, 'L'apport du traité de Versailles au droit international. Un regard rétrospectif à l'occasion du centenaire', in Société française pour le droit international, *Le traité de Versailles: Regards franco-allemands en droit international à l'occasion du centenaire* (Pedone 2020) 7; Pierre-Marie Dupuy, 'Conclusions générales', ibid, 307.

Chapter 6: Splitting the Atom of Nationality: The Mixed Arbitral Tribunal for Upper Silesia and the Emergence of Citizenship in International Law

Momchil L Milanov[*]

'So it has happened that the worst disasters have come to light when secular societies have sought to become organic, a recurrent aspiration among all societies that develop the cult of themselves.
Always with the best intentions.
Always to regain a lost unity and supposed harmony'.
Roberto Calasso, *The Unnameable Present*

1. *Whose 'Grandmother is Dead'?*

At 4 pm on 31 August 1939, Reinhard Heydrich, head of the Reich's *Sicherheitsdienst* (SD), telephoned SS-Sturmbannführer Alfred Naujocks and delivered a coded message: '*Großmutter gestorben*' (Grandmother died). Naujocks had been sent to Upper Silesia a couple of days earlier with a special mission – to organise a provocation that could serve as a pretext for the invasion of Poland. It is pointless and presumptuous to try to uncover the meaning behind the code word, but one is tempted to see it as signalling the definitive demise of the League of Nations in all senses – physical, legal, institutional, and most important of all – symbolic. A couple of hours later, Naujocks and a squad of heavily armed SD men dressed as Polish insurgents carried out a fake attack on the radio transmitter in Gleiwitz, German Upper Silesia. The body of a concentration camp inmate named Franciszek Honiok, dressed similarly to the raiders, was found outside the radio station, as if he had been killed in a gun battle with German police.[1] Honiok, an ethnic Pole who had participated in

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1 Frederick Taylor, *1939: A People's History* (Picador 2019) 320ff.

the 1921 uprisings and had later been arrested for pro-Polish activities, was the first victim of the Second World war. It is no mere coincidence that the most devastating war in human history started as a 'false-flag' operation against the radio station in Upper Silesia;[2] that Honiok was its first victim, and that there was no actual declaration of war. The shelling of Westerplatte by the battleship *Schleswig-Holstein* early on the following morning announced the second victim of the war: the entire international order established in Paris 20 years earlier and the demise of its institutional incarnation – the League of Nations. The symbolic importance of the relationship between Upper Silesia and the League cannot be understated. For 15 years, between 1922 and 1937, the legal regime of the region established under the auspices of the League had succeeded in keeping volatile political passions under control. The 'international experiment of Upper Silesia' was associated with and later formed part of the broader 'experiment narrative' of the League.[3] Those who plotted to destroy the League were aware of the symbolic importance of the region.

The history of Upper Silesia since the 14th century resembles a case study for an undergraduate international law course. A vital economic area in Central Europe with rich resources and a long history of a disputed (trans)border region,[4] Silesia is situated at the crossroads of Germanic and Slavic Europe.[5] Although for many centuries this 'land-in-between'[6] did

2 On the 'radio-war' between Poland and Germany in Upper Silesia in the interwar period, see Peter Polak-Springer, 'Jammin' with Karlik': The German-Polish 'Radio War' and the Gleiwitz 'Provocation', 1925–1939' (2013) 43 European History Quarterly 279.

3 See Jean d'Aspremont, 'The League of Nations and the Power of "Experiment Narratives" in International Institutional Law' (2020) 22 International Community Law Review, 275–90; Christian Tams, 'Experiments Great and Small: Centenary Reflections on the League of Nations' (2019) 62 German Yearbook of International Law 62; Nathaniel Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (1992) 4 Yale Journal of Law & the Humanities 376.

4 Michel Erpelding, 'Local International Adjudication: The Groundbreaking 'Experiment' of the Arbitral Tribunal for Upper Silesia' in Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (eds), *Peace through Law* (Nomos 2019) 278. F Gregory Campbell, 'The Struggle for Upper Silesia, 1919–1922' (1970) 42 Journal of Modern History 361.

5 Tomasz Kamusella, 'The Changing Lattice of Languages, Borders and Identities in Silesia', in Tomasz Kamusella, Motoki Nomachi and Catherine Gibson (eds), *The Palgrave Handbook of Slavic Languages, Identities and Borders* (Palgrave 2016) 188.

6 Philipp Ther, 'Caught in Between: Border Regions in Modern Europe' in Omer Bartov and Eric D Weitz (eds), *Shatterzone of Empires Coexistence and Violence in the German, Habsburg, Russian and Ottoman Borderlands* (Indiana University

not belong to Poland, the majority of the population spoke either Polish or Silesian.[7] As pointed out by Michel Erpelding, the period between the creation of the Second German Reich in 1871 and the outbreak of the First World War marked the rise of nationalism,[8] further exacerbated by the German defeat in the war and the revival of Poland. Unsurprisingly, the application of the principle of self-determination (*le mot du jour* was also a *mot valise* accommodating contradictory meanings and ideas) provoked tension, frustration, and disappointment.[9] The collapse of the multi-ethnic empires let the genie of nationalism out of the bottle. Two different strands of nationalism clashed – the (re)nationalising policy of the newly (re)created states like Poland confronted the homeland nationalism of revisionist states like Germany, forming the 'vicious circle of nationalist resentment which became such a characteristic feature of the interwar period'.[10]

Press 2013) 487: 'Even the term "borderlands" has potential drawbacks, because of prominence of the word "border," which in today's perspective automatically connotes the boundaries of nation states. The "lands in between" … do not necessarily end *at* state borders, but often transcend them and encompass areas of both sides … one can label "the lands in between" as *intermediary spaces*. This term has a geographical dimension, in the sense of a location between (inter) national centers and spaces … A vivid example can again be provided by Upper Silesia, where Czech, Austrian, Prussian, German, and Polish rule not only shaped the region's history but also its language.'

7 Erpelding (n 4) 278. There seems to be a disagreement on whether the Silesian is a language or a dialect. See Magdalena Dembinska, 'Ethnopolitical Mobilization without Groups: Nation-Building in Upper Silesia' (2013) 23 Regional & Federal Studies 47, 54–55.

8 Erpelding (n 4) 279; Tomasz Kamusella, 'Nation-Building and the Linguistic Situation in Upper Silesia' (2002) 9 European Review of History 37, 46.

9 On the ambiguity in the meaning and scope of the term, see Christopher Casey, *Nationals Abroad* (CUP 2020) 91: 'Robert Lansing, the American Secretary of State who accompanied Wilson to Paris as a legal advisor, worried, "When the president talks of 'self-determination' what unit has he in mind? Does he mean a race, a territorial area, or a community? [...] The phrase is simply loaded with dynamite.'

10 See also Oliver Zimmer, 'Nationalism in Europe, 1918–45' in John Breuilly (ed), *The Oxford Handbook of the History of Nationalism* (OUP 2013) 417. As observed by Kamusella: 'The ideology of nation-building gave rise to two basic strains of civic and ethnic nationalism.' German and Polish nationalism arguably belonged to the latter as opposed to its 'civic' counterpart in France and USA. 'In the framework of civic nationalism citizenship equals nationality, thus, citizenry *is* nation. Ethnic nationalism requires proof of appropriate and ethnically construed nationality before one can be granted with citizenship of an ethnic nation-state'. Kamusella (n 8) 38. Another instance of this opposition of Western (civic) and Eastern (ethnic) nationalism could be found in the dictum of the PCIJ in the

One of its most sinister incarnations was the ideal of ethnic homogeneity, ie the overlap between population, ethnicity and jurisdiction over a given territory.[11] The pursuit of this idea(l) in the aftermath of the Great War revealed what nowadays appears to be a received truth: ethnic or religious homogeneity has devastating and irreparable consequences which involve the complete eradication of centuries-old ties.[12] The main objective of the present chapter is to demonstrate and analyse how the Arbitral Tribunal for Upper Silesia managed to protect (even if temporarily) the rights of individuals and groups and thus maintain these old ties. At the same time, the action of the League may be seen as legitimising the ideal of homogeneity for it rubberstamped the partition of the territory.[13]

Greco-Bulgarian communities case in which the Court acknowledged the existence of a distinct 'Eastern' understanding of 'community': 'By tradition, which plays so important a part in Eastern countries, the "community" is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions…' PCIJ Ser B no 17, 21.

11 Alfred Zimmern quotes John Stuart Mill who writes that it is 'in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities'. Alfred Zimmern, 'Nationality and Government' in Alfred Zimmern, *Nationality & Government with Other War-time Essays* (Chatto & Windus 1918) 46. An even more forceful and radical exposition of the same view can be found in Carl Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press 1988) 9: 'Democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity'. Renan wrote in 1882: 'Unity is always effected by means of brutality'. Ernst Renan, 'What is a Nation?' in Homi Bhabha, *Nation and Narration* (Routledge 1990) 11.

12 As Timothy Wilson has argued, the excessive violence of Upper Silesia's plebiscite era was due largely to the lack of clear national dividing lines between towns or regions. Because one's neighbour could easily be in the other national camp, violence could emerge anywhere – the schoolhouse, the pub, the private residence – as a means of creating national divisions at the micro level where none had previously existed. Tim Wilson, *Frontiers of Violence: Conflict and Identity in Ulster and Upper Silesia, 1918–1922* (OUP 2010). Cited in Brendan Karch, *Nation and Loyalty in a German-Polish Borderland* (CUP 2018) 125.

13 Ther (n 6) 491. Its influence was felt not only in the context of Upper Silesia and plebiscites in general but also with regard to the infamous 1923 agreement between Greece and Turkey on the exchange of populations. The minority protection and the exchange of populations are 'radical alternatives' in the expression of Özsu. See Umut Özsu, 'Fabricating Fidelity: Nation-Building, International Law, and the Greek-Turkish Population Exchange' J.S.D. thesis, 2011, iii. Online at: <https://tspace.library.utoronto.ca/bitstream/1807/31888/7/Ozsu_Umut_201111_S

The League took over Upper Silesia in 1920 and was bent on making it into a showcase solution to a dispute between two nation-states.[14] Of the five plebiscites that were organised in the contested borderlands of Central Europe[15] the one in Upper Silesia which took place in March 1921 marked the largest such voting exercise after the World War. The overall vote in favour of Germany was approximately 60 %, characterised by a marked discrepancy between urban and rural areas.[16] It is important to note that Upper Silesians were essentially being asked to vote on state rather than national belonging. 'Many were expected to vote on the basis of very pragmatic considerations related to perceived security, freedom, and prosperity as citizens of one state or the other'.[17]'There was no 'option' to remain Polish *and* German or to declare an allegiance to Silesia.[18] Neither side was prepared to recognise an identity which fell outside the two options.[19] *Tertium non datur.*

JD_thesis.pdf> accessed 3 July 2020; See also Umut Özsu, *Formalising Displacement* (OUP 2015) 70–98, 72.

14 Kamusella (n 8) 49.

15 Plebiscites were held in Schleswig, Allenstein and Marienwerder, Klagenfurt, and Sopron, in addition to Upper Silesia. Several other plebiscites were discussed, planned, or attempted, but never carried out fully. See Sarah Wambaugh, *Plebiscites since the World War* (Carnegie Endowment for International Peace 1933).

16 Karch (n 12) 139: 'These results [of the plebiscite], at a broad level, adhered to linguistic divides: the heavily Polish-speaking eastern rural and suburban centers voted for Poland, while German urban centers cast majorities for Germany'.

17 Karch (n 12) 137.

18 Ther (n 6) 491; Karch (n 12) 117: At no time did autonomists advocate a distinct Upper Silesian nationality; rather, they argued for various levels of federalized self-rule that would theoretically enable the peaceful coexistence of Polish and German speakers. On the other hand see Tomasz Kamusella, 'Upper Silesia in Modern Central Europe: on the significance of the non-national/a-national in the age of nations', in James Bjork, Tomasz Kamusella, Tim Wilson and Anna Novikov (eds), *Creating Nationality in Central Europe, 1880–1950 Modernity, violence and (be)longing in Upper Silesia* (Routledge 2016) 8: 'Contrary to what the relevant national master narratives maintain, the population concerned did have their own identity(ies) of an a-national or non-national kind. Thus, instead of passively awaiting ennationalization from above, they deployed their identity as a national one or negotiated its (more or less accepted) position. It was done in the context of the currently obtaining national identity connected to the state that was at any particular time in possession of Upper Silesia or of a fragment thereof'.

19 Tomasz Kamusella, 'Upper Silesia 1918–45' in Karl Cordell (ed) *The Politics of Ethnicity in Central Europe* (Macmillan 2000) 98.

The plan drafted by the League's Secretariat divided the highly contested industrial area in two. Upper Silesia was partitioned to the dissatisfaction of both Germany and Poland.[20] In the following years, approximately 170 000 pro-Germans and 100 000 pro-Poles chose to emigrate and relocate to the other side of the border where they would be part of the ethnic majority.[21] Notwithstanding these important numbers, significant minorities chose to remain in their pre-partition homes.[22] The economic unity of the area was shattered.[23] In 1922, pursuant to the plan, Germany and Poland concluded a bilateral convention (hereafter the 'Geneva Convention' or 'GC') regulating some essential matters related to the territory.[24] With its 606 Articles, it was the most elaborate international regime of its time[25]. The conclusion of this convention must have felt like a remarkable and impossible feat comparable to completing a cathedral in a year. Throughout its entire existence, the Geneva Convention functioned in an atmosphere of mutual lack of trust which stemmed from the diametrically opposing views held by the states on the role of minorities: Poland viewed ethnic Germans as a fifth column whose primary loyalty was to Germany and consequently tried to reduce to a minimum the number of Germans quali-

20 Carlile Macartney, *National States and National Minorities* (OUP 1934) 198.

21 See Kamusella (n 19) 98.

22 Karch (n 12), 144. Erpelding (n 4) 281. 44 % of Upper Silesians in the new Polish partition and 29 % in the German partition had voted for the other state. Brendan Karch, 'Polish nationalism and national ambiguity in Weimer Upper Silesia' in James Bjork, Tomasz Kamusella, Tim Wilson and Anna Novikov (eds), *Creating Nationality in Central Europe, 1880–1950 Modernity, Violence and (Be)Longing in Upper Silesia* (Routledge 2016) 150.

23 Carlile Macartney, 'National States and National Minorities', in Stuart Woolf (ed), *Nationalism in Europe, 1815 to the Present: A Reader* (Routledge 1995) 112.

24 Convention between Germany and Poland relating to Upper Silesia (signed 15 May 1922, entered into force 15 June 1922) 9 LNTS 465; 118 BSP 365. The convention contained several innovations. Some of the most significant among them were the protection of 'vested rights' ('*droits acquis*'), ie rights acquired before the partition (art 4 GC), the right of residence and non-discrimination of those persons who chose to retain their domicile on one side of the territory while opting in favour of the nationality of the other state (arts 40–45 GC); rights of minorities (arts 64–158 GC).

25 Nathaniel Berman, '"But the alternative is despair": European Nationalism and the Modernist Renewal of International Law' (1993) 106 Harvard Law Review 1893–98.

fied to receive Polish nationality.[26] Germany in turn focused on converting as many of its nationals as possible to Polish.[27]

The convention divided the territory and provided a painstakingly detailed regime protecting the special rights of the inhabitants of the region, including the right to nationality, the right of residence and the rights of minorities.[28] It established the organs in charge of overseeing the application of the convention: a Mixed Commission, chaired by the former Swiss President Felix Calonder, and a Mixed Arbitral Tribunal, presided by the young Belgian lawyer Georges Kaeckenbeeck. The Convention set up complex machinery which effectively dissolved, defused, and transformed nationalistic aspirations into administrative/legal procedures. The regime established by the treaty was supposed to last only fifteen years.[29] For that limited period, the highly disputed political issues were in some sort of *stasis*. The Clausewitzian formula was turned on its head: law and not war became the continuation of politics by other means.

The Mixed Arbitral Tribunal for Upper Silesia[30] stands out as perhaps the most innovative international judicial body of its time.[31] Its rich case law heralded some truly remarkable developments. Suffice it to give three examples: in the ground-breaking decision in *Steiner and Gross v Poland*,[32]

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26 Georges Kaeckenbeeck, *The International Experiment of Upper Silesia* (OUP 1942) 158: '… German officials tried to counteract all promptings to opt in favour of German nationality by intimating it as a duty for Germans to remain in Poland and strengthen the German minority there. People repeatedly complained to the Arbitral Tribunal of having thus been made to stay in Poland, and when they later asked to be naturalised Germans again, of having been met with a refusal accompanied by the remark that they had had a right of option of which they had not availed themselves.' See St 143/36 *Rzepka* (13 May 1937) 7 Arb Trib Dec 250ff.

27 Kaeckenbeeck (n 26) 123, 522.

28 It is worth recalling that the minorities protection system in the interwar period applied only to the states in Central and Eastern Europe; in the West this concept practically did not exist.

29 Article 1 GC.

30 The nomenclature in the present paper follows the one adopted by Erpelding (n 4), ie Mixed Commission/Mixed Arbitral Tribunal *for* Upper Silesia. While not being part (strictly speaking) of the dozens of MATs directly created by the Paris Peace Treaties, the Arbitral Tribunal for Upper Silesia can nevertheless be considered as having direct links with the latter, as its creators conceived it as an evolved version of the Paris MATs. See also Erpelding (n 4) 289.

31 Michel Erpelding, 'Introduction: Versailles and the Broadening of "Peace Through Law"' in Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (eds), *Peace through Law* (Nomos 2019) 26.

32 C 7/27, *Steiner & Gross v Poland* (30 March 1928) 1 Arb Trib Dec 8–10. See Erpelding (n 4) 299–300.

the Tribunal recognised the right to sue one's own country, which could be considered as an immediate predecessor of the individual application in Article 34 of the European Convention on Human Rights[33]. The second innovation was the procedure which resembles the pilot judgment procedure before the European Court of Human Rights (ECtHR), used to identify structural problems underlying repetitive cases.[34] The third example is immediately related to the topic of the present chapter and concerns the competence to exercise judicial control over matters of nationality and the protection of the right of residence of non-nationals. Paul Weis, one of the most distinguished specialists on nationality and statelessness wrote that:

> The establishment of international judicial machinery for the adjudication of conflicts in questions of nationality which could be set in motion by an individual whose nationality is in doubt and to which individuals would, therefore, directly or through the intermediary of an international agency acting on their behalf, have access, is essential for their solution.[35]

Together with the Conciliation Commission, the Tribunal was in charge of 'sorting out' the individuals[36] with *erga omnes* effect,[37] one of the most consequential attempts to limit sovereignty.[38] Nationality is the last bas-

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33 See W Paul Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals* (Martinus Nijhoff 1966) 41–42. The search in the preparatory works of the ECHR did not reveal any explicit references to the case law of the Arbitral Tribunal. Much of the case turned on the interpretation of art 4(2) of the Convention. The tribunal found that this provision clearly conferred jurisdiction on it to hear claims of individuals against states and that art 4(2) contained no limitations on the right of action by private persons. Since the clear aim of the Convention was to protect private rights, the necessary jurisdiction to hear such claims had been conferred on the tribunal. Annual Digest 1927–28 (1928), case No 188, 291. See Georges Kaeckenbeeck, 'The Character and Work of the Arbitral Tribunal of Upper Silesia' (1935) 21 Transactions of Grotius Society 27, 36.

34 Article 592 GC. Applied for the very first time in the *Wagner* case (1933); cited in Erpelding (n 4) 303. See Kaeckenbeeck (n 26) 194.

35 Paul Weis, *Nationality and Statelessness in International Law* (Sijthoff 1979) 255.

36 Arts 55–58 GC.

37 Art 591 (2) GC.

38 Nathaniel Berman, 'Intervention in a "Divided World"', in Philip Alston and Euan Mcdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 235. The interwar experiments '… create a legal space for themselves by bracketing the question of sovereignty, either by explicitly deferring the question to a later time (the Saar…), superimposing a unified, experimental regime on

tion of sovereignty[39]. A hundred years later, there remain very few exceptions of international courts and tribunals competent to exercise direct control over matters of nationality. The Inter-American Court of Human Rights is the most obvious example.[40]

This chapter argues that the reasoning and the conclusions of the Arbitral Tribunal for Upper Silesia in matters of nationality and residence could be considered among the first signs of the long process (which is still ongoing) of the separation of citizenship from nationality; a process from which the latter may emerge 'the more dominant descriptor, with all of its implications of equality and rights'.[41] It argues that the Tribunal decoupled nationality from rights without necessarily 'weakening the state as a location of identity'.[42] However, by no means does the chapter try to imply that the Tribunal was using the concepts of nationality and citizenship in the same way. That ahistorical thinking would be manipulative and tantamount to ventriloquism. The French text of the Convention, the Polish Minorities Treaty and the Versailles Treaty did not even use the term '*citoyen*' (citizen) but '*ressortissants*' (nationals), which indicates not the belonging to a particular nation or ethnic group but the (primarily) jurisdictional link which exists between an individual and a state.[43]

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top of sovereign divisions (Upper Silesia…), or creating a novel a-sovereign entity (Danzig).'

39 Kristin Henrard, 'The Shifting Parameters of Nationality' (2018) 65 Netherlands International Law Review 293.

40 Art 20 of the American Convention on Human Rights provides for the right to nationality. The Inter-American Court of Human Rights has made some very important pronouncements in this regard and has been able to protect persons who otherwise would have remained stateless. See Momchil Milanov, 'Nationalité, citoyenneté, apatridie : le statut international des apatrides entre l'érosion des concepts et la réaffirmation des droits', in Jean-Denis Mouton and Peter Kovacs, *The Concept of Citizenship in International Law* (Brill / Nijhoff 2018) 289–91.

41 Kim Rubenstein, 'Globalization and Citizenship and Nationality' in Catherine Dauvergne (ed), *Jurisprudence for an Interconnected Globe* (Ashgate 2003) 161 (highlighting 'confident, even triumphalist discourse of citizenship as emancipation'). Cited in Peter Spiro, 'A New International Law of Citizenship' (2011) 105 AJIL 694, 717.

42 Spiro (n 41) 697. I believe it is so in the Upper Silesian context because on the one hand the pressure exerted by the League on the two states to reach an agreement did not undermine the nation-state as a locus of identity; on the contrary, it even reinforced it because the individual inevitably faced a choice. On the other hand, it is doubtful whether the participants in the plebiscite were really asked to define their identity: the only thing they were asked to do was to choose a state.

43 The Versailles Treaty and the Polish minorities treaty use the terms '*habitants*', '*ressortissants*', '*nationaux*'. None of them mentions 'citoyen'. According to Blüh-

The four remaining sections are structured as follows. Section 2 outlines the conceptual distinction between nationality and citizenship, which will be illustrated with concrete examples in Section 4. Section 3 briefly discusses two important cases which had an immediate incidence over the approach on nationality and citizenship cases adopted by the Tribunal. Section 4 contains the core argument of the paper. It discusses five instances in which the Arbitral Tribunal for Upper Silesia was able to protect the nationality and rights of individuals, either directly, under the provisions of the Geneva Convention on nationality and residence, or indirectly, through the provisions on minorities. Section 5 concludes.

2. *Nationality and Citizenship: Two Sides or Two Different Coins?*

Throughout the 'long 19th century' nationality gradually became the main link between an individual and a state both in public and private international law. In respect of the former, there were no other contestants; this was not the same situation in the case of the latter, where it had to compete with domicile.[44] Together with territory and rights, nationality was an essential element of the 19th-century positivist triangle. The creation of the Arbitral Tribunal coincided with the period when for the first time this triad underwent a significant change. The First World War revealed the cracks on its façade; its entire construction premised on the all-encompassing concepts of jurisdiction and sovereignty, was put under considerable strain.[45] If nationality simultaneously meant two things, the link between an individual and a state, but also the relationship between

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dorn, the MATs have unanimously accepted that the term 'ressortissant' is larger than 'national'. See Rudolf Blühdorn, 'Le fonctionnement et la jurisprudence des Tribunaux arbitraux mixtes créés par les Traités de Paris' (1932) 41 Recueil des Cours 205.

44 On this competition see León Castellanos-Jankiewicz, 'Harnessing the Adjacent Possible: From Conflict of Laws to Human Rights', forthcoming: 'before the nineteenth century it was generally accepted in continental Europe that the personal status of individuals was connected to their domicile. But, after the French Revolution, personal status came increasingly under the influence of nationality'.

45 Hannah Arendt, *The Origins of Totalitarianism* (first published 1951, Harcourt Brace Jovanovich 1973) 267: The war 'sufficiently shattered the facade of Europe's political system to lay bare its hidden frame', cited in Aristide Zolberg, 'The Formation of New States as a Refugee-Generating Process' (1983) 467 The Annals of the American Academy of Political and Social Science 24, 28.

an individual and a nation,[46] large groups of persons risked finding themselves 'beyond the pale of law'. Another *lien de rattachement* was necessary and that genuine link between a person and a territory was domicile. It shifted the focus from nationality (and ethnicity) to an enduring territorial link[47] and demonstrated that belonging to the nationality of the majority is not a *conditio sine qua non* for the enjoyment of rights.[48]

2.1 General Observations

A graphic table in the recently published *Oxford Handbook on Citizenship* shows that the usage of 'nationality' and 'citizenship' in Google books follows a very similar trajectory: both steadily rise and peak in the 1920s, before declining gradually until the 1980s when a new surge begins.[49] This apparent similarity may be misleading. The relationship between the two concepts is by no means settled and it is further complicated on the one hand by the multiplicity of meanings attached to them and on the other, by the role of contingency in international relations as explicitly acknowledged by the Permanent Court of International Justice (PCIJ) in the *Nationality Decrees* advisory opinion[50], as well as by the Harvard Research in International Law which concluded that:

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46 Casey (n 9) 87.

47 See eg Hannah Arendt, *Men in Dark Times* (Harcourt, Brace 1968) 81: 'A citizen is by definition a citizen among citizens of a country among countries. His rights and duties must be defined and limited, not only by those of his fellow citizens, but also by the boundaries of a territory'.

48 Mira Siegelberg, *Statelessness: A Modern History* (HUP 2020) 169 where she mentions the 1930 course given by René Cassin at the Hague Academy in which he argued that privileging domicile over nationality would mitigate the personal tragedies arising from the absence of citizenship. See René Cassin, 'La nouvelle conception du domicile dans le règlement des conflits de lois', 34 Recueil des Cours (1930) 659–663. See also Maximilian Koessler, '"Subject," "Citizen," "National", and "Permanent Allegiance" (1946) 56 Yale Law Journal 76: 'It would also seem to be no unreasonable guess that domicile rather than birthplace or filiation may in the future be the favorite fact of attachment for the acquisition of nationality'.

49 See Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink, 'Introduction', in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds) *The Oxford Handbook of Citizenship* (OUP 2017) 3–4.

50 *Nationality Decrees Issued in Tunis and Morocco* (1923) PCIJ Rep Series B no 4, 24: 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of

> Nationality has no positive, immutable meaning. On the contrary, its meaning and import have changed with the changing character of states… It may acquire a new meaning in the future as the result of further changes in the character of human society and developments in international organization.[51]

The most widely shared perceptions on the relationship between nationality and citizenship can be reduced to two. According to the first view, although the two concepts used to be clearly distinguishable, today they are practically interchangeable.[52] According to the second view, both concepts are closely related but not synonymous;[53] they are the two sides of the same coin; nationality designates the international aspects of the relationship between an individual and a state while citizenship is 'the highest of political rights/duties in municipal law'.[54] In the same current of thought, for some, the relationship between the two concepts may be seen through the dialectic of 'form' and 'substance' where nationality denotes a formal link between an individual and a state and citizenship is a complex of rights and duties. In recent years, yet another group of scholars have argued in favour of the existence of an autonomous position of citizenship in international law.[55] The present chapter subscribes to this view and at-

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international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain'.

51 Research in International Law of the Harvard Law School, *The Law of Nationality,* 23 AJIL 1, 21 (Special Supp. 1929)

52 Alice Edwards, 'The meaning of nationality in international law in an era of human rights: procedural and substantive aspects', in Alice Edwards and Laura van Waas, *Nationality and Statelessness under International Law* (CUP 2014) 13–14; Yaffa Zilbershats, *The Human Right to Citizenship* (Brill 2002) 5 (noting that the 'instances in which a difference still exists between nationality and citizenship are rare').

53 Green H Hackworth, 3 *Digest of International Law* (US Government Printing Office 1942) § 220, cited in Patricia McGarvey-Rosendahl, 'A New Approach to Dual Nationality' (1985) 8 Houston Journal of International Law 305.

54 See Spiro (n 41) 695. Paul Weis, *Nationality and Statelessness in International Law* (Sijthoff 1979) 4–5; Edwards (n 52) 13. Sebastien Touzé, 'Rapport introductif : La notion de nationalité en droit international, entre unité juridique et pluralité conceptuelle', SFDI, Colloque de Poitiers, *Droit international et nationalité* (Pedone 2012) 18.

55 Spiro (n 41) 694; Jean-Denis Mouton, 'La citoyenneté en droit international: un concept en voie d'autonomie?' in Jean-Denis Mouton and Peter Kovacs, *Le concept de citoyenneté en droit international/The Concept of Citizenship in International Law* (Brill 2019) 81ff.

tempts to provide an early example of this autonomous existence through the prism of inclusion and protection.[56] But before plunging into any substantive discussion of the Tribunal's case law, it is necessary to explain the meaning of these two concepts for the present chapter.

The concept of nationality is prone to confusion precisely because it contains at least two very different possible meanings – one centred on the formal link between an individual and state on the plane of international law and the other in which the emphasis is put on the nature of that link. In 1943, W Bisschop observed in rather terse terms:

> The word 'Nationality' does not mean what it says, nor does it say what it means. Etymologically it would mean the condition of *belonging to a nation, of being a national.* In International Law 'nations' are an unknown quantity. A nation is a concept of municipal law and means a group of persons who, through racial, religious or economical ties, are bound together to follow a common pursuit. The word 'national', if used in International Law, has a technical meaning. The Law of Nations or Public International Law is the law prevailing between States [...] *The word 'national' is used in connection with a State and then means a member or a subject of such a State.* An individual who is a national of a State is internationally only known through the State to which he belongs.[57]

In 1918, the British historian of German descent Alfred Zimmern suggested that 'Nationality … is a form of corporate sentiment. I would define a nation as a body of people united by a corporate sentiment of peculiar intensity, intimacy and dignity, related to a definite home-country'.[58] Similarly, some years later, the PCIJ observed in the *Certain German Interests in*

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56 See Friedrich Kratochwil, 'Citizenship: On the Border of Order' (1994) 19 Alternatives 486. Neil Walker, 'The Place of Territory in Citizenship' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds) *The Oxford Handbook of Citizenship* (OUP 2017) 557.

57 William R Bisschop, 'Nationality in International Law' (1943) 28 Transactions of the Grotius Society 151, 151–152. (Emphasis added) On the confusion between 'nation' and 'state', See Casey (n 9) 87–8. Among the very interesting citations contained in *Nationals Abroad*, it is worth mentioning the one from Oppenheim: 'nationality as citizenship of a certain state must not be confounded with nationality as membership of a certain nation in the sense of a race,' and reminded his readers that 'although all Polish individuals are of Polish nationality *qua* race, they have been, since the partition of Poland … either of Russian, Austrian, or German nationality *qua* citizenship.'

58 Zimmern (n 11) 52.

Polish Upper Silesia case, that nationality is the 'personal tie' that connects physical persons to a state.[59]

While the spatial dimension in 'nationality' is arguably less significant, in the conceptual realm of 'citizenship' territory plays an important, if not primary, role.[60] Some scholars have argued that territory is a socio-political category which allows for people to be governed and provides them with an identity, different from the one determined by their origin. Charles Meier's observation is particularly eliciting in this regard:

> The tendencies we lump together under the idea of globalization suggest that the attributes of territory are changing rapidly. ... What has weakened is precisely a *traditional sense of territory*. *The political rights that came with territory included determination of who belonged and who was foreign*, how wealth would be generated and distributed, how the domain of the sacred must be honored, how families reproduced themselves. Territory is thus a *decision space. It established the spatial reach of legislation* and collective decisions. At the same time, territory has specified the domain of *powerful collective loyalties*. *Political and often ethnic allegiance has been territorial* … Territory has thus also constituted an *identity space* or a space of belonging.[61]

It must be made clear that the purpose of this chapter is not to deal with the relationship between nationality and citizenship on the one hand, and concepts such as identity and belonging.[62] Nor is its intention to deal with the sanction of identity and belonging by international law. It is completely unnecessary to dwell on these untameable concepts; the presence

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59 *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (1926), PCIJ Rep Series A no 7, 70.

60 Casey observed that: 'In the age of nationalism, the politics of expansion and boundary claims were increasingly (although by no means exclusively) conducted by reference to people and their ethnolinguistic identities rather than to territory'. See Casey (n 9) 89.

61 Charles Meier, *Once within Borders* (Harvard University Press 2016) 3 (footnotes omitted) (emphasis added).

62 See Magdalena Dembinska, 'Adapting to Changing Contexts of Choice: The Nation-Building Strategies of Unrecognized Silesians and Rusyns' (2008) 41 Canadian Journal of Political Science 916. On citizenship as *belonging* and *status*, see Kratochwil (n 56) 485, 490; Henrard (n 39) 278. Spiro (n 41) 694. Haldun Gülalp, 'Introduction: citizenship vs. nationality', in Haldun Gülalp (ed), *Citizenship and Ethnic Conflict: Challenging the Nation State* 1: 'nation-states define their national communities in diverse ways, but the core elements of nationality usually include a combination of such historically rooted identities as religion, race, or ethnicity'.

of domicile establishes an objective link between individual and territory under which his rights can be protected.

While keeping in mind this multiplicity of meanings, in this chapter 'nationality' is understood as membership primarily based on ethnic ties. In that sense, the tension between nationality as ethnicity and citizenship as a status of persons living on a certain territory seems to be just another instance of the old competition between *jus sanguinis* and *jus soli*. In the context of Upper Silesia in the interwar years, the enjoyment of rights depended on the factor of domicile counterbalancing ethnicity as a decisive *indicium* of belonging.

The importance of the distinction between nationality and citizenship appears most clearly when juxtaposed to the figure of the alien,[63] what could be called the 'non-national-citizen' as opposed to the term 'non-citizen national' used by Maximilian Koessler. Koessler, who was born in Austria and later emigrated to the United States, may be seen as an early precursor to the conceptual distinction between 'nationality' and 'citizen-

63 Paul Lagarde, 'Nationalité' in Denis Alland and Stéphane Rials, *Dictionnaire de la culture juridique* (PUF 2003) 1052: '*la notion de nationalité n'a d'intérêt juridique que par l'existence de différences entre le national et l'étranger*'. See Linda Bosniak, 'The Citizenship of Aliens' (1998) 56 Social Text 29: 'the idea of foreignness helps us to define the kinds of identities and experiences we commonly associate with citizenship.' See also Linda Bosniak, 'Universal Citizenship and the Problem of Alienage' (2000) 94 Northwestern University Law Review 963, 975: 'If, on the other hand, citizenship theory were to take the subject of alienage into account, matters of citizenship-as-status and citizenship-as rights would come to seem far more interesting and far more urgent as well… alienage does not offend the norm of universality so long as a person is assigned the status on a temporary basis.' Mira Siegelberg explains the position of Maximilian Koessler: 'He stated that the status of the "non-citizen national" would be the central object of his investigation because of the potential for international law to regulate nationality as opposed to citizenship, which could only come under the control of municipal law. Koessler sought proof for a substantive distinction between nationality and citizenship, which for him meant delineating a space in which international law had control over the boundaries of naturalization.' See in particular his article 'Rights and Duties of Declarant Aliens', (1942–3) 91 University of Pennsylvania Law Review 324. He proposed to examine 'whether international law is bound to recognize a nationality which by the provisions of the respective municipal law has become a hollow, if not farcical concept.' Siegelberg (n 48) 153–4. However, Koessler considered nationality and citizenship as the external/international and internal/domestic facets of the same coin and in that sense, he differed from the approach taken in the present chapter which argues that citizenship may play an autonomous role in international law.

ship'.[64] The distinction between nationality and citizenship shows that the category of 'alien residents' is smaller than what it may seem from the majority's point of view.

If nationality connotes ethnicity, thus excluding persons not belonging to the majority, citizenship appears as a much more inclusive concept: a citizen is a person who possesses the highest degree of membership in a political community on a certain territory with all the rights and duties flowing from this membership irrespective of ethnic or religious ties. 'Citizenship is still nothing but equality between individuals independent of their social condition'.[65] Those rights and duties exist primarily on this territory, and it is on that territory that the link between individual and state (characterised by the dialectic of protection and allegiance) is strongest. Thus, contrary to nationality which oscillates between a subjective feeling of belonging and a formal link,[66] citizenship appears as an objective legal status. Territory acts as a force field, in which the relationship between an individual and a state reaches its maximum intensity. The citizen may be a national and indeed, more often than not this is precisely the case. In other situations, however, the person's belonging to a certain community is not contingent on ethnic ties with the majority; and in any case, this is not his or her defining feature. In these cases, citizenship may also serve as a protection against nationalist excesses. For instance, the note sent by Clemenceau to Paderewski on June 24th 1919 just before the signature of the Polish Minorities Treaty, states : '*Les clauses 3 à 6 visent à assurer à toute personne résidant réellement dans les territoires transférés sous la souveraineté polonaise tous les privilèges afférant à la qualité de* citoyen'.[67] This vision of citizenship is in strong contrast with the ideal of ethnic homogeneity, according to which only ethnic nationals can be full citizens.[68] As pointed

64 See Koessler (n 48) Journal 65–7.

65 Etienne Balibar, 'Propositions on Citizenship (1988) 98 Ethics 723, 726.

66 Kratochwil (n 56) 485: '… focal points of the concept of citizenship: *belonging* and *status* (understood as a bundle of distinctive rights) … these notions constitute the core of our understanding of citizenship.'

67 'Articles 3 to 6 aim to guarantee to any person who has established his permanent residence on the territories transferred to Poland all the privileges related to the citizenship status' (Translated by the author). Cited in Marc Vichniac 'Le statut international des apatrides' (1933) 43 Recueil des Cours 145 (emphasis added).

68 Cf Arendt (n 45) 275: 'Some years later the Minority Treaties revealed "that only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions, that persons of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origin"'.

out by Spiro, the reconceptualization of citizenship status involves a shift from an identity to a rights frame.[69] The provisions on the rights of permanent residents in the Geneva Convention constitute a truly watershed moment for the emergence of citizenship as an autonomous concept.[70] But this chapter would certainly be incomplete without mentioning that the distinction between nationality and citizenship was used by the Nazi regime to emphasise the importance of ethnicity. In 1935, Germany enacted the Nuremberg Laws that created two separate kinds of nationality/citizenship – *Reichsbürger* for ethnic Germans and *Staatsangehörige* reserved for non-ethnic Germans (ie Jews and ethnic minorities).[71]

2.2 Nationality and Citizenship in the Partition of Upper Silesia

The persons who found themselves as a minority on the wrong side of the arbitrarily drawn partition line were in a radically different situation from those who formed part of the majority. As pointed out by Kamusella, 'the sought-for equation of citizenship with nationality (that is, the [f]act of belonging to an ethnolinguistically defined nation) was initially somewhat softened by the Minorities Treaties'[72] and in particular, by the Geneva Convention. Part II of the Convention, based on Article 91 of the Versailles Treaty[73] and the Polish Minorities Treaty[74] provided for various

69 Spiro (n 41) 695.

70 Berman (n 25) 1894–95: 'The Convention's provisions regarding individuals bestowed both substantive and procedural rights on the inhabitants of Upper Silesia that moved towards extending them an autonomous international legal status outside the state system.' He further pointed out: 'the Convention gave such individuals a novel international legal status by reconfiguring that traditional bulwark of the state system, the distinction between "inhabitants" and "citizens," a phenomenon encountered in a different form in the Saar'.

71 Kamusella (n 19) 99. Gerhard Wolf, 'Exporting *Volksgemeinschaft*. The *Deutsche Volkliste* in Annexed Upper Silesia' in Martina Steber and Bernhard Gotto (eds) *Visions of Community in Nazi Germany* (OUP 2014) 132.

72 Kamusella (n 19) 17.

73 Berman (n 25) 1832: 'Article 91 embodied the traditional rule that citizenship follows territory, as well as three modifications of that rule. Each of these modifications reflected at least one of the new principles of international law: the new respect for subjective choice, legitimation of state power on the basis of the state's conformity to the "nation," and the new identification of individuals on the basis of their objective membership in such a "nation."'

74 Art 3 provides for the acquisition of Polish nationality through domicile and stipulates for the persons affected a right of option in favour of their former

situations in which the persons who at a certain point of time had their domicile in Upper Silesia could acquire a new nationality or preserve their habitual residence.[75]

It is unnecessary to present all the possible hypotheses provided for in the Convention. Suffice it to mention some of the main provisions which were later complemented by the case law of the Tribunal. Germans domiciled in Polish Upper Silesia before 1 January 1908 would automatically lose their German nationality and acquire Polish nationality.[76] Germans could opt for German nationality for two years after the transfer of sovereignty.[77] The same right existed for Poles. The language used in Article 91 and the Geneva Convention clearly shows the distinction between ethnic belonging and the acquisition of nationality[78] and the crucial role played by domicile. In some cases, the German nationals born in Polish Upper Silesia but not domiciliated there at the time of the transfer would acquire Polish nationality in addition to their German nationality if they had family ties to the region and vice versa. They had two years to renounce one of the nationalities; otherwise, their nationality would be determined by their domicile.[79] Thus, the German nationals domiciled in Polish Upper Silesia could either opt for Germany or remain there.[80] The exercise of the right of option did not necessarily imply a duty to emigrate: the optants could remain in the portion of Upper Silesia that the partition had made 'foreign territory' to them.[81] The right of residence included the

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nationality. Art 4 provides for the acquisition of Polish nationality through birth within the territory and stipulates for the persons affected the right of renouncing this nationality.

75 Casey observed that the Peace Treaties 'also contributed to the conflation of the legal and ethnic categories... In effect, treaty provisions like Article 91 linked membership within a political community to membership in an ethnic community. That is, "Poles" who were legal Germans could opt to fix that anomaly. As a clerk in novelist B Traven's dark comedy on interwar nationality politics asked a sailor, "Did you, within the proper time given, declare before a German authority … that you wish to retain German citizenship after the Polish provinces according to the provisions of the Treaty of Versailles were returned to Poland?"' See Casey (n 9) 92.

76 Art 25 § 1 GC.

77 Art 25 § 4 GC. In that case those who opted for Germany would need to transfer their domicile there within twelve months of the declaration of option.

78 'Poles who are German nationals over 18 years of age and habitually resident in Germany will have a similar right to opt for Polish nationality.'

79 Art 26 GC.

80 Arts 40–45 GC.

81 Berman (n 25) 1895 citing Kaeckenbeeck (n 26) 188.

right to exercise the profession or economic activity they practised before the transfer of sovereignty and the right to be treated on an equal footing with nationals.[82] From the language used by the Polish Minorities Treaty, we can surmise the existence of several concentric circles: the innermost composed of nationals-citizens notwithstanding their belonging to the ethnic majority in the respective state; persons belonging to an ethnic, religious or linguistic minority; and finally, all permanent residents.[83] The distance between the first and the second circle is reduced to a minimum by the equality of treatment 'in law and in fact'.[84] This is the basis of citizenship as a status protecting the persons when 'the politics of national loyalty [do] not necessarily correspond to linguistic boundaries'.[85] In the legal framework of the Convention habitual residence played a crucial role. In a great many cases submitted to the Tribunal, what mattered was to establish the domicile of the applicant on a certain date. The defining feature is threefold: the continuous presence on a certain territory which, pursuant to the Convention, gives rise to a legal status consisting of rights and duties. Citizenship does not aim to substitute nationality, but it definitely has an effect on it: it counterbalances and complements it. It also enlarges the scope of the group of subjects possessing the highest civil status in society.[86] This innovation is at the origin of the discourse heralding the emergence of a new 'international law of citizenship'.[87] As the recent

82 Art 43 GC.

83 André Mandelstam, 'La protection des minorités' (1923) 1 Recueil des Cours 367. See also Kratochwil (n 56) 502: 'Attempts to mediate these tensions [resulting from the drawing of boundaries between "insiders" and "outsiders"] in the fashion of Montesquieu, by positing three concentric circles of "belonging" that at the same time provide for a hierarchical and "functional" integration of identity and authority, are unlikely to succeed.' See Arts 2, 7 and 8 of the Polish Minorities Treaty.

84 Art 8 of the Polish Minorities Treaty; Art 68 GC.

85 Karch (n 12) 140.

86 There seems to exist a certain proximity between the idea developed in the present paper and the concept of 'quasi-nationality'. The similarity resides in that both cases attempt to relativise the figure of the alien; in Upper Silesia the persons belonging to the minorities were not aliens because their domicile predated the transfer of sovereignty just like the long-term foreign residents could be considered as quasi-nationals. Sébastien Touzé, 'La "quasi-nationalité", Réflexions générales sur une notion hybride' (2011) 115 RGDIP 5, 10, spec. 19–20.

87 Spiro (n 41) 717: 'This new discourse also supports arguments that habitual territorial residents should enjoy access to citizenship.' See also Diane Orentlicher, 'Citizenship and National Identity', in David Wippmann (ed), *International Law and Ethnic Conflict* (Cornell University Press 1993) 299: 'Access to citizenship for

study by Timothy Wilson has shown, identities in ethnically mixed border regions like Upper Silesia were extremely fluid.[88] The Geneva Convention left aside the question of identity (individuals could exercise their right of option and on a broader scale the same role was played by plebiscites)[89] and focused only on the 'objective determination' of nationality through domicile.[90] It is hard to overstate the revolutionary character of this objective determination operated by a third impartial judicial organ and submitting to judicial control one of the most sensitive facets of sovereignty.[91]

3. *Lawfare in The Hague, Mixed Feelings in Vienna*

In the first five years of its existence, the Arbitral Tribunal dealt with only 11 cases on nationality.[92] This was mainly due to two reasons: first, the period of option lasted until 15 July 1924; and second, many individuals were undecided which nationality to choose.[93] Even though their decision was not related to the identity but the formal link to a particular state, the choice would have serious repercussions on their everyday lives. But before the Tribunal could actually start the process of 'sorting out Poles and Germans', two important developments took place which should be seen in the broader context of the confrontation between Germany and Poland throughout the entire 1920s. Two cases decided in Vienna and The Hague set the background against which the Tribunal assumed its task and which had an immediate incidence on the approach of the Tribunal

habitual residents is founded in democracy and equality values, on a territorial-civic basis'.

88 See Timothy Wilson, *Frontiers of Violence: Conflict and Identity in Ulster and Upper Silesia, 1918–1922* (OUP 2010). See also Kamusella (n 8) 37–62. Cited by Volker Prott, *The Politics of Self-Determination* (OUP 2016) 132.

89 The right of option provided in Art 91 of the Treaty 'embodied the subjective idea of choice on the individual level, just as the plebiscite principle embodied it on the collective level'.

90 See also the judgment of the PCIJ in the *Rights of Minorities in Upper Silesia (Minority Schools)*, in which it declared that identity could not be subjected to 'objective' determination. (1928) PCIJ Series A no 12, 32.

91 Paul Weis, 'Statelessness as a Legal-Political Problem' in *The Problem of Statelessness* (World Jewish Congress 1944) 23: 'it becomes clear that, the compulsory settlement of conflicts of nationality laws by a supra-national judicature whose judgments would be binding on the States becomes imperative.'

92 In the next five another 153 cases were brought and the last four and a half years show a dramatic increase with 610 cases. Kaeckenbeeck (n 26) 131.

93 Kaeckenbeeck (n 26) 130.

on nationality and citizenship: the 1923 advisory opinion of the PCIJ on the acquisition of Polish nationality[94] and the 1924 arbitral award rendered by Georges Kaeckenbeeck.[95] Both states were engaged in what can be qualified as 'lawfare'[96] or 'judicial diplomacy'[97] as a number of cases (contentious and advisory proceedings) were argued before the PCIJe.[98]

3.1 The 1923 Acquisition of Polish Nationality Advisory Opinion

The advisory opinion requested by the Council of the League concerned the interpretation of Article 4 of the Polish Minorities Treaty. Some persons, who were formerly German nationals, were treated by the Polish government as not having acquired Polish nationality and as continuing to possess German nationality, which exposed them to the treatment laid down for persons of non-Polish nationality and prevented them from enjoying the guarantees granted by the Treaty. Since these persons were born in the territory which was transferred to Poland and since their parents had their habitual residence there at the date of birth of these persons, Germany argued that they fell within the scope of Article 4(1) and could consequently be considered as Polish nationals. Poland considered that the correct interpretation of that provision required that the parents of these persons had to be habitually resident on that territory both at the date of birth and at the date of entry into force of the treaty (10 January 1920). On 15 September 1923, the Court handed down its advisory opinion in

94 *Acquisition of Polish nationality* (1923) PCIJ Rep Series B no 7, 6.

95 *Affaire relative à l'acquisition de la nationalité polonaise (Allemagne/Pologne)* 1 RIAA (10 July 1924) 401–438.

96 David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 160: '"Lawfare" – law as a weapon, law as a tactical ally, law as a strategic asset, an instrument of war. … [L]aw can often accomplish what might once have been done with bombs and missiles: seize and secure territory, send messages about resolve and political seriousness, even break the will of a political opponent.'

97 Terry D Gill, *Litigation Strategy at the International Court* (Martinus Nijhoff 1989) 6.

98 Suffice it to mention the *Chorzow* cases saga comprising the *Certain German Interests in Polish Upper Silesia* and *Factory at Chorzow*, *Rights of Minorities in Upper Silesia*, as well as the advisory opinions on *German Settlers in Poland*, *Acquisition of Polish Nationality* and *Access to German Minority Schools in Upper Silesia*.

which it unanimously[99] found: first, that the issue fell within the scope of competence of the League and therefore within the guarantees protected by the League;[100] second, Article 4 of the Polish Minorities Treaty referred 'only to the habitual residence of the parents at the date of birth of the persons concerned.' In other words, it did not impose overly stringent requirements on the persons in question. The nationality of a state is not a necessary precondition for the membership of a minority within that state. The broad interpretation of the term 'minority'[101] adopted by the Court included inhabitants who differed from the population in race, language, or religion, ie inhabitants of this territory of non-Polish origin, whether they were Polish nationals or not.[102] In a telling *obiter dictum*, the Court observed that:

> One of the first problems which presented itself in connection with the protection of the minorities was that of preventing these States from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, *in spite of the link which effectively attached them to the territory* allocated to one or other of these States. It is clearly not a purely *fortuitous circumstance* that the

99 Judge Finlay appended observations in which he expressed that the Court 'should not merely have based its answer to the Polish contention as to competency on the view that the minority contemplated by Article 12 may be one of inhabitants simply, but that it should also have pointed out that, … the Polish case fails even if the minority were to be taken on the basis of *ressortissants*'. See PCIJ Rep Series B no 7 (Finlay) 26.

100 See Paul de Vineuil, 'Les résultats de la troisième session de la Cour permanente de Justice internationale' (1923) 4 Revue de droit international et de législation comparée (3rd ser.) 593.

101 Nathan Feinberg, 'La juridiction et la jurisprudence de la Cour permanente de Justice internationale en matière de mandats et de minorités' (1937) 59 Recueil des Cours 587, 635.

102 PCIJ 14: 'these clauses [of the Minorities treaties] considerably extend the conceptions of minority and population, since they allude on the one hand to the inhabitants of the territory over which Poland has assumed sovereignty and on the other hand to inhabitants who differ from the majority of the population in race, language or religion. The expression "population" seems thus to include all inhabitants of Polish origin in the territory incorporated in Poland. Again, the term "minority" seems to include inhabitants who differ from the population in race, language or religion, that is to say, amongst others, inhabitants of this territory of non-Polish origin, whether they are Polish nationals or not.'

> Treaties for the protection of minorities contain provisions relating to the acquisition of nationality.[103]

In the abovementioned passage the Court defended the position that although an effective link between the inhabitants and the territory must exist, this requirement need not be interpreted in an overly formalistic manner. The Court considered that the interpretation of the Polish government would 'amount to an addition to the text' which would only make sense if the habitual residence of the parents was aimed to create a presumption in favour of a 'closer, more enduring and more powerful link [between the children and] … Poland'. This, however, was not the case. Thus, pursuant to Article 4, ethnic Germans were considered as having acquired, *ipso facto*, the status of Polish *ressortissants*, *de plein droit et sans aucune formalité*, if born of parents domiciled in Poland at the time of birth.[104] The value of the judgment lies in this rejection of the excessively restrictive interpretation of the conditions for the acquisition of Polish nationality. The Court's interpretation inevitably undermined what Ole Spiermann qualified as 'the national principle of self-containedness'.[105]

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103 Ibid, 15 (emphasis added). In this passage, the Court arguably secretly paraphrased Count Rostworowski, who had argued in the parallel case concerning the German Settlers in Poland (which was decided five days before the present one, on 10 September 1923), that the fact that most of the settlers affected by the disputed Polish legislation were German, was merely a '*coïncidence fortuite*'. See the pleadings of Count Rostworowski in the *German Settlers in Poland* case, where he stated that : '*Le fait que les colons [of German settlers] sont exclusivement classés ou se classent d'eux-mêmes dans la catégorie d'Allemands au point de vue ethnique, est* une coïncidence fortuite *au point de vue de la législation et de la jurisprudence polonaises, mais elle s'explique au point de vue historique, notamment par la tendance de l'ancien Gouvernement prussien de faire servir l'œuvre de colonisation dans les provinces polonaises au renforcement du germanisme.*' PCIJ Rep Series C03/2, 436. ('The fact that the settlers are categorised or consider themselves as Germans from an ethnic point of view is a fortuitous coincidence from the point of view of the Polish legislation and case law but which can be explained from a historical point of view, in particular by the tendency of the former Prussian government to use settlers in the Polish provinces in order to strengthen Germanism'.) Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice* (CUP 2005) 187: 'As for the *German Settlers* opinion concerning discrimination in the context of property rights, the Permanent Court sensibly concluded that the Polish Government's declared policy of de-Germanisation amounted to discrimination, if not in law, then in fact.'

104 Observations of Judge Finlay, PCIJ Rep Ser B no 7, 23.

105 Spiermann (n 103) 79: According to this principle 'the state is seen as perfectly capable on its own, that is, in its national law, to regulate the relationship

However, the advisory opinion left open one important question because it did not provide a precise definition of the term 'domicile'.

3.2 The 1924 Vienna Arbitral Award

As soon became clear, the advisory opinion of the PCIJ failed to settle the issue of domicile. Although both states accepted in principle the definition ('permanent establishment with the intention of remaining'), many practical problems arose concerning its interpretation and in the following months, the controversy between Germany and Poland at the Council of the League festered.[106] After lengthy exchanges, an agreement was reached to initiate an arbitration which would eventually serve as a basis of a convention to be drafted by the two governments under the presidency of the arbitrator, none other than Georges Kaeckenbeeck, President of the Tribunal for Upper Silesia. On 10 July 1924, after the submission of the written pleadings (oral rounds were excluded as they would unnecessarily exacerbate the tension), Kaeckenbeeck gave a ruling on twelve issues on which the governments maintained opposing views.[107] There were twelve questions in total which concerned two issues: the meaning and (territorial and temporal) scope of the term 'domicile' and option.[108] For the present chapter, only the former will be discussed. The importance of domicile resides in that it establishes the link between a person and territory. It is at the heart of the conceptual triangle formed by territory, nationality/citizenship, and rights. The place where a person habitually resides is the place where he or she should enjoy the full spectrum of rights and their most effective protection.

The German government argued for a more flexible approach while Poland predictably favoured a strict interpretation implying an exclusive

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between individuals, and between individuals and the state; thus individuals are not normally a concern for the international law of coexistence.'

106 Kaeckenbeeck (n 26) 125.

107 1 RIAA 401–28 (in French).

108 As to the former some of the questions before the Arbitrator were whether it needed to be uninterrupted, the domicile of parents, whether the persons in questions needed to be German nationals at birth or at the moment of the transfer of sovereignty, the acquisition of the nationality by descendants, the nationality of women and children; regarding the exercise of options, he had to decide on the necessity to recognise their validity by the other state, the validity of options in some specific cases, the obligation to emigrate in the twelve months after the exercise of option (only for German nationals).

concentration of personal and economic relations in a single place.[109] Kaeckenbeeck began his analysis by insisting on the existence of an autonomous concept of domicile in public international law which differed from public law and even private international law.[110] For him. there was no doubt that the genuine connection between an individual and state was characterised by a concentration of a certain degree of economic and personal relations. The individual's habitual residence is the place where he or she is principally resident.[111] But the requirement of exclusivity of all economic relations in a single place supported by the Polish government is unjustly rigid and does not reflect the exigencies and the conditions of economic life.[112] Nor was the expression 'in a single place' to receive a strict interpretation.

> The choice of domicile as an indication of the links existing with a particular territory does not require the establishment to be localised in absolute terms. Changes of residence or even of municipality within the territory in question do not affect in any way the domicile as it is understood here. There is no need [for the persons in question] to remain fixed in a particular spot; what is required is a certain stability in the territory.[113]

In other words, what matters is not the almost dogmatic fixation on a particular immutable point in space but whether the person in question has fulfilled the objective and the subjective elements contained in the definition provided by the PCIJ, ie permanence and intention to remain. The rejection of the requirement of exclusivity led Kaeckenbeeck to admit the possibility that a person may have two domiciles in two different

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109 1 RIAA 407–409.

110 ibid, 407.

111 Cf Article 5 of the Convention on Certain Questions relating to the Conflict of Nationality Laws (signed 12 April 1930, entered into force 1 July 1937) 179 LNTS 90.

112 1 RIAA 408: '*Une concentration exclusive correspondrait d'ailleurs très mal à la vie sociale et économique actuelle qui, loin de se concentrer entièrement en un seul endroit, donne souvent lieu à une décentralisation très considérable*'.

113 ibid, 408: 'Le domicile choisi comme indice d'attache à un territoire ne demande pas un établissement absolument localisé. Des changements de demeure ou même de localité à l'intérieur du territoire en question ne nuisent nullement au domicile tel qu'il faut l'entendre ici. *Il ne faut pas la fixité sur un même point; il faut la fixité dans le territoire*'. (translation by the author) (emphasis added). See also *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ Rep Ser A no 7 (1926) 79

territories. That conclusion *per se* would not mean that two domiciles open the way for the acquisition of dual nationality. The latter was excluded by the right (which in a way was also a duty) of option. Individuals had the right to choose but they were also obliged to choose and even the non-exercise of that right could be considered as a matter of personal choice. Although Kaeckenbeeck indicated what domicile is not: ('*pas un établissement absolument localisé … il ne faut pas la fixité sur un même point*') but he carefully avoided defining the meaning of 'territory' ('*il faut la fixité dans le territoire*')[114] which was left to be determined by the Tribunal in each case. This flexible interpretation was matched by a broad territorial and personal scope. The habitual residence in Articles 3 and 4 of the Minorities Treaty concerned the entire territory of Poland and not only the part ceded by Germany. Women and children could acquire Polish nationality if they fulfilled the legal conditions even if their respective husbands or legal representatives did not fulfil the said conditions. After protracted negotiations during which the League continued to apply pressure, a compromise agreement was finally concluded in Vienna on August 30, 1924, which adopted the Polish view of option and the German theory of domicile.[115] As will be demonstrated in the next section, the reasoning and the conclusions reached by Kaeckenbeeck in the arbitral award exerted significant influence over the approach of the Mixed Arbitral Tribunal in its case law on the matters of nationality and right of residence.

4. *'It Was Above All Life That Was to Be Interpreted': The Five Pillars of Citizenship Protection in the Case Law of the Tribunal*

In a speech before the Grotius Society in 1935, Kaeckenbeeck observed that:

> Anyone who examines the five volumes of precedents of the Arbitral Tribunal will be struck by the place occupied by nationality cases. The reason is this: the provisions of the Geneva Convention concerning

114 '[T]he establishment [need not] to be localised in absolute terms … There is no need [for the persons in question] to remain fixed in a particular spot; what is required is a certain stability in the territory'.

115 Jacob Robinson, Oscar Karbach, Max Laserson, Nehemiah Robinson and Marc Vichniak, *Were the Minorities Treaties a Failure?* (Institute of Jewish Affairs 1943) 121–22.

> nationality will still have to be frequently applied after both the Conciliation Commission and the Arbitral Tribunal have ceased to exist.[116]

But the Tribunal's contribution goes even beyond this already quite impressive feature of its jurisdiction. This section will show that in several ways the Tribunal was able to protect the rights of individuals differing from the majority in Upper Silesia. The Tribunal would not be able to achieve that without the firm basis provided by the Geneva Convention, the Polish Minorities Treaty, and the Versailles Treaty. It did so by relying on the principle of effective interpretation, which was finding its place in international law and to which the PCIJ also had recourse in the context of minorities.[117] The relative brevity of the decisions was in stark contrast with the meticulous qualification of the facts. However, despite the painstakingly detailed legal regime, life quickly rushed in bringing up situations which were not foreseen by the drafters of the Convention. This was particularly relevant in the context of the determination of domicile. In the words of its President:

> in the matter of the definition of domicile, so vital for the application of the Geneva provisions on change of nationality, the Arbitral Tribunal above all repudiated rigid, automatic criteria. Its decisions were a constant reminder that all the facts must first be ascertained, and then be considered as a whole. *It was above all life that was to be interpreted*.[118]

Thus, it is not at all surprising that the interpretation of domicile was among the most important questions in the rich case law of the Tribunal. Whether certain conduct amounted to 'temporary abandonment' (*abandon temporaire*), whether it was the same as 'momentary abandonment' ('*abandon passager*') and how could one discern the subjective element (the intention to return) were hotly contested issues that receive an authoritative interpretation in *Puchalla*.[119]

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116 Kaeckenbeeck (n 33) 37.

117 See Spiermann (n 103) 188. On the principle of effectiveness in treaty interpretation in this context see also Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 134.

118 Kaeckenbeeck (n 26) 141 (emphasis added).

119 4 Arb Trib Dec 126ff. The importance of the case resided in the need for the Tribunal to decide on the meaning of the term 'temporary abandonment' as an essential condition for the preservation of German citizenship in the case of persons who already had their permanent residence in the Polish part of Upper Silesia before 1908 (Art 25 § 2)

Kaeckenbeeck and his colleagues were very much aware that nationality questions were at the heart of the sensitivities and sovereignty of states. Exercising judicial control over issues of nationality is one of the most conclusive proofs of the existence of a right to nationality, 'the acquisition or loss of which should be a matter of law, and not simply one of discretion for national authorities'.[120] This clearly illustrates Kaeckenbeeck's attitude towards the 'principle of self-containedness'.

The following subsections will first address the direct implications of the Tribunal's case law on citizenship. I start with the most immediate instance, namely the right to a nationality, followed by the right to residence and its corollary the protection against expulsion, the prohibition of discrimination and finally the protection of stateless persons and dual nationals. The last subsection deals with some instances of indirect protection such as vested rights which emphasise the role of domicile and consequently, of citizenship.

A preliminary clarification is warranted: Upper Silesia represented a peculiar instance of state succession under hybrid (international/local) administration. The fundamental disagreement between Germany and Poland on all matters of nationality and permanent residence resulted in a zero-sum game, the first victims of which were the individuals affected by the transfer of sovereignty. That is also why most cases were negative conflicts where the persons concerned would end up *de jure* or *de facto* stateless.[121] All the instances discussed in the following subsections were used to mitigate the negative effects of the partition on these vulnerable groups.

120 Kaeckenbeeck (n 26) 521. For the sake of clarity, it has to be pointed out that access to the Tribunal was open only after recourse to the Conciliation Commission had failed. Several passages in the *International Experiment of Upper Silesia* are revelatory of the tension between the two institutions which held opposing views on the issue of nationality. The Commission tried to block the way to the Tribunal and to transform the right of the inhabitants to acquire a nationality in conformity with the provisions of the Geneva Convention into the obligation of putting up with the nationality which the officials of both states agreed to confer to them. It is easy to imagine that the members of the Conciliation Commission viewed with suspicion the attempts of the Tribunal to apply the Convention and to protect the rights of individuals and considered them as 'international encroachments'. Kaeckenbeeck (n 26) 130, 142.

121 ibid, 123.

4.1 The Right to a Nationality

The first and most powerful incidence of territory on nationality, where we see most clearly how permanent residence paves the way to the full range of rights is the conception of the right to a nationality.[122] The previous section broached the issue in relation to the meaning of domicile. But the entire purpose of the interpretation of that term is precisely to determine who can undergo the spectacular transformation from a non-national permanent resident into a citizen. The existence of a customary provision on the right to a nationality in international law is subject to intense ongoing debate, especially in the context of statelessness, where its absence is felt most acutely. The Geneva Convention was perhaps the first international instrument to establish a subjective right to a nationality on which the Arbitral Tribunal was competent to make binding pronouncements with lasting effects. The majority of the post-WWI treaties contained clauses on nationality, but they were mostly concerned with the avoidance of statelessness (not very successfully in this regard)[123] and did not go as far as to amount to a recognition of the subjective right to a nationality.

The right for permanent residents of German origin to acquire Polish nationality is also the instance where nationality and citizenship merge into one inseparable compound. In all other situations, notably the right of residence, the individual is protected as a citizen by his or her domicile. The subjective right to a nationality constitutes an important exception in the broad framework of the regulation of this extremely delicate issue. As pointed out by President Kaeckenbeeck:

> As international lawyers are wont to say, nationality is a reserved matter, i.e. one for which international law gives the States a sort of blank cheque. But this reservation is in reality only partial, and the cheque is not quite blank.[124]

122 See Kaeckenbeeck (n 26) 214. The term preferred in the present chapter is 'right to a nationality' which implies a particular nationality as opposed to 'right to nationality'.

123 Vichniac (n 67) 145–46.

124 Kaeckenbeeck (n 26) 520. See also ibid, 521.

4.2 The Right of Residence and the Protection Against Expulsion

The previous sections posited that the 1919 treaties and the Geneva Convention as *lex specialis* distinguished between citizenship based on domicile and nationality based on descent. The gateway to the subjective right to a nationality and all the other rights was Article 29 GC which contained the definition of domicile. It was also one of the very last provisions on which agreement had been reached in Geneva[125] and it is hardly surprising that the definition was intentionally left ambiguous. It was only the 1924 arbitral award that provided the necessary clarity with an interpretation expressing support for the flexible approach defended by the German government.

The right of residence is the first instance where nationality and citizenship take different paths.[126] It is an original creation of the Convention. In essence, it gave people settled in Upper Silesia at the time of partition the right to remain there undisturbed for fifteen years even though they had not acquired, or they had lost the nationality corresponding to their place of residence. Those who could benefit from the right were therefore always aliens, ie persons not belonging to the majority[127]. Another offshoot of this right was contained in Article 43 which provides that regarding their business or lucrative activities, these aliens could not be subjected to other restrictions than such as existed by law at the time of partition and were for the rest to be treated on the same footing as nationals[128].

The Tribunal examined each case with meticulous care to determine the domicile of the person(s) in question. The situations varied and significant flexibility was warranted. The Tribunal did not set out a strict approach to domicile – it merely 'collected the facts and drew from them a natural conclusion'.[129] Of course, it is difficult to take this statement at face value. There could be no such thing as a 'natural conclusion' because most of the cases discussed by Kaeckenbeeck in his book presented a difficulty of one sort or another: either the facts could not be clearly established, or they simply did not fit the existing legal regime. The tribunal used a variety of interpretive techniques and the flexibility demonstrated by Kaeckenbeeck as arbitrator in Vienna, continued in Beuthen. A good illustration of the flexibility is presented by the *Czollek* case. The applicant was born in

125 Kaeckenbeeck (n 26) 135.
126 Arts 40 and 41 of the Convention.
127 Kaeckenbeeck (n 33) 38.
128 Art 43 GC.
129 Kaeckenbeeck (n 26) 137.

Krascheow in German Upper Silesia, and he lived there until 1921 when he moved to Beuthen and Siemianowice (on the Polish side) to work as a stoker. One day Czollek was arrested by German officials who found a membership card of the Polish insurgents. After a judicial procedure, the government of Oppeln issued an order of expulsion because it considered him to be a Polish national. The main question before the Tribunal was whether on 15 June 1922 Czollek had his domicile in Krascheow or Siemianowice. Czollek, however, kept close ties with his parents on the German side. He spent all his free time with his family, he contributed significantly to paying the loan for the family house and his clothes were regularly washed and mended at home and he took victuals with him to his workplace. He had gone to Siemianowice on the Polish side only because he found a position there. The Polish authorities had issued him with a circulation permit, which stated that he was German. The Tribunal considered that his domicile was where his activities, interests of personal and economic nature were concentrated. Czollek was declared to be a German national and his expulsion did not take place.[130] Kaeckenbeeck reiterated that the Tribunal merely 'collected the facts and drew from them a natural conclusion, which was also a human one. It showed the Conciliation Commission what it should have done'.[131] The attempt of the Tribunal to locate the centre of vital interests strongly resembles the so-called 'genuine link' doctrine. And just like in *Nottebohm* three decades later, the context of the case was that of a single nationality.[132] But the definitive interpretation of Article 29 came in the *Halamoda* case.[133] The applicant was prosecuted for not possessing a Polish passport and for residing without permission at Bresnitz. Halamoda claimed German nationality because he had his domicile in German Upper Silesia at the time of the transfer of sovereignty. The local German administration of Ratibor considered him as a Pole because of his domicile in Polish Upper Silesia. Like Czollek, Halamoda found work in Polish Upper Silesia, and

130 Kaeckenbeeck (n 26) 136.

131 Kaeckenbeeck (n 26) 137.

132 *See Nottebohm* 1955 ICJ Rep 22 (noting approach of arbitral bodies to claims of dual nationals to give 'their preference to the real and effective nationality ... that based on stronger factual ties between the person concerned and one of the States whose nationality is involved'). On the criticisms regarding the approach of the Court, see Robert Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 1. See also Ian Brownlie, 'The Place of the Individual in International Law' (1964) 50 Virginia Law Review 446.

133 1 Arb Trib Dec 122.

he returned every Saturday to his family in Bresnitz in the German part; he carried out domestic tasks, he washed his clothes there and prepared food for work. The Tribunal adopted a holistic approach towards the factual background, considering all the circumstances. It confirmed its conclusion in *Czollek* and found that the domicile of Halamoda was in German Upper Silesia. The Tribunal did not use or impose a strict methodology on how to determine the domicile; it preferred to remain flexible and take all the circumstances into account. In the cases, mentioned by Kaeckenbeeck, the workplace seems to have been attributed less weight than personal interests. Family relations were granted particular attention, even though the Tribunal did not elevate the place of residence of wife and children to the rank of a decisive criterion.[134]

Another example of the rejection of formalism in the appreciation of facts was *Lindhorst*. The claimant had lived in Polish Upper Silesia around the time of the transfer of sovereignty but moved to Bielefeld just before the transfer while his family had remained in Poland in preparation to join him. The German authority took the view that he 'had become a Pole'.[135] After Lindhorst was able to prove that he did not have a domicile in Poland after mid-June 1922 and all his furniture was packed and waiting to be shipped to Germany, the Tribunal reversed the decision of the Conciliation Commission and concluded that Lindhorst was able to preserve his German nationality. The absence of his family in the relevant period did not have a decisive impact on his situation.[136] The decision is another instance of the difference of approach between the Tribunal and the Conciliation Commission. One of the most important threats to the right to nationality was that the individual's right to a nationality could be effectively replaced by the agreement of the members of the commission.[137]

If protecting the right to a residence was the basis of the citizen as a member of the community, that right would be seriously impaired if it had not been complemented by the protection against expulsion. The power to decide whom to exclude physically remains an important

134 Kaeckenbeeck (n 26) 139. 3 Arb Trib Dec 76.

135 Kaeckenbeeck (n 26) 139.

136 For other cases demonstrating the flexibility of the approach, see *Fuchs*, 5 Arb Trib Dec 88 or Kaeckenbeeck, (n 27) 140–1; *Kasparek* 7 Arb Trib Dec 278; cases of vagabonds St. 106/33, St 161/35; of prisoners: *Drewniok*, 7 Arb Trib Dec 64; St. 14/29, St. 20/32; of a permanent invalid at home: *Dubiel*, 3 Arb Trib Dec 34; of refugees: St. 4/29, St. 114/33, St. 24/32

137 Kaeckenbeeck (n 26) 143.

prerogative of states.[138] Article 44 of the Geneva Convention stipulated the right of states to expel persons for reasons of public security (internal and external) or any other reason of police, hygiene, morals or public assistance. Cases of expulsion were frequently dealt with urgently such as *Schult* where the interim decision (resembling the provisional measures order in the International Court of Justice procedure) was dictated by Kaeckenbeeck on the phone to the Polish police who were already at the house 'ready to proceed with the forcible removal of Director Schult and his family'.[139] The authority issuing the expulsion order also had to demonstrate the existence of one of the grounds listed in Article 44. If the Tribunal was not satisfied with the information provided, it could conclude that the expulsion order constituted a violation of the right to residence as demonstrated by *Diederichs.*[140] The Tribunal did not deny the margin of appreciation left to states but it used it to strengthen its power of judicial overview. If the authority could prove the existence of a link between the circumstances, the measure and motives of state security, the Tribunal could do nothing but find that the right to residence has not been violated. It could not 'in each particular case pass on the necessity of the measure.'[141]

While admitting that the right of residence played a significant role in all matters of territorial adjustments, Kaeckenbeeck did not hide his scepticism regarding the general usefulness of this right.[142] 'It would certainly be wrong to deny that under exceptional circumstances a right of residence may, for small numbers of people, prove a boon and a definitely humane solution. But mostly it appears, from my experience, politically unsound

138 In *Hochbaum*, a landmark case on expulsion, the Tribunal referred to 'the right of the Contracting Parties to forbid, for reasons of State security … this reservation – which is unqualified – concerns the fundamental right of every sovereign State to decide, within its own discretion, upon the staying of aliens in its territory', 5 Arb Trib Dec 140. See Gerard Conway, 'The Arbitral Tribunal for Upper Silesia' in Ignacio de la Rasilla and Jorge E Viñuales (eds) *Experiments in International Adjudication* (CUP 2019) 110.

139 Kaeckenbeeck (n 26) 208.The decision was based on Article 599 GC. 'This interim decision is necessary because, owing to the shortness of the time limit, the Arbitral Tribunal has no possibility of examining the merits of the case, whereas the carrying out of the expulsion would cause considerable damage to the persons concerned'.

140 2 Arb Trib Dec 84.

141 ibid.

142 Kaeckenbeeck (n 26) 213.

and humanly dangerous'.[143] This statement comes in stark contrast with the overall exposition of the case law of the Tribunal in which the right of residence features prominently. Paradoxically, Kaeckenbeeck contrasts the negative conclusion on the right of residence with the international judicial control of change of nationality, which was and remains a much more contested issue. It is perplexing why he considered that matters of nationality *per se* were less susceptible to provoke tension than a permanent residence, given that the former was more immediately related to subjective perceptions of identity than the latter which was more susceptible to objective appreciation. Judging from the conclusions regarding the Tribunal's success, Kaeckenbeeck seemed to take the view that the right to a residence could not be compared with the right to *a* nationality, implicitly revealing the tension between nationality and citizenship; furthermore, even though at the time the advent of such a right outside the narrow context of Upper Silesia was deemed possible, in the present context the development of this subjective right is slow and rather unsatisfactory while citizenship enjoys more attention.

4.3 The Prohibition of Discrimination

As already mentioned, Article 43 of the Convention provided that people who had the right to preserve their residence could not be subjected to other restrictions than such as existed by law at the time of partition and were for the rest to be treated on the same footing as nationals. Due to the severe economic crisis in the area, individuals dismissed by their employers frequently relied on this provision and argued that their dismissal in preference to certain nationals, not entitled by their social circumstances to more regard, was due to pressure of the authorities on their employers.[144] The case of *Gilga* clearly illustrates the importance of this element in the legal framework of the Convention.[145] The second case is not part of the case law of the Tribunal, but is related to the Upper Silesian context and represents special interest: the famous *Bernheim* petition.

Gilga had worked for 25 years for the Rybnik coal-mining company. In September 1930 he was given notice for the reason of staff reduction. He protested and after some lengthy administrative procedures, his protest

143 ibid.
144 Kaeckenbeeck (n 33) 38.
145 4 Arb Trib Dec 260.

was rejected by the Conciliation and Arbitral Commission which stated that since Gilga was an alien (German), given the absolute necessity of reducing staff, it was possible to dismiss him as alien. The Tribunal stated that:

> Denying protection to persons possessing the right to residence would thus mean differential treatment as compared with nationals with regard to lucrative activities and it would be contrary to article 43. This does not imply that persons possessing the right of residence should be treated more favourably than nationals. If, therefore, nationals have to be dismissed for economic reasons, the dismissal may also extend under the same conditions to persons possessing the right of residence because they are not entitled to privileged treatment. *But neither should they be less well treated.* In their case, as in the case of nationals, there must therefore be examined without regard to nationality whether, taking into account a social and family conditions, there are actual reasons important enough to justify their dismissal. … the only reason for the dismissal of the complainant was his nationality. His right of residence has not been taken into consideration in this connexion and has therefore been violated.[146]

This is a strong statement in favour of establishing a link between rights, territory, and citizenship where a permanent resident cannot be discriminated against because he did not belong to the ethnic majority.

The other important case was not decided by the Arbitral Tribunal but its presence is justified first, by the relevance for non-discrimination and second, for the attention it attracted to the point that we can arguably consider *Bernheim* as an instance of strategic human rights litigation *avant la lettre*.[147] The condition of the Jewish inhabitants in German Upper Silesia had worsened considerably in the first months of 1933 following Hitler coming to power. In a meeting in Katowice, leaders of the Jewish community in Upper Silesia decided to attempt to attract the attention of the Council of the League of Nations. To do so, it was necessary to file a petition on behalf of someone who was no longer on that territory to

146 Cited in Kaeckenbeeck (n 26) 199.

147 This short exposition of the *Bernheim* case is based on the article by Johann W Brugel, 'The Bernheim petition: A challenge to Nazi Germany in 1933' (1983) 17 Patterns of Prejudice 17–25. 'Strategic litigation is the identification and pursuit of legal cases as part of a strategy to promote human rights. It focuses on an individual case in order to bring about broader social change', <https://trialinternational.org/topics-post/strategic-litigation> accessed 30 January 2023.

avoid worsening his personal situation. This person was Franz Bernheim. Between 1931 and 1933 he lived in Gleiwitz and worked in a company from which he was dismissed in April. Bernheim was a brother-in-law of a left-wing publisher, which additionally exacerbated his position and led him to emigrate to Prague. The petition was drafted by the president of the Jewish party of Czechoslovakia, Dr Emil Margulies, and sent to Pablo de Azcárate, head of the Minorities Section in the League Secretariat. The petition reproduced recent German legislation and made a larger case for the treatment of the Jewish minority in Upper Silesia, claiming that it was in breach of several provisions of Part III of the Geneva Convention which guaranteed the equality of all German nationals (ie citizens) before the law.[148] Bernheim requested that the Council annul all the legislative and administrative measures, that the rights of the Jews be restored and they receive compensation.[149] The machinery of the League was set in motion with impressive speed. Only two days later the Secretary-General of the League circulated the petition to the members of the Council. The German representative at the Council Keller considered that Bernheim was not even entitled to lodge a complaint since he was neither by origin nor by other means connected with Upper Silesia. Keller declared that Germany was open to settling the matter through the 'local procedure' provided by the Convention but the Council decided to ask three international lawyers to prepare an opinion on whether 'with a view to determining the Council's incompetence to decide on the said petition, it can be validly argued that the petitioner does not belong to the minority because he has no sufficient connections with Upper Silesia'.[150] The committee, composed of Max Huber, Maurice Bourquin and Manuel Pedroso, found that the German arguments regarding the admissibility of the petition were ill-founded. Their answer was as follows: 'If these facts are correct – and they have not been disputed – the undersigned concludes that Herr Franz Bernheim must be regarded legally as belonging to a minority within the meaning of Article 147 GC'.[151] The text of the Convention did not require that 'the petitioner must either have been domiciled in the plebiscite area for a certain minimum period, or have connections with it of a specific

148 For a more detailed exposition of the provisions in question, see André Mandelstam, 'Les dernières phases du mouvement pour la protection internationale des droits de l'homme' (1933) 12 Revue de droit international 469, 502.

149 ibid, 503.

150 Only the first argument is mentioned here. The other two are not directly relevant for the purposes of our study. Kaeckenbeeck (n 26) 264.

151 ibid, 265.

nature, such as origin or family ties, or possess the nationality of the State of Prussia'.[152] The fact that Bernheim was not physically present in the territory of Upper Silesia could not deprive him of the right conferred to him by Article 147. Moreover, the committee found that the fact that the petitioner was not affected himself by the legislation in question, did not affect the petition. 'The only interest the petitioners are required to have is that resulting from their being actually members of a minority'.[153] In the end, the case came before the Mixed Commission, which granted Bernheim compensation although the German representative tried to prevent this by arguing that Bernheim was dismissed because of his incompetence and communist tendencies and not for ethnic reasons.[154] After a couple of months, the administration in Oppeln declared that the legislation in question had no validity in Upper Silesia.[155] The victory was short-lived since after the lapse of the Geneva Convention on 15 July 1937 all the measures were reinstated. On the other hand, Germans in Polish Upper Silesia were systematically discriminated against, not for ethnic reasons, as noted by Kaeckenbeeck, but as part of the process of 'polonisation' of the region in the context of a severe economic crisis.[156]

4.4 The Protection of Dual-Nationals and Stateless Persons

The Geneva Convention did not mention the possibility of dual citizenship, but it did not exclude it either. In practice, however, both states were extremely reluctant to grant full rights to dual nationals.[157]

In the context of widespread nationalism where identity, loyalty and nationality were intrinsically related, double nationality and statelessness were regarded with equal suspicion.[158]

The protection against statelessness and the protection of dual nationals is an essential pillar in the process of autonomisation of citizenship. Their presence in the same subsection is justified by the general attitude towards them. Both were perceived as equally anomalous situations, two sides of

152 League of Nations, C.366.1933.I Geneva June 2nd, 1933, cited in Kaeckenbeeck (n 26) 265.
153 ibid.
154 Kaeckenbeeck (n 26) 266; Brugel (n 147) 23.
155 ibid.
156 Kaeckenbeeck (n 26) 267.
157 Erpelding (n 4) 288.
158 See Casey (n 9) 100.

the same coin, resulting from the positive or negative conflict of laws.[159] The procedure foreseen by the Convention followed the prevailing trend at the time: it aimed to sort out persons and to reduce their links to single citizenship. If a genuine link meant a link with a single state, 'to the exclusion of any other state'[160] and genuine loyalty could exist only towards one state, a person without a state is as unfit for citizenship as the dual national. To eliminate this, the Convention had two instruments: option and renunciation. While the former was meant to readjust the relationship between individuals and states, the latter was clearly meant to put an end to dual nationality without, however, resulting in statelessness.[161] The peace treaties aimed to get rid of statelessness and they failed signally in that endeavour.[162] The Geneva Convention contains a complex set of interlocking rules for the acquisition and loss of nationality[163] which had the residual effect of reducing the possibility of statelessness. The system could be qualified as thoroughly territorial because most of the safety valves preventing the person from statelessness were based on his or her domicile. Some provisions had the same function, although implicitly, for instance, those on the change of nationality of married women and children.[164] Article 28 provided the last line of defence, some sort of a legislative *pis-aller* in cases when it was impossible to determine the nationality according to the provision of the Convention, nor determine the habitual residence. Pursuant to this provision, all persons born within the plebiscite area before the date of the transfer of sovereignty and whose nationality could not be determined, are to be considered nationals of the state to which the place of their birth has been attributed as a consequence of the partition. Of course, the scope of the provision is limited only to persons born in Upper Silesia. The usefulness of the provision was well illustrated by the *Dominik* case.[165] Its complex factual background involved several moves back-and-forth between German and Polish Upper Silesia, at times without informing the police authorities and staying for weeks and

159 See the Preamble of 1930 Convention.

160 *Nottebohm* 23: 'the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with *that of any other State*." (emphasis added).

161 Kaeckenbeeck (n 26) 157.

162 Norman Bentwich, 'Statelessness through the Peace Treaties after the First World War' (1944) 21 BYBIL 171.

163 Arts 25–28 GC.

164 Arts 30–31.

165 Kaeckenbeeck (n 26) 180.

months in parents' or friends' houses. The lapse of time and the conflicting statements of the witnesses additionally complicated the establishment of facts. Since the nationality of Dominik could not be determined on the basis of Article 26(1) or (2), Article 28 came into play. According to the reasoning of the Tribunal, Article 28 became operative when it was not certain whether a particular person had to change their citizenship or had to remain German.[166] The provision had one inherent limitation, however: the person in question had to have been born in Upper Silesia. Once again, the territorial link provided the indispensable (albeit limited) safety net for the prevention of statelessness.[167]

The situation of dual nationals was of similar vulnerability because many of them were *de facto* stateless. Many families were treated as Poles by the German authorities while the Polish administration considered them as German or having both nationalities. As a consequence, they had to renounce one of their nationalities, but the Convention contained more automatic machinery in which domicile played an important role. Pursuant to Article 26 (3) the domicile at the end of the two years was, in the absence of express renunciation, decisive for the nationality to be preserved. But there were some diabolically complicated situations. In *Plonka* a person born in what had been Russia and after the war, Poland, found himself *de facto* stateless: he was domiciled in Polish Upper Silesia but if the relevant provision of Article 25 GC was applied to him, he would be German; the German authorities considered him to fall under Article 7 of the Vienna Convention and consequently, for them he was a Polish national.[168] Plonka was in the position where he could 'fall between two sovereignties'.[169] The German authorities confiscated his German passport, which Plonka argued violated Article 83 of the Geneva Convention[170] in view of the fact that his acquisition of German nationality would have automatically deprived him of the prior Polish nationality that he had,

166 Kaeckenbeeck (n 26) 182. The main problem consisted in the need to operate an interpretation harmonious with Article 6 of the Polish Minorities Treaty.

167 The need for certain links between an individual and a state as a basis for conferring nationality was emphasized by various members of the International Law Commission in the debates on elimination and reduction of statelessness. Habitual residence and the question of allegiance recur in these discussions. Brownlie (n 132) 440.

168 2 Arb Trib Dec 100.

169 Kaeckenbeeck (n 26) 179.

170 Article 83 stated that the Contracting Parties undertake to assure full and complete protection of life and liberty to all inhabitants of the plebiscite territory, without distinction of party, nationality, language, race or religion.

meaning he would now be *de facto* stateless.[171] On 15 June 1922 (the date of the transfer of sovereignty), Plonka was domiciled in Polish Upper Silesia, but Article 25 did not apply to him because on that day he was already a Polish national and could therefore not acquire Polish nationality again. The Arbitral Tribunal's decided that:

> The fact is that Leo Plonka, a German subject by birth, had already acquired Polish nationality on January 10th, 1920, because his birthplace, Bolesławice, district of Wielun, was in former Russian Poland, which is now Polish territory, and the Court of Arbitration can undoubtedly base its decision on the fact that Plonka's parents were domiciled at the time of his birth in 1878 on what is now Polish territory – according to the unrefuted evidence laid before the Court, the family only removed to Germany in 1896. Accordingly, in the case of Leo Plonka the conditions of article 4 of the Minorities Treaty concluded on June 28th, 1919 between Poland and the United States of America, Great Britain, France, Italy and Japan, are complied with; in addition Article 2 (3) of the Polish law of January 20th, 1920 (Legal Gazette, IJo.7 § 44), expressly recognises the applicability of that Treaty.[172]

However, the Arbitral Tribunal decided that he had also remained a German national: '… since he was at the time domiciled in German Upper Silesia (Article 7 of the German-Polish Convention for the interpretation of the Minorities Treaty, dated August 30th, 1924); as from 10 January 1920, therefore, he possessed both Polish and German nationality.'[173] In a great many cases, for example *Scherff*[174] (which happened to be also the first case on nationality) and *Bulla*[175], the Tribunal found that the persons had both nationalities. However, this had the same practical consequences as having no nationality at all.[176] The Tribunal explicitly condemned this attitude in *Kirsch*.[177] Since the conclusion reached by the Conciliation Commission that Kirsch had dual nationality, she had encountered many practical difficulties as she was recognised neither as a German nor as a Pole.[178] The Tribunal confirmed her dual nationality and it stated that the

171 Conway (n 138) 112.
172 *Plonka* (n 168), paras 9–10.
173 ibid, para 11.
174 1 Arb Trib Dec 58.
175 4 Arb Trib Dec 106.
176 Kaeckenbeeck (n 26) 134.
177 7 Arb Trib Dec 50.
178 Kaeckenbeeck (n 26) 134.

consequence of dual nationality must be that the person concerned had to be considered as a national in each of the two states. It must not lead to the authorities of each state acknowledging only the nationality of the other state, and therefore treating persons with dual nationality as if they had none.[179] In factually and legally complex cases such as *Skrzipietz*, who was also threatened with *de facto* statelessness and expulsion if he did not get a German passport, the Tribunal chose the most straightforward solution and it found that since Skrzipietz was born in the plebiscite area, Article 28 GC was applicable and he was a German national.[180]

4.5 The Indirect Relevance of Citizenship Through the Protection of Minorities

While the previous sub-sections confronted head-on the most conspicuous aspects of the emergence of citizenship as an autonomous concept, the present complements the picture with some instances where indirectly the Convention was able to provide certain protection to non-nationals thus diminishing the role of nationality. In other words, individuals who were not of German or Polish nationality, but whose rights came within the scope *ratione materiae* of the Geneva Convention, could also bring claims before the Arbitral Tribunal.[181] All the examples are drawn from Part III of the Geneva Convention which deals with the protection of minorities. Although Articles 56 and 58 limit the jurisdiction of the Tribunal and the Conciliation commission only to issues falling in Part II (Nationality and domicile), in some cases indirectly the rights of minority members were protected in all matters regulated by Part III.

The first case where nationality and citizenship differed and the protection of minorities served as a safety net for the protection of both was *Bruck*.[182] The case concerned a medical doctor, a German national domiciled in Polish Upper Silesia who was dismissed because he was not a Polish national. Pursuant to Article 40 Dr Bruck had the right to preserve his domicile. and he also enjoyed the rights provided for in Articles 43 (free exercise of one's profession) and 82 (free access to public institutions).[183] He claimed a violation of those provisions. The Polish rep-

179 Kaeckenbeeck (n 26) 134.
180 See Kaeckenbeeck (n 26) 188.
181 Conway (n 138) 118.
182 1 Arb Trib Dec 70.
183 Art 43 protects the right to continue exercising the profession after the transfer of sovereignty to the persons who were allowed to retain their domicile; Art

resentative strongly contested the jurisdiction of the Tribunal because *inter alia* the provisions in question belonged to Part III (rights of minorities). The Tribunal found (while interpreting Article 56), that its jurisdiction is not 'conditional on the rights in question being attached to the right of residence through a provision of Part II [of the Geneva Convention]; [the words '*en vertu des dispositions de la présente partie*' in article 56] made it conditional on the rights in question being attached to a right of residence valid under the provisions of Part II.'[184] In other words, what really mattered for the protection of the rights under Part III (Protection of minorities) was that the person had a valid residence under Part II. The Tribunal rejected the argument raised by the Polish representative that the correct procedure in the case of Article 82 (concerning the preservation of the domicile of certain persons) was the special petition procedure for minorities, ie Council of the League, Minorities Office, President of the Mixed Commission, President of the Arbitral Tribunal.[185] But the conditions for the right of residence imposed by Article 40 were very different from the conditions of members of minority (Article 74). The former was not a subdivision of the latter. Thus, the scope *ratione personae* of the right to a residence was larger than the category of persons belonging to a minority. Kaeckenbeeck commented that 'the importance of the decision consisted less in the Tribunal's finding that rights resulting from Dr Bruck's right of residence in Polish Upper Silesia had been infringed than in the authoritative expression of the Tribunal's determination to discountenance measures of exclusion for reasons of nationality at the expense of persons having a right of residence in either part of Upper Silesia.'[186] Such cases, as unpleasant as they were, were not an exception.

Another important contribution of the case law of the Tribunal where the strengthening of citizenship is more visible is the confirmation of the principle of family unity. In the *Neumann* case, the four children of a German father killed in the war were deprived of their father's war pension by the Polish state because they were not Polish nationals. After the partition, the children's stepfather had become a Polish citizen through his domicile (Article 25 GC). His wife, the mother of the children, had acquired Polish nationality through the marriage. The question was whether the children had also *ipso facto* acquired the new nationality from their mother. The Tri-

82 extends the equality treatment of domiciliated members of the minorities in several cases.

184 Kaeckenbeeck (n 26) 190.

185 Art 147ff of the Convention.

186 Kaeckenbeeck (n 26) 191.

bunal took the view that the mother had acquired *ipso facto* the nationality of her second husband according to Article 31 (4) GC. This acquisition was shared by her children pursuant to Article 31 (1).[187] The acquisition was derivative but nonetheless *de plein droit*.[188] Moreover, the subsequent reacquisition of German nationality by the stepfather and their mother in 1926 by naturalisation did not affect their Polish nationality.[189]

5. Conclusion

This chapter has attempted to show the crucial role of domicile in the case law of the Arbitral Tribunal for Upper Silesia concerning nationality and residence. It demonstrated some of the ways in which the Tribunal contributed to the emergence of citizenship as an autonomous concept in international law, distinct from nationality. On the one hand, the 1922 Geneva Convention provided a solid basis of the individual's right to a nationality, the acquisition or loss of which should be a matter of law and not simply at the discretion of the national authorities, an achievement largely unsurpassed.[190] On the other hand, the analysis of the case law demonstrates the remarkable range of instances where citizenship, understood as status comprising rights and duties granted to individuals linked to a certain territory, may provide protection to those who share the same territory with an ethnic majority without belonging to it. Upper Silesia was in the vanguard of the experiments of the League of Nations. Its success may be explained by three reasons. The Tribunal was able to contain some of the ugliest manifestations of nationalist aspirations (on both sides) – expulsion, discrimination, denial of rights and statelessness.

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187 In the event of a change of nationality as of right, the legitimate children of at least 18 years whose parents are alive, will acquire the nationality of those of the parents who is granted their legal representation. If only one parent is still alive, the child will acquire his/her nationality. If both parents are alive but they have been deprived of legal representation, the child will acquire the father's nationality father. (translated from French by the author) ('*En cas de changement de nationalité intervenant de plein droit, les enfants légitimes âgés au moins de dix-huit ans dont les parents sont tous deux en vie, acquièrent la nationalité de celui des parents auquel revient la représentation légale. Si un seul des parents est en vie, l'enfant acquiert sa nationalité. Si les parents sont tous deux en vie, mais sont tous deux privés de la représentation légale, l'enfant acquiert la nationalité du père*').

188 Kaeckenbeeck (n 26) 153.

189 ibid, 154.

190 See Kaeckenbeeck (n 26), 521.

The second consideration is related to sovereignty. The Tribunal followed the reasoning of PCIJ in *Wimbledon* in the sense that absolute sovereignty does not and could not exist. Moreover, the decision to enter into an international engagement is one of the most characteristic features of sovereignty.[191] Third, the Arbitral Tribunal for Upper Silesia was a ground-breaking experiment because it was able to bind the wounds caused by the partition of the hotly disputed territory while dealing with one of the most sensitive characteristic traits of sovereignty: the competence to decide who is a national.[192] The biggest achievement of the Convention and the tribunal, in particular, was the ability to dissolve complex questions of identity and politics into legal procedures, criteria, technicalities and legal principles. In doing so, it significantly extended the category of persons possessing full membership in the political community without necessarily identifying with the ethnolinguistic or religious majority. All the tenets discussed in Section 4 constitute the building blocks of the emerging international human rights law as an immediate predecessor of the post-WWII legal regime. The answer to the old question of whether human rights are a citizen's rights depends on the definition of a 'citizen'.

The success was, as we know very well, only temporary. The outbreak of World War II put a violent caesura to the League of Nations. This chapter started with the ordinary Polish worker Franciszek Honiok who happened to be the first victim of the war. It is a much less known fact that in the 1920s, after staying in Poland for a couple of years, Honiok returned to his homeland in the German part of Upper Silesia. He became a salesman for agricultural machinery. The German authorities attempted to expel him, but Honiok sought protection from the machinery established by the Geneva Convention and was able to prove that he had the right to retain German citizenship.[193] His tragedy is a sad reminder that individuals

191 PCIJ Series A no 1, 25.

192 Arendt (n 45) 278: 'theoretically sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion.'

193 It is not entirely clear whether he applied to the Mixed Commission for Upper Silesia or to the Conciliation commission in matters of nationality. The search in the archives of the Tribunal and the Conciliation commission in matters of nationality gave no results. Authors like Eugeniusz Guz, *Zagadki i tajemnice kampanii wrześniowej* (Bellona 2011) 147 and Roger Moorhouse, *Poland 1939* (Basic Books 2020) seem to repeat what was said by Donald Cameron Watt *How war came: the immediate origins of the Second World War* (Pantheon 1989) 532: 'The first casualty of the Second World War had, however, died before 4.45 when the guns began. His name was Franz Honiok. He was a "Konserve". He had been a salesman for agricultural machinery, who came from a small town

and groups could only be safe when their rights are protected under international law.

2022 marks the centenary of the Geneva Convention, which presents an excellent opportunity to reassess the relevance of the triangle of nationality-territory-rights. Unfortunately, the issue of nationality as ethnicity has not been resolved, as demonstrated by some initiatives which resurface periodically. The potential land swap between Kosovo and Serbia threatens to create new vulnerable persons and to open a Pandora's box of territorial claims and ethnic nationalism.[194] The attempt to 'sort out' or exchange individuals and groups, or to swap territories to achieve some anachronistic ideals, will result only in the perpetuation of antagonism, suffering, and the severance of centuries-old ties.

near Gleiwitz. He was a sympathizer for Poland, had fought on the Polish side in 1921 in Silesia, and *lived for a couple of years in Poland before returning to Germany. A German attempt to expel him had been foiled by his appeal to the League of Nations arbitration tribunal for issues of personal nationality in Geneva*'. Watt seems to have confused the MAT and the Conciliation commission in matters of nationality. Moreover, they were not situated in Geneva.

194 Sasa Dragojlo and Xhorxhina Bami, 'Land Swap Idea Resurfaces to Haunt Serbia-Kosovo Talks' (*Balkan Insight*, 16 June 2020), online at: <https://balkaninsight.com/2020/06/16/land-swap-idea-resurfaces-to-haunt-serbia-kosovo-talks> accessed 3 July 2020.

Part III.
Arbitrators as Peacemakers: The Case of Professor Paul Moriaud

Chapter 7: Paul Moriaud, la paix par l'arbitrage : L'homme, les réseaux, les idées

Pascal Plas[*]

Paul Moriaud, président du Tribunal arbitral mixte germano-belge, le 7 janvier 1924. Détail d'une photographie de l'agence de presse Meurisse. Source: gallica.bnf.fr / Bibliothèque nationale de France.

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La mort de Paul Moriaud le 8 septembre 1924 créa en Suisse mais aussi dans de nombreux pays d'Europe une certaine émotion. Ses obsèques réunirent une "foule considérable"[1] et un immense cortège composé d'hommes politiques, de diplomates et de représentants de différents Etats, de membres de la Société des Nations, de magistrats, de collègues, d'amis et "d'étudiants portant leurs drapeaux voilés de crêpe"[2] l'accompagna à sa dernière demeure. Les multiples articles qui parurent à cette occasion, les discours qui furent prononcés au moment des obsèques et dans les jours qui suivirent, les hommages qui furent rendus par la suite à sa mémoire (brochures, fascicules, statuaire[3]) rendent bien compte de l'importance de l'homme mais aussi de sa complexité.

Tous font état de son activité de professeur à l'Université de Genève et des rapports cordiaux qu'il entretenait avec les étudiants, de sa passion pour la cause de la paix internationale et, *in fine* de l'exercice de sa présidence à Genève du Tribunal arbitral mixte germano-belge où il avait alors (en 1924) à régler l'importante affaire touchant la Compagnie internationale des wagons-lits et l'Allemagne, affaire assez médiatisée en Suisse. La plupart des quotidiens soulignaient "la perte que constitue sa mort dans le monde des juristes internationaux où il était aimé autant qu'apprécié pour son équité et sa science très étendue"[4]. Mais tous ajoutaient que son activité "débordait largement hors des limites de son enseignement universitaire et embrassait les domaines les plus divers";[5] et de rappeler son expertise du "fameux bordereau" lors de l'affaire Dreyfus,[6] le dévouement à son pays (sténographe mémorialiste du Grand Conseil), ses qualités musicales et, à partir du début de la guerre de 1914 son implication dans la réflexion sur la mise en place d'un système de droit international qui

1 "Obsèques de MM. Paul Moriaud et Aloys Pictet" *Journal de Genève* (Genève, 11 septembre 1924).
2 ibid.
3 "Ceux qu'il a laissés sur le chemin ont tenu à ce que l'émotion ressentie lors de son décès ne fut pas comme un nuage furtif au ciel de la cité" écrivait le *Journal de Genève* en 1925 pour présenter une plaquette à la mémoire de Paul Moriaud (Georg s.d.), "couronne déposée sur son tombeau", rédigée par Charles Borgeaud et Charles Bernard "qui l'ont connu dans l'intimité". "À la mémoire de Paul Moriaud" *Journal de Genève* (Genève, 26 avril 1925). Un buste de Paul Moriaud fut dévoilé lors d'une importante cérémonie officielle qui se tint le 29 janvier 1933 dans le grand vestibule du premier étage de l'Université de Genève. "Inauguration du buste du professeur Paul Moriaud" *Journal de Genève* (Genève, 31 janvier 1933).
4 *Le Courrier* (Genève, 9 septembre 1924).
5 "Obsèques…" (n 1).
6 Cf. *infra* (n 38).

conduirait à garantir la paix à l'issue du conflit et permettrait aussi de dénoncer les atrocités de la guerre en Europe, en particulier les massacres commis en Arménie, cause à laquelle il était très attaché. Il s'engagea avec enthousiasme dans l'aventure de la Société des Nations pour laquelle il milita sans compter en Suisse – pays neutre dans lequel l'adhésion n'allait pas de soi – avant de prendre la présidence d'un, puis de plusieurs tribunaux arbitraux mixtes mis en place conformément au Traité de Versailles.[7]

En définitive, la part des tribunaux arbitraux mixtes (TAM) semble modeste au regard de ce que fut la vie particulièrement dense de Paul Moriaud. Pourtant celle-ci fut considérée comme un apogée. En fait on ne peut séparer les deux. Toute la vie de Paul Moriaud antérieure à 1918 conduisait aux TAM et cette communication voudrait montrer la cohérence de ce parcours, tout en livrant ainsi, plus généralement, une "biographie totale" d'un responsable de TAM qui pourra être utile pour une prosopographie plus générale et surtout plus fine du personnel des TAM, lesquels ne peuvent être uniquement ramenés à l'appartenance à la petite communauté internationale des juristes internationalistes en pleine effervescence avant la Première guerre mondiale.[8]

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7 On ne reviendra pas sur ces tribunaux arbitraux mixtes créés après le Traité de paix de 1919 – qui ont compétence pour régler les litiges ayant pour origine les mesures exceptionnelles prises pendant la guerre par le Reich contre les biens des ressortissants des pays considérés comme leurs ennemis ainsi que la conflictualité liée à des redécoupages de frontières après le conflit – sinon pour souligner leur originalité : chacun est composé de deux nationaux respectifs des Etats en litige et présidé par un "neutre" désigné par ceux-ci ou, à défaut d'accord par le Conseil de la SDN; il existe une ouverture directe aux particuliers intéressés; la forme d'arbitrage est à "inventer" au fur et mesure des affaires et de leur plus ou moins grande complexité. Cf. Jean Teyssaire et Pierre de Solère, *Les Tribunaux arbitraux mixtes* (Editions Internationales 1931).

8 Le droit international est en plein développement depuis le premier congrès de La Haye; des juristes mais aussi des acteurs politiques, de plus en plus nombreux se retrouvent dans les cercles universitaires mais aussi dans des structures internationales qui ne cessent de s'étoffer et de se structurer (bureaux dirigeants plus fournis, multiplication de commissions, rédaction de manifestes et de déclarations, publications) qu'il s'agisse de l'Institut de droit international, de l'Union juridique internationale, de la Société de Législation comparée (SLC) ou de la toute nouvelle Académie de droit international de La Haye. Plusieurs membres du personnel des TAM sont issus de ce vivier – Paul Moriaud est membre de la SLC depuis 1900 – quoique non exclusivement, mais si l'on veut aller plus loin et comprendre les liens interpersonnels qui existent entre Etats et juristes et entre juristes entre eux,

Trois "moments" ont conduit Paul Moriaud vers cette grande entreprise d'arbitrage qu'ont constitué les tribunaux arbitraux mixtes après la Grande guerre : l'appartenance à un milieu familial particulier, très centré déjà sur le concept de médiation, de négociation ante procédure; la notoriété très positive acquise en Europe à partir de son université (Genève) qui lui permit de constituer un réseau important d'estime et d'amitiés en Europe ainsi que, et surtout peut être, ses engagements humanitaires, ceux pour le développement du droit international et son opérativité accrue pendant la Première guerre mondiale et enfin le combat pour la Société des Nations à l'issue de celle-ci.

1. Du goût de l'arbitrage : la tradition familiale

Paul Moriaud est né en 1865 dans une famille appartenant, au départ, au milieu des horlogers suisses – le grand-père, Julien Guillaume Moriaud est déclaré comme tel – mais qui semble avoir connu une ascension sociale rapide et féconde, par le droit, à partir du père de Paul Moriaud, David Moriaud.[9]

Celui-ci est important dans les générations de Moriaud et mérite qu'on lui accorde une certaine attention. Né le 31 décembre 1833 (il décède en 1898), il semble qu'il ait d'abord effectué de courtes études commerciales et qu'il soit entré comme clerc dans un cabinet d'avocat à Genève – en l'occurrence celui d'Etienne Gide, alors considéré comme "un avocat de

le recours à l'approche biographique détaillée se révèle encore très utile et permet d'aller au-delà de l'analyse de l'appartenance.

9 Julien-Guillaume Moriaud, époux de Jeanne-Louise Caillat ou Calliate est dit horloger dans la biographie de David Moriaud telle qu'on la trouve dans *Le livre du Recteur 4, Notices biographiques des étudiants* (Librairie Droz 1975) 592. Cette simple mention ne permet pas de savoir quel est le rang social exact de la famille au sein de la corporation professionnelle et plus généralement de la société genevoise. Mais le fait qu'on trouve dans plusieurs notices nécrologiques de David Moriaud la mention "fils de ses œuvres et uniquement de celles-ci" ou des formules comme "qui a su par sa seule énergie et son intelligence se frayer sa route et atteindre au plus légitime succès" pour qualifier ses mérites indiquent que Julien-Guillaume Moriaud n'appartenait "qu'à" la classe moyenne, (supérieure peut être selon les concepts anglo-saxons – *upper middle*) permettant de financer les études des enfants; auquel cas, selon cette approche, David Moriaud n'était pas un héritier.

premier ordre"[10] et surtout un des grands avocats d'affaires de Genève – au sein duquel la recherche d'un accord avait plus d'importance que la juridicisation des causes.[11] Il mène alors, parallèlement à ses fonctions de clerc, des études en droit à l'Université de Genève de 1856 à 1859 puis s'inscrit au barreau de la ville le 2 mai 1862. De disciple, il devient associé dans le cabinet Gide puis il succède "au patron" comme avocat d'affaires, choix judicieux en cette "époque d'énorme développement d'affaires financières et industrielles" à Genève.[12]

Plusieurs aspects de sa pratique professionnelle et de sa personnalité ont pu influencer la destinée de son fils, Paul Moriaud. Outre le fait qu'il fut très tôt, comme son formateur Etienne Gide, un partisan de l'arbitrage, il soutint le 30 avril 1862 une thèse de droit assez remarquée dans les milieux juridiques et dans le milieu des affaires suisse : De l'arbitrage selon la loi genevoise.[13] Il posait la question de savoir si la loi prise en France le 19 juillet 1856 pour abolir l'arbitrage forcé et rendre aux tribunaux de commerce la connaissance des contestations entre associés ne pourrait être transposée en Suisse, ce qui donnerait une plus grande souplesse aux process de gestion de la conflictualité des affaires tout en favorisant la conciliation à laquelle il se déclarait particulièrement attaché.

Il a probablement exercé une grande influence sur son fils Paul pour tout ce qui relève de l'arbitrage, de la négociation, du règlement parajudiciaire des conflits et il n'est pas exclu que, au moment de la création des tribunaux arbitraux mixtes, cette caractéristique soit ressortie et que ceux qui contactèrent le fils connaissaient les qualités du père.

David Moriaud était en effet dans ce domaine, sinon original du moins singulier; il donnait de longues consultations dans la rue, en marchant avec son client – pour sortir ce dernier d'un "espace de justice", en l'occurrence son cabinet – et passait beaucoup de temps à tenter d'apaiser les querelles et d'obtenir un arbitrage/accord plutôt que d'ester en justice; "c'était un merveilleux négociateur" et "le nombre de procès qu'il a su concilier est plus grand encore que celui des grandes affaires qu'il a plaidées et gagnées" diront de lui plusieurs de ses anciens confrères et clients.[14]

S'il fit une grande carrière au barreau de Genève "dont il fut un des maîtres les plus aimés et les plus écoutés", un représentant de "l'ancien bar-

10 Article nécrologique sur David Moriaud, *Journal de Genève* (Genève, 13 mars 1898).
11 ibid.
12 *La Tribune* (Genève, 14 mars 1898).
13 David Moriaud, *De l'arbitrage selon la loi genevoise* (Jules-Guillaume Fick 1862).
14 Article nécrologique… (n 10).

reau genevois",[15] génération du milieu du XIXe siècle qui se distinguait par un certain nombre de caractéristiques : "un langage poli et distingué, l'urbanité professionnelle, la finesse de l'argument et du ton", il fut aussi "un lettré, un poète, un dilettante cultivé et ingénieux"[16]. Comme son maître professionnel Etienne Gide,[17] il s'adonnait à la poésie, déclamait des vers et en publiait dans un certain nombre de journaux. Il collectionnait des livres rares et était bien introduit dans les milieux intellectuels genevois; en 1854, il avait été l'un des fondateurs de la revue périodique *l'Album genevois* et en 1857 il contribua à la parution de son héritier *l'Album suisse*.[18] Il recevait beaucoup dans sa magnifique villa du Closelet garnie "d'objets d'art, de livres curieux, de tableaux et de statues".[19]

Il fut, par ailleurs, en 1868 le promoteur d'un grand établissement hydrothérapique dans quartier de Champel, vaste opération d'aménagement urbain tout à fait originale par son ampleur et son développement qu'il ne cessa, à l'aide de différentes sociétés immobilières, de développer jusqu'en 1898.[20]

Ce "poète collectionneur", "amant de l'art", "causeur enjoué, subtil et charmeur" comme on aimait à le désigner à Genève[21] – et entrepreneur commercial avisé – était un curieux éclectique, ce que fut aussi le fils d'une

15 "David Moriaud" *Journal de Genève* (Genève, 12 mars 1898). A cette date, David Moriaud est un des doyens au barreau et, en Suisse comme ailleurs, les générations d'avocats s'agrègent mais aussi s'individualisent en fonction de leur année de prestation de serment. David représente la strate du milieu du XIXe siècle. Sur les particularités de l'usage du passé et de la mémoire des strates générationnelles par les avocats en Europe, cf. Pascal Plas, *Avocats et barreaux dans le ressort de la Cour d'appel de Limoges, 1811–1939* (Presses Universitaires de Limoges 2007).

16 Il déclamait des poèmes à ses invités lors de différentes réceptions. Il écrivait des poésies "très ciselées, très romantiques […] vivement goûtées par des hugolâtres et les parnassiens. L'une d'elle, *Fleur fanée*, fut mise en musique (C. Castillon) et était souvent chantée dans les salons". E.J., "David Moriaud poète" *Journal de Genève* (Genève, 16 mars 1898).

17 Etienne Gide était considéré à Genève comme un "poète délicat" connu pour un recueil élégiaque *Le sentier perdu* (s. ind.) : Article nécrologique… (n 10).

18 *La Tribune* (Genève, 14 mars 1898).

19 Article nécrologique… (n 10).

20 Il décida d'utiliser les eaux de l'Arve à des fins thérapeutiques. Ayant constitué plusieurs sociétés immobilières, il acquit un important domaine foncier et, en collaboration avec deux associés il fit construire au pied de la falaise de Champel un établissement thermal. En 1874 il créa la Société hydrothérapique de Champel-sur-Arve qui devint Champel-les-Bains. *Journal de Genève* (Genève, 13 mars 1898).

21 *Journal de Genève*, *Gazette de Lausanne*, *Le Genevois*, *La Tribune*, articles et brèves parues dans les jours qui suivirent son décès.

certaine façon en sus de son imprégnation d'une certaine conception de l'arbitrage.

2. *La construction d'une renommée professionnelle avant la Grande guerre*

Paul Moriaud naquit le 4 janvier 1865 à Carouge (Genève). Il profita très tôt de la richesse culturelle du milieu paternel et de la grande bibliothèque de la maison dont il fit, enfant, le *Catalogue*.[22] Il fit ses premières études de droit à l'Université de Genève puis il se rendit en Allemagne (Leipzig) et en France (Paris). En 1883, alors qu'il était encore très jeune, il était licencié ès-lettres, en 1886 il obtint sa licence en droit et en 1889, à l'issue de celle-ci, le doctorat en droit, soutenant alors une thèse originale : *De la justification du délit par l'état de nécessité*, qui fut remarquée et immédiatement publiée avec quelques modifications sous le titre *Du délit nécessaire et de l'état de nécessité*;[23] un ouvrage prolongea par la suite cette publication : *La question de la liberté et la conduite humaine*[24] et lui valut le prix Amiel de philosophie venant récompenser "un remarquable travail sur la liberté".[25]

Il s'inscrivit d'abord au barreau de Genève à la fin de l'année 1889 ou au début 1890 et fit son stage d'avocat chez maître Eugène Richard, mais Paul Moriaud ne voulait pas faire une carrière d'avocat comme son père (et son frère William qui devint aussi avocat). Aimant enseigner, il entra alors à l'Université de Genève en 1892 comme *privat docent* et, à la Faculté de droit, lui fut confié l'enseignement d'un cours sur *La famille à Rome*.[26]

Il devint Professeur ordinaire en 1896; il occupait alors la chaire de Droit romain (*Pandectes et Institutes*). Cet enseignement allait rester pendant 30 ans l'activité maitresse de Paul Moriaud qui "ne s'attacha jamais spécialement à l'histoire détaillée du droit romain qu'il laissait à son collègue spécialiste Joseph Partsch; il considérait le droit romain avec les Windscheid et les Dernburg comme la meilleure école de formation de

22 *La Patrie suisse* (Genève, 8 octobre 1924). Une partie de cette bibliothèque se retrouvera dans la propre bibliothèque de Paul Moriaud dont il ne reste malheureusement que quelques traces.

23 Paul Moriaud, *Du délit nécessaire et de l'état de nécessité* (R. Burkhardt et L. Larose & Forcel 1889).

24 Paul Moriaud, *La question de la liberté et la conduite humaine* (Félix Alcan 1897).

25 *Journal de Genève*, 9 septembre 1924.

26 Charles Borgeaud, 'Le professeur Paul Moriaud. 1865–1921. Hommage de la Faculté de droit : Eloge prononcé à la rentrée de l'Université de Genève le 27 octobre 1924' (1925) *La Revue mensuelle* Genève.

l'esprit juridique. Les Pandectes lui servaient à définir les institutions, à expliquer la meilleure méthode de discussion, à apprendre à distinguer le juste et l'injuste, le rationnel et le sophistiqué; à l'heure où les nouveaux codes poussaient trop à des méthodes purement déductives, il puisait dans le droit romain le secret de former de vrais juristes"[27]. Il ne tarda pas toutefois à étendre ses enseignements; en 1900 il prit en charge le cours de "*Législation civile comparée*".[28]

En ce début de siècle, la Faculté de droit de Genève observait avec attention la réorganisation de l'enseignement dans les facultés de droit allemandes en raison de l'entrée en vigueur du nouveau Code civil allemand de 1896. Elle en tira l'idée de modifier ses propres enseignements afin de retenir ses étudiants allemands alors fort nombreux et d'en attirer de nouveaux. Paul Moriaud fut chargé d'établir un rapport sur cette question et de faire des propositions; il se plia à la tâche et conseilla au final l'introduction d'un "enseignement spécial destiné aux étudiants allemands". Cette proposition fut longuement examinée par la faculté et finalement adoptée le 5 mai 1900, approuvée ensuite par le département de l'Instruction publique. Il fut décidé que cet "enseignement spécial" serait un cours sur la partie générale du Code civil allemand; il devait être assuré par un de ses collègues, le professeur Bridel, mais celui-ci venant de répondre positivement à une invitation de l'Université de Tokyo pour y assurer un enseignement, l'Université le proposa à Paul Moriaud qui, tout en conservant sa chaire de Droit romain, l'assura seul à titre d'essai avant de le partager ensuite avec le *privat docent* genevois Hugo de Claparède et, dans un second temps avec un professeur allemand, le docteur Gottlieb-August Meumann, diplômé de l'Université de Leipzig, ex-magistrat à Cologne.[29] Manifestement les deux hommes se connaissent bien, tous deux avaient

27 Albert Picot, "Paul Moriaud", notice biographique in *L'Université de Genève de 1914 à 1956* (Georg 1959) 184. L'auteur a suivi les leçons de Paul Moriaud de 1902 à 1905 et en a gardé le souvenir "d'un brillant romaniste, logicien impeccable, ami des idées générales et capable de faire transposer dans le monde moderne la superbe méthode des préteurs romains".

28 ibid.

29 La Faculté de droit était très fière d'avoir recruté Gottlieb August Meumann. Ce descendant d'une ancienne famille prussienne de pasteurs et de juristes avait fait une partie de ses études universitaires à Genève en 1887/88 avant de les poursuivre à Berlin, Bonn et finalement Zurich où il soutint sa thèse en 1890 sur La nature juridique du contrat de compensation, étude jugée remarquable et qui obtint la mention *magna cum laude*. En 1896 il avait pris un poste d'assesseur au tribunal de Cologne mais en 1899 il démissionna et opta pour une carrière universitaire … à Genève où il venait d'épouser la fille du poète genevois Edouard

été des élèves d'Henri Brocher et ce cours double eut d'emblée un grand succès. Paul Moriaud le lui laissa en entier par la suite et Gottlieb Meumann fut titularisé en 1904 comme professeur ordinaire de droit civil et chargé de l'enseignement du droit civil allemand,[30] mais Paul Moriaud fut considéré en Allemagne comme le véritable initiateur de cette formation et sa notoriété y gagna considérablement, relayée par les générations d'étudiants qu'il formait au fil des ans.

En 1912, Paul Moriaud fut nommé doyen, fonction qu'il occupa jusqu'à la fin de la guerre et qui ne fut pas de tout repos parce qu'il eut à défendre au Sénat l'autonomie de l'Université "contre un chef de département qui voulait la restreindre" et il dut aller "jusqu'au peuple par la voie du référendum pour défendre la Haute Ecole", ce dont lui surent gré ses collègues.[31]

Paul Moriaud a cependant limité son investissement à l'Université aux fonctions décrites précédemment (il sera cependant vice-Recteur en 1922) et a peu rédigé de travaux universitaires avant la guerre, à l'exception de son *De la simple famille paternelle en droit romain : Première partie*,[32] mais il a laissé une forte empreinte chez tous ses étudiants, point important car il en retrouvera plusieurs en poste dans les pays engagés dans les TAM, en particulier en Belgique et en Allemagne. "Il aimait les étudiants […] était à même de faire comprendre les notions les plus difficiles […] était remarquable dans ses séminaires de droit romain […] puissance de sa dialectique […] entrain et charmantes soirées où se mélangeaient les discussions sur tel ou tel point de doctrine et des airs de piano dont il jouait remarquablement, en particulier les Sonates de Beethoven et les

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Tavan. Cf. Bernard Gagnebin, La Faculté de droit de 1914 à 1956 in *L'Université de Genève…* (n 27).

30 Charles Borgeaud, *Histoire de l'Université de Genève, vol. III : L'Académie et l'Université au XIX^e^ siècle* (Georg 1934); Charles Borgeaud, *Le professeur Paul Moriaud, op. cit*., ci-dessus note 26.

31 ibid.

32 Paul Moriaud, *De la simple famille paternelle en droit romain : Première Partie* (Mémoires publiés à l'occasion du Jubilé de l'Université de Genève Librairie Georg 1910). Paul Moriaud a assuré des comptes rendus bibliographiques pour la *Revue de morale sociale* à partir de 1899 et pour *La Suisse universitaire* après 1905. Il a rédigé quelques articles professionnels pour le grand public comme "L'abus de droit" dans le *Journal de Genève* (1906) ou pour ses pairs comme "Du consentement du père de famille au mariage en droit classique" dans *Mélanges P. F. Girard* (Rousseau 1910) ; enfin il est l'auteur de préfaces, comme celle du commentaire de M. A. Okoumeli sur le *Russo-Georgian Treaty Concluded in 1783 between Catherine II, Empress of Russia, and Irakly II, King of Georgia* (J. Bale, Sons & Danielsson 1919) et il a laissé une notice biographique d'Henri Brocher de la Fléchère pour le *Journal de Genève* le 2 juillet 1907.

Fantaisies de Schumann".[33] Son enseignement a attiré à Genève de nombreux étudiants étrangers, de la Belle Époque à la guerre, et il a entretenu des relations avec les universités allemandes et françaises. En particulier, l'Université de Strasbourg le comprit "en 1922 dans sa fameuse promotion Aubry et Rau et le nomma Docteur Honoris causa, hommage rendu au savant"[34]. Son attention aux étudiants étrangers ayant, pour beaucoup, peu ou prou des problèmes, surtout pendant la guerre, fut soulignée par plusieurs d'entre eux devenus célèbres par la suite. Ainsi Albert Cohen – qui fait ses études à Genève à partir de 1914 (de droit puis de lettres) – touché par la sympathie toute particulière que Paul Moriaud lui témoigna alors qu'il était un peu perdu, rappellera au moment de la parution de son chef-d'œuvre *Belle du Seigneur* sa "reconnaissance au doyen Paul Moriaud […] pédagogue de grande réputation [qui] était un homme brillant […], avait un don d'éloquence et était apprécié pour le contact personnel qu'il savait établir avec les étudiants. La fin de son cours était une conversation et la modernité de son enseignement lui valait tous les suffrages". Albert Cohen conclut ses propos en soulignant combien, par ses fonctions universitaires, Paul Moriaud avait acquis une renommée internationale : "il appartenait au clan des genevois prestigieux qui depuis Necker portent le nom de leur ville à travers le monde. C'était un homme de pouvoir autant que l'homme de sa science".[35]

Mais son investissement académique ne pouvait guère être plus intense car, en fait, ses activités embrassaient depuis le début des années 1890 les domaines les plus divers et étaient gourmandes en temps.

On ne peut examiner ici tous ses engagements;[36] aussi mettra-t-on en exergue ceux qui ont une certaine importance pour notre propos. Il avait

33 "Paul Moriaud" *Journal de Genève* (Genève, 10 septembre 1924). Paul Moriaud était un musicien brillant. Il était membre du Comité du Conservatoire de musique de Genève. "Il joua un grand rôle dans la réforme de l'enseignement du piano; il fit adopter un nouveau programme d'examen (mélange de musicalité et de technique)» selon F. Held, directeur du Conservatoire de Genève dans la *Revue mensuelle*, février 1925. Il a livré de nombreux articles de critique musicale dans *L'Echo de Genève* à partir de 1892, dans *La Gazette musicale de la Suisse romande* jusqu'en 1895.

34 "Paul Moriaud" (n 33).

35 Cf. Gérard Valbert, *Albert Cohen le seigneur* (Grasset 1990) passim.

36 Une partie des papiers de Paul Moriaud ont été déposés à la Bibliothèque de Genève (Papiers Paul Moriaud, 1883–1936. CH BGE Ms fr 5312–5320, cf. Inventaire détaillé pour le contenu du fonds); la Société d'Histoire et d'Archives de Genève dispose d'un petit lot d'archives de Paul Moriaud, environ 190 lettres qui lui ont été adressées [ensemble épars : correspondance, notes liées à son activité

une passion pour la sténographie qu'il avait étudiée très jeune avec la méthode Duployé.[37] Ce détail pourrait sembler anecdotique, même si la sténographie lui permit de travailler deux fois plus vite en prenant en sténo des milliers de procès-verbaux de réunion. Mais la sténographie n'était qu'un aspect de sa passion pour l'écriture en générale et la graphologie en particulier; ses qualités en ce domaine étaient telles qu'il fut reconnu comme expert dans un certain nombre d'affaires célèbres, dont l'affaire Dreyfus et l'affaire Francisco Ferrer en 1909 et qu'il parcourut l'Europe, pour de moindres procès, développant peu à peu un remarquable carnet d'adresses.[38]

Selon certains de ses biographes et de ses collègues de l'Université de Genève, il aurait réalisé de très nombreuses expertises graphologiques et "rédigé un nombre considérable de rapports qui sont de véritables chefs-d'œuvre".[39] Ces différentes interventions dans le grand théâtre des

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de mémorialiste du Grand Conseil, photographies, brochures]. On trouve dans les papiers Moriaud dont un dépouillement intégral a été réalisé grâce à l'obligeance et à la disponibilité des bibliothécaires (qu'ils/elles en soient ici remercié(e)s) des bribes de correspondance avec des organisations, sociétés associations, dans lesquelles il s'investit souvent au niveau des structures dirigeantes. Citons, entre autres, sa vice-présidence du Comité de l'Association des anciens collégiens, ses responsabilités dans la Commission de la Bibliothèque publique et universitaire de Genève, sa participation à la Section genevoise du CAS où il est dit vétéran de 1893, etc.

37 Paul Moriaud a laissé plusieurs écrits se rapportant à la sténographie, un *Cours de sténographie*, édité à Genève en 1886 et réédité régulièrement avec un ajout de données (3e édition 1889), une "Méthode de décompte des traits de plume" publiée dans *L'Instituteur sténographique* à Paris en 1890, et de nombreux articles dans *Le Signal sténographique* publié à Lausanne. Cf. Borgeaud, *Le professeur…* (n 30); Papiers Paul Moriaud (n 36).

38 Il procède à l'expertise du fameux "bordereau", lettre manuscrite non signée attribuée à Alfred Dreyfus, et qui a valu à ce dernier son arrestation et sa condamnation pour haute trahison, en dépit des déclarations de Moriaud. Il est frappant de voir que dans l'affaire Dreyfus, Moriaud est dans la liste de ceux qui sont considérés comme les meilleurs graphologues d'Europe et des Etats-Unis, ceux "qui sont des experts d'une renommée incontestable mais encore et surtout des savants qui ont contribué à faire de la graphologie une science rigoureuse ayant ses règles et ses lois […] : MM. Crémieux-Jamin et Gustave Bridier en France, MM. *Paul Moriaud* et de Rougement en Suisse, M. E. de Marneffe en Belgique, MM. De Gray Birch, Th. Gurrin et Schooling en Angleterre, MM. Larvalho et Ames aux Etats-Unis", cf. Bernard Lazare, *Une erreur judiciaire : L'Affaire Dreyfus* (Allia 1993) [réédition de l'original].

39 "Paul Moriaud" (n 33). Nous n'avons pu retrouver les affaires dans lesquelles il est intervenu à l'exception des procès Edouard Berlie – expertise de signatures – qui fit un certain bruit en Suisse (*Journal de Genève*, 22 février 1912) et de ceux de

cours d'assises ou des tribunaux militaires, très médiatisées lui valurent de nombreux sarcasmes notamment lors de l'affaire Francisco Ferrer[40] mais c'est au cours de ces activités qu'il apprit beaucoup manifestement sur l'âme humaine, "il a connu par les expertises les drames de famille, la malfaisance, les lettres anonymes, les falsifications commerciales"[41] et sur l'importance de l'écoute et de l'arrangement précoce avant qu'on en arrive aux drames.

C'est aussi par la sténographie qu'il exerça les fonctions de Mémorialiste du Grand Conseil pendant dix ans de 1890 à 1900; il prenait en sténo les débats et rédigeait ensuite le *Bulletin analytique* et le *Mémorial*.[42]

3. La guerre, l'injustice, le droit international et la paix

3.1. Le Comité pour la sauvegarde du droit des gens

Dès le début de la guerre, Paul Moriaud ne tarda pas à prendre toute une série d'initiatives à côté et en plus de sa carrière universitaire et de ses multiples activités. En 1914, il fut un des éléments-clefs de la création du Comité pour la sauvegarde du droit des gens qui prit le nom de *Pro Luce et Jure* (Pour la lumière et le droit) dont il assura assez rapidement la présidence. Cette aventure occupa une grande partie de son temps et lui permit de se doter d'un vaste réseau international de correspondants dans les milieux universitaires, des fondations mais surtout dans les aéropages

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Francisco Ferrer et surtout du capitaine Dreyfus, ce dernier étant très médiatisé. *La Gazette de Lausanne* alla même jusqu'à publier un extrait des conclusions de Paul Moriaud dans l'affaire Dreyfus, rappelant qu'il avait été opposé à Alphonse Bertillon lors de l'expertise, ce qui n'était pas rien, et qu'il avait brillamment fait la preuve de "l'impossibilité d'attribuer le bordereau à Dreyfus" (10 novembre 1897).

40 La condamnation de Francisco Ferrer en Espagne, accusé d'être un des organisateurs de la Semaine tragique de Barcelone à l'été 1909, souleva une vague d'indignation dans plusieurs pays dont la Suisse. Paul Moriaud avait envoyé de nombreuses lettres à la presse dont plusieurs avaient été publiées (*Gazette de Lausanne*, décembre 1909) mais il estimait que les journaux ne soutenaient pas assez Ferrer et ceux-ci du coup le décrivirent comme un "militant agité" de cette cause et non plus comme un expert (ibid.). Ses articles furent repris en une *Lettre ouverte à M. Edouard Secrétan, rédacteur en chef de La Gazette de Lausanne sur l'affaire Ferrer* (Imprimerie Richter Genève).

41 *Patrie suisse* (Genève, 8 octobre 1924).

42 Activités mentionnées dans toutes les notices nécrologiques consacrées à Paul Moriaud, mais il n'y eut aucun article spécifique émanant de ce milieu politique.

politiques qui allait peser lors du choix des présidents des tribunaux arbitraux mixtes.

Paul Moriaud et un certain nombre de ses collègues des universités suisses de Genève, Zurich et Neuchâtel, Wilhelm Oechsli, Georges Sauser-Hall, et Paul Seippel avaient été frappés très tôt par la nature nouvelle du conflit qui venait de se déclencher en Europe, caractérisé par des exactions nombreuses en particulier à l'égard des civils, actes qu'ils jugeaient alors inacceptables. Après avoir organisé deux réunions préparatoires qui se tinrent, l'une à Neuchâtel, l'autre à Zurich en septembre 1914, ils décidèrent de mettre en place un organisme susceptible de générer des "Commissions d'enquêtes impartiales" sur les actes de violences de guerre commis par les belligérants.[43] Paul Moriaud et ses collègues rédigèrent – en français et en allemand – un document destiné à être largement diffusé, un Appel à la création d'une "Croix rouge du droit des gens".[44] Dans le groupe initial, il semble que ce soit Paul Seippel, immense personnalité de la presse suisse et du monde des lettres qui ait joué un rôle de premier plan.[45] Mais c'est Paul Moriaud qui proposa l'intitulé de l'organisation à créer, refusant l'appellation première que les fondateurs avaient retenue, soit Comité neutre pour l'examen des faits de guerre allégués contraires au droit des gens, et qui fit valider par ses pairs la dénomination Comité pour la sauvegarde du droit des gens.

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43 Dossier *Pro Luce et Jure*, Bibliothèque de Genève, Série 4 Ms fr 5313, f. 1–26.

44 ibid.

45 Paul Seippel (Lausanne 24 avril 1858 Genève – 13 mars 1926) est alors une personnalité incontournable en Suisse; professeur à l'Ecole polytechnique de Zurich il est aussi écrivain et surtout journaliste; après avoir pour *Le Soir* en 1884, il est entré au *Journal de Genève* en 1887, quotidien dans lequel il assure par la suite la direction des pages littéraires. Dès le début de la guerre, dans ses *Chroniques Zurichoises* et dans un discours largement publié par la suite *Vérités helvétiques pour la Suisse romande*, il prend en Suisse romande la position qui est celle de Carl Spitteller (futur Prix Nobel de Littérature en 1919) en Suisse alémanique à savoir établir une médiation en Suisse entre les partisans des puissances centrales et ceux de l'Entente, tâche difficile qui leur vaut à tous deux de nombreuses critiques dans les deux camps. Paul Seippel est très lié à Romain Rolland dont il a écrit une biographie parue en 1913 (*Romain Rolland l'homme et l'œuvre*, Ollendorf et Payot 1913) et à qui il a ouvert très largement les colonnes du *Journal de Genève* et de son *Supplément* en 1914. Les articles qui y furent publiés seront repris et ordonnés par la suite et, après des ajouts de chroniques diverses, mis à nouveau à la disposition des lecteurs en 1915 sous le titre *Au-dessus de la mêlée* (Ollendorff 1915). Cf. Hans Marti, *Paul Seippel, 1858–1926* (Helbing und Lichtenhahn 1973).

Paul Moriaud ne tarda pas à prendre une place prépondérante dans la structure. Au printemps 1915 il était désigné comme président, Wilhelm Oechsli assurant la vice-présidence, Edmond

Pittard la trésorerie. Il pouvait s'appuyer sur deux secrétaires généraux, l'un pour les populations de langue française, Georges Sauser-Hall, et un pour celles de langue allemande, Erich von Wattenwyl.[46] L'ensemble était assez équilibré entre Suisse romande et Suisse alémanique : on trouvait aussi dans le Comité directeur un professeur de Berne, Giacomo Balli, Charles Borgeaud de l'Université de Genève, le rédacteur en chef du quotidien *Bund* à Berne : Michel Bühler, des avocats de Lausanne, Genève, Berne et Zurich. Paul Seippel était sorti du jeu.[47] il faut dire que le développement de *Pro Luce et Jure* n'allait pas sans poser de problèmes et créer des tensions en Suisse.

De nombreuses difficultés surgirent en effet assez rapidement, qu'il s'agisse du développement proprement national du Comité ou de l'existence de problèmes internes à la structure : constitution d'un vivier d'adhérents, mise en place d'outils de communication, financement de l'association, détermination d'actions à entreprendre, en particulier établissement de commissions d'enquêtes, etc. En Suisse, les avis des personnalités contactées étaient très partagés ; beaucoup considéraient que l'Université de Genève, même si elle n'avait pas manifesté son opinion en tant que telle

46 Wilhelm Oechsli (Zurich 6 octobre 1851 – Weggis 26 avril 1919), après avoir suivi une formation en histoire et théologie aux universités de Berlin et Zurich a obtenu un doctorat en Lettres à Zurich en 1873; il devient professeur ordinaire de sciences historique (chaire d'histoire suisse) à l'Institut fédéral suisse de technologie en 1887 puis à l'Université de Zurich en 1899. Edmond Pittard (Genève 12 avril 1872 – 15 juin 1933) est docteur en droit de l'Université de Genève en 1896 (thèse remarquée sur *La protection des nationaux à l'étranger* et membre de la Société littéraire de Genève. Georges Sauser-Hall (La-Chaux-de-Fonds 26 septembre 1884 – 12 mars 1966) a obtenu un doctorat en droit à l'Université de Genève en 1910, y a été recruté comme *privat docent* en 1911 puis devient professeur ordinaire de droit privé à Neuchâtel en 1912; son frère n'est autre que le romancier Blaise Cendrars (1887–1961) qui s'est engagé dans la Légion étrangère au début de la guerre et qui est gravement blessé au front en 1915. Cf. notices nécrologiques publiées dans le Bulletin de la société de législation comparée, (1966) 89(3) et *Mélanges Georges Sauser Hall* (Delachaux Nestlé 1952).

47 A la suite d'une querelle avec Paul Moriaud au sujet des liens à nouer avec une association concurrente plutôt pro allemande. Alors que Paul Seippel était pour une jonction/fusion, Paul Moriaud se montrait beaucoup plus prudent et réservé. Cf. Pascal Plas, *Un projet singulier d'enquêtes internationales pendant le premier conflit mondial : Paul Moriaud et l'association Pro Luce et Jure* (Dossiers de l'Institut international de Recherches sur la Conflictualité (IiRCO) Limoges 2020).

sur le conflit né en 1914, "privilégiait la cause des Alliés" et le fait que deux personnalités de ladite université aussi éminentes que Paul Moriaud et Charles Borgeaud soient à la direction de *Pro Luce et Jure* créait des remous. Un certain nombre de courriers adressés à Paul Moriaud traduisent l'existence de critiques récurrentes "sur le fait de considérer prioritairement les exactions commises par les troupes allemandes" par exemple et d'aucuns accusaient Paul Moriaud "de nourrir les plus ardentes sympathies pour la malheureuse Belgique" et de ne pas "être assez vigilant sur la qualité des informations reçues, fruit de rumeurs et de récits [d'exactions allemandes] souvent exagérés, difficilement vérifiables" ainsi que de vouloir mettre en pratique "des commissions d'enquêtes uniquement orientées vers l'Allemagne"[48].

C'est ce qui explique, en partie, que Paul Moriaud ait estimé nécessaire que le Comité s'extraie du chaudron suisse et qu'il atteigne une dimension internationale, ce qui lui semblait possible au moins en fédérant les neutres. Aussi s'attacha-t-il plus particulièrement au développement de ce dossier. Il s'agissait dans un premier temps de vérifier quelles organisations similaires existaient dans le monde, de les contacter, de s'en inspirer et même temps de développer un réseau international. En novembre 1914, il prit des contacts avec la Société brésilienne de droit international qui, depuis Rio, lui fit parvenir ses Statuts. Il prit contact avec le Carnegie Endowment à Washington pour obtenir sinon un parrainage, au moins une coopération, sans grand succès.[49] Il tenta à plusieurs reprises de prendre contact, dès qu'il avait connaissance de leur existence avec d'autres organisations aux buts similaires qui naissaient dans différents Etats où il devait alors se rendre pour présenter *Pro Luce et Jure* et tenter sinon d'intégrer les nouvelles initiatives, au moins d'établir des liens étroits de collaboration. Paul Moriaud déploya ainsi beaucoup d'énergie (courriers, voyages, conférences) pour s'associer au *Nederlandsche Anti Oorlog Raad* en Hollande, redoutant que cette entreprise similaire à la sienne, installée à La Haye, ville symbole du droit international, ne supplante *Pro Luce et Jure*.[50]

Quels que soient les cas, il ne ménagea pas son temps et sa peine, multipliant les déplacements, les propositions d'association et démultipliant les outils de communication de *Pro Luce et Jure* en différentes langues,

48 ibid.

49 Dossier *Pro Luce et Jure* (n 43).

50 Sur ce point qui demanda à Paul Moriaud le déploiement de beaucoup d'énergie et lui créa de nombreuses inquiétudes, cf. Plas, *Un projet singulier…* (n 48).

tout en tentant d'occuper en Suisse cette position centrale d'arbitre si peu évidente.

Paul Moriaud devint peu à peu le gestionnaire principal d'une aventure de plus en plus difficile à mener et au résultat de plus en plus incertain.

De fait, ce grand projet tourna court; l'organisme mis en place en resta surtout à des éléments déclaratifs, avec une référence importante et constante à Romain Rolland, référence initiale voulue par Paul Seippel qui rappelait en permanence les propos de Rolland sur la nécessité de "provoquer dans le monde entier la formation d'une haute commission morale, d'un tribunal de conscience qui veille et qui se prononce sur toutes les violations faites au droit des gens"[51]. Ces paroles furent très souvent reprises et ne restèrent pas ignorées d'un certain nombre de juristes internationaux et de responsables politiques qui "pensaient" déjà l'après-guerre.

Le plus original dans *Pro Luce et Jure* et le plus avant-gardiste consistait peut être en la mise en place de Commissions d'enquête constituées de juristes internationalistes et de personnalités de pays neutres qui auraient "tous pouvoirs" – après négociations avec les belligérants – pour établir des Rapports sur des exactions de guerre qui auraient été signalées par des "témoins".[52]

Pour ce qui nous concerne, l'une de ces Commissions d'enquête est importante dans la mesure où elle jouera par la suite un rôle dans le choix de Paul Moriaud comme président de Tribunal arbitral mixte germano-belge (TAM). *Pro Luce et Jure* offrit ses services à la Belgique et à l'Allemagne dès 1915 pour faire une enquête dans les territoires belges occupés par les armées allemandes; le gouvernement de la Belgique émit une acceptation officielle, mais le gouvernement allemand consulté y opposa une fin de non-recevoir catégorique.[53] Cet épisode sera rappelé en 1920 par les autorités belges lorsqu'elles contacteront Paul Moriaud pour la présidence du TAM germano-belge ainsi que plusieurs autres attitudes et démarches pro-belges de celui-ci, rappels que nous analyserons par la suite tant ils ont aussi leur importance dans le lien entre Paul Moriaud et la Belgique.

Paul Moriaud avait gagné, par ses rencontres, ses déclarations, une dimension internationale de protecteur des droits des victimes des conflits; celle-ci fut renforcée par son engagement auprès de différentes structures.

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51 Cf. *supra* (n 45).

52 Plas, *Un projet singulier…* (n 47).

53 On trouve peu de traces dans les papiers de Paul Moriaud sur cette commission d'enquête mais son existence fut rappelée par le *Journal de Genève* le 24 octobre 1918 à l'occasion d'une querelle de presse avec des journaux allemands Plas, *Un projet singulier…* (n 48).

Il était vice-président de la Ligue internationale pour la défense des indigènes en 1921, ligue dirigée par René Claparède, son collègue à l'Université de Genève. Il donnait en 1919 des consultations à la Délégation des Dodécanésiens qui s'était adressée à lui pour qu'il défende "l'aspiration des îles et de leurs habitants à la liberté" dans les cercles genevois et les organisations internationales.[54] Il fut aussi un des défenseurs du sionisme.[55] Mais c'était surtout depuis 1915, un philarménien convaincu et c'est spécialement dans la défense de la cause arménienne qu'il s'était investi très tôt et à laquelle il consacra beaucoup de temps et d'énergie.

Paul Moriaud participait aux nombreuses activités de la Fédération des Comités suisses Amis des Arméniens (FCSAA) créée en 1895 – il était membre du Comité central et assistant d'Henry Necker qui en assurait la présidence et ce, dès la mise en place de cette structure et était engagé dans la Commission exécutive de la Ligue Internationale Philarménienne.[56] A la FCSAA, il ne marchanda ni son temps ni sa peine, s'occupant aussi bien de la gestion des collectes de fonds pour les orphelinats, écoles et structures d'accueil pour les enfants arméniens tant en Suisse qu'à l'étranger[57], que de l'action diplomatique à mener en Europe pour que les gouvernements prennent en considération le drame des populations arméniennes. Il joua un rôle essentiel dans ce domaine lorsqu'en 1919 et 1920 la Fédération décida d'intervenir dans les négociations internationales qui se tenaient à Paris pour "sauvegarder la liberté, les droits et le bien-être du peuple

54 Echange de courriers entre la Délégation et Paul Moriaud à partir du 12 août 1919. Fonds Paul Moriaud, Bibliothèque de la ville de Genève, Série 5, Ms fr 5314–5318.

55 Correspondances diverses conservées dans le fonds Paul Moriaud.

56 Cf. brochures annuelles publiées par la Ligue lors de la grande campagne d'appels de fonds qui contiennent la liste des membres des comités et bureaux. Quelques-unes ont été conservées dans les papiers de Paul Moriaud. Bibliothèque de la ville de Genève, Fonds Moriaud, Série 5, Ms fr 5314–5318.

57 La Fédération gère en Suisse l'Ecole arménienne de Begnins et celle de Genève (l'une pouvant être une annexe de l'autre) et au moins deux établissements d'accueils, à la fois orphelinats, hôpitaux et centres de secours) en Turquie à Sivas et Ourfa, dans lesquels elle envoie régulièrement des missions composées de médecins, de pasteurs et d'enseignants, lesquels convoient en même temps des vivres, des vêtements et du matériel. Ces établissements informent la Fédération sur la situation dramatique des Arméniens et, à Genève, le Comité directeur s'emploie à montrer au monde entier les violations inimaginables du droit des gens et à alerter les responsables politiques. La Fédération est très soutenue par les églises mais aussi par les autorités politiques au plus haut niveau. *Suisse et Arménie, 1919–1920*, brochure (Comité central de la Fédération des Comités suisses Amis des Arméniens 1920).

arménien dans l'élaboration des traités avec la Turquie", autrement dit pour plaider la cause d'une Arménie indépendante. En janvier et février 1920 encore, Paul Moriaud conduisait à Paris une délégation de la Fédération des Comités suisses pour plaider une ultime fois la cause de l'Arménie. Après avoir vu les représentants de la Délégation nationale arménienne et le président de la République arménienne du Caucase qui se trouvaient à Paris, il rencontra à différentes reprises "les milieux les plus divers, protestants, catholiques, socialistes, francs-maçons, ligue des droits de l'homme, publicistes, professeurs de l'Université, sénateurs et député […] les chefs de cabinet de M. Deschanel, de M. Léon Bourgeois, le secrétaire d'Etat aux Affaires étrangères, M. Millerand, président du Conseil des ministres".[58] Paul Moriaud remit finalement à ce dernier ainsi qu'au Président Deschanel, au président du Sénat, Léon Bourgeois, et à Louis Barthou, président de la Commission des Affaires étrangères à la Chambre, une Note claire qui développait en substance que "conformément aux promesses faites à plusieurs reprises par les gouvernements alliés, le traité de paix avec la Turquie devra constituer une Arménie indépendante et absolument affranchie du joug turc".[59]

Paul Moriaud avait, par cette multiplicité d'expériences croisées, acquis à la fin de la guerre une réelle stature de négociateur qui ne fit que se conforter après 1918 alors que se dessinaient des projets d'organismes internationaux propres à modifier les relations internationales. Ce point est important pour comprendre pourquoi au début des années 1920, il était parfaitement connu au sein des organismes internationaux nés du "mouvement" de La Haye mais aussi et surtout par les gouvernements de plusieurs Etats avec qui il avait eu de nombreux entretiens; il pouvait constituer une vraie personne ressource lors de la constitution des tribunaux arbitraux mixtes – en particulier le TAM germano-belge – position qui fut encore renforcée par sa participation à la mise en place de la Société des Nations.

3.2. Paul Moriaud et la promotion de la Société des Nations

L'expérience de *Pro Luce et Jure*, même mal terminée, avait beaucoup appris à Paul Moriaud, de même que les négociations menées dans le cadre de la défense de la cause arménienne, et renforcé sa volonté de voir naître

58 *Suisse et Arménie* (n 57) 35.
59 ibid. La *Note* est bien signée Paul Moriaud.

une organisation internationale qui, d'une certaine manière, parachèverait ses propres ambitions dans le domaine de la paix. Cela explique qu'il se soit lancé, encore une fois, dans une autre bataille, celle de la promotion de la Société des Nations, dont il était un actif partisan. Il devint à la fin de la guerre l'un des contributeurs majeurs à l'élaboration des propositions suisses pour la future Société des Nations et surtout le propagandiste le plus efficace en Suisse pour le « oui » au référendum, nécessaire à l'entrée du pays dans la nouvelle organisation internationale.

Dès 1917, "le Conseil fédéral, reconnaissant l'extrême importance des problèmes relatifs au droit international et au futur régime de la paix entreprit une étude d'ensemble des travaux préparatoires à la conférence de la paix". Cette étude prit, dans un premier temps, l'aspect d'une consultation. Elle fut confiée, en 1918, par le conseiller fédéral Felix Calonder, chef du département de la politique fédérale, à Max Huber, professeur à l'Université de Zurich. Il en résulta la mise sur pied d'une "Commission extra parlementaire pour examiner le problème de la SDN et la collaboration de la Suisse neutre". Trois professeurs de l'Université de Genève en faisaient partie : Charles Borgeaud, William Rappard et Paul Moriaud. Ce dernier, dans un premier temps, n'eut qu'un rôle effacé ; c'est William Rappard qui fut l'homme de la situation. En effet, après que la Commission eut siégé du 4 au 8 novembre 1918, la Suisse avait demandé le 20 du même mois à participer aux négociations de la Conférence de la Paix et ce sans résultat. William Rappard, qui avait déjà rempli une mission aux USA en 1917 – c'était un ancien professeur d'économie politique à l'Université de Harvard – et avait rencontré le président Wilson fut à nouveau envoyé aux Etats Unis pour négocier. Il rentra avec une réponse négative à sa requête mais néanmoins des assurances quant à l'installation du futur siège de la Société des Nations à Genève.[60] Charles Borgeaud avait déjà travaillé avec William

60 William Rappard (New York 22 avril 1883 – Genève 29 avril 1958) après avoir fait des études dans différentes facultés (Genève, Paris, Harvard, Vienne), il devient professeur assistant d'histoire économique à Harvard en 1911 puis professeur ordinaire à l'Université de Genève en 1913. Les autorités suisses profitent de ses bonnes relations avec un certain nombre de personnalités américaines (Walter Lippmann, journaliste au *New-York Herald Tribune* et surtout Edward Mandel House, conseiller du président Wilson) pour l'envoyer aux USA en 1917 pour négocier un accord économique américano-suisse à l'issue duquel la Suisse pourra être ravitaillée, tâche dont il s'acquitte avec brio. Dès lors il est "l'homme de la Suisse auprès des Américains" qui, cependant, ne prévoient pas de place spécifique pour les neutres dans les négociations de Versailles si bien que sa seconde mission est moins fructueuse que la première sauf à considérer qu'il obtient la promesse du siège de la SDN en Suisse. Cf., sur l'homme : Victor Mon-

Rappard, on ne sait comment Paul Moriaud fut associé aux travaux de la Commission. Quoi qu'il en soit, il ne tarda pas à y occuper une place essentielle, en Suisse en particulier alors que William Rappard devenait un représentant quasi permanent des intérêts de la Suisse à Paris.

En fait, les universitaires membres du Comité se répartirent les tâches, William Rappard devint une sorte de délégué permanent à Paris et à Londres pour suivre les intérêts de la Suisse et tenir ses collègues informés en temps réel de ce qui se discutait et se décidait dans les différentes commissions et sous commissions. Comme les Etats neutres avaient été finalement autorisés à faire connaître leurs désidératas, Charles Borgeaud, Max Huber et Paul Moriaud travaillèrent avec d'autres membres de la Commission à la rédaction, dans un premier temps d'un Projet de Pacte fédéral et d'un Statut constitutionnel de la SDN assorti d'un *Mémorandum* sur la neutralité de la Suisse, documents qui furent portés à Paris par une délégation dirigée par le conseiller fédéral Colonder et qui furent présentés dans le cadre des négociations générales qui se tinrent jusqu'à l'adoption du Pacte de la SDN le 28 mars, voire jusqu'à la signature du Traité de Versailles le 28 juin 1919.

Le gouvernement suisse devait toutefois obtenir l'adhésion des chambres puis du peuple pour que la Suisse soit intégrée à la SDN. En raison du caractère particulier de la composition de la population, il s'agissait d'un véritable pari et les dirigeants en étaient conscients. Charles Borgeaud et Paul Moriaud, resté en Suisse, devinrent alors des rouages importants du process de la campagne plébiscitaire qui se mit en place pour obtenir un vote favorable à la SDN. Charles Borgeaud publia une Notice au long titre : *La neutralité suisse au centre de la SDN. Notice historique sur l'avant-projet suisse de pacte fédéral et de statut constitutionnel de la Ligue des Nations*, dans laquelle il présentait la spécificité ancienne de la Suisse en tant que neutre, l'apport d'expérience qu'elle serait à même de fournir et l'intérêt qu'elle avait à entrer dans la SDN sans que sa neutralité, telle que définie, n'en souffre. Paul Moriaud devint Président du Comité local de soutien à l'adhésion de Genève et, à ce titre, fut chargé d'une série de conférences à la fois pédagogiques et en même temps clairement engagées pour l'entrée de la Suisse dans la nouvelle organisation internationale. L'une d'elles eut un réel retentissement, celle qui se tint lors de l'assemblée générale de la Société genevoise de la Paix, vieil organisme prestigieux de promotion

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nier, *W.E. Rappard, défenseur des libertés, serviteur de son pays et de la communauté internationale* (Slatkine 1995). Sur son travail lors de cette seconde mission, voir : *Diplomatic Documents of Switzerland, 1848–1971*, vol. 6 et 7.

de la paix.[61] Le succès en fut tel que ladite conférence fut développée et éditée sous la forme d'une importante brochure de plus de 100 pages – *Le projet de Charte des Nations*[62] – qui devint, en Suisse une sorte de *vade-mecum* pour l'adhésion. Lorsque le 16 mai 1920, tombèrent les résultats du plébiscite – 416 870 oui/ 323 719 non – la presse rappela le rôle clef de Paul Moriaud dans la campagne, entre autres facteurs déterminants.[63]

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61 Plusieurs universitaires participèrent à cette série de conférences, Eugène Borel, Georges Fulliquet, Paul Logoz et William Rappard mais celle que donna Paul Moriaud semble avoir eu une importance considérable en raison du lieu où elle fut donnée mais aussi de la médiatisation dont elle fut l'objet. Cf. *Histoire de l'Université de Genève. La guerre 1914–1918.* La Société genevoise de la Paix avait en outre lancé un "Appel aux citoyens de Genève qui ne veulent pas seulement une paix immédiate mais une paix durable" mettant l'accent sur le fait que la guerre ayant été exceptionnelle par sa violence et ses horreurs, la paix ne pouvait être "ordinaire" mais se devait d'être aussi exceptionnelle (référence à la mise en place d'un organisme international). Paul Moriaud était un des vingt signataires de cet *Appel*. Cf. la version publiée dans le *Journal de Genève* le 28 avril 1918.

62 En fait cette brochure fut présentée comme un *Tiré à part du Mouvement pacifiste*, organe officiel du Bureau international de la paix. Après une longue introduction historique, Paul Moriaud y traitait de la question du désarmement, des organes judiciaires internationaux, des sanctions et de la nécessité de la justice, puis il présentait un "Exemple d'une Charte de la Société des Nations" élaboré par le Comité de la Société genevoise de la Paix, esquisse destinée à donner au lecteur une idée de ce que pourrait être dans un avenir prochain, une société des nations idéale capable d'empêcher les guerres et de "protéger un petit Etat tel que la Suisse" (17) avant de présenter des considérations sur "L'élaboration du pate de la SDN", "Les avantages principaux du Pacte de Paris", "L'universalité et la composition de la SDN" ainsi qu'une multitude de points précis comme la place de l'Allemagne et le rôle des grandes puissances, la protection des minorités, etc.; au final un ensemble très complet et très fouillé qui devait permettre à tout un chacun de répondre aux questions qu'il se posait sur l'entrée de la Suisse dans la SDN, ce que permettait un index très détaillé et fort bien conçu. La presse relaya très largement tout ou partie de cet ouvrage, le *Journal de Genève* du 12 décembre 1919 lui consacra trois colonnes sous le titre "La voix d'un juriste", précisant que celui-ci avait fait "le tour de force de résumer ce vaste sujet en 100 pages sans négliger rien d'essentiel. Pas un mot inutile, pas un mot d'éloquence, le laconisme du Code civil. En revanche le plus scrupuleux respect de l'exactitude (etc.)» et le journal appelait "à lire et à méditer l'étude de Paul Moriaud […] autorité incontestée en la matière".

63 Plusieurs autres facteurs étaient à prendre en compte en particulier le fait que le siège de la SDN serait placé à Genève, l'attribution aussi par le Sénat de l'Université, approuvée par la Conseil d'Etat du titre de Docteur *Honoris causa* au président Wilson qui lui fut remis lors de son séjour à Paris en 1919. Il y eut aussi probablement d'autres éléments qui conduisirent à la majorité de oui – Cf. Rolland Ruffieux, "L'entrée de la Suisse à la SDN, le grand tournant de

L'appartenance à ce vivier suisse des juristes partisans de la SDN donnait à Paul Moriaud la dernière touche de prestige, s'il en était encore besoin, qui le mettait en lumière sur la scène nationale mais aussi internationale alors que l'on se penchait désormais sur le règlement de la guerre et qu'on allait chercher des juristes pour mettre en œuvre la paix et régler une infinité de problèmes générés par le conflit en particulier des questions de propriété de terres (après la modification des frontières), d'indemnités liées au bouleversement des échanges, de différents commerciaux dont une grande partie serait traitée par l'arbitrage.

3.3. Les liens avec la Belgique et l'accès à la présidence du Tribunal mixte germano-belge

De son héritage familial, de sa formation et de son enseignement, de ses prises de position militantes en faveur du droit international et ses engagements humanitaires, Paul Moriaud était en 1919/1920, après l'armistice un juriste connu dans toute l'Europe et qui plus est un juriste citoyen d'un Etat neutre, le principe de neutralité étant alors très recherché par les Etats ex-belligérants pour les règlements post-conflit. Rien d'étonnant à ce qu'il ait été repéré très tôt par un certain nombre de gouvernements qui avaient des litiges commerciaux à régler avec l'ancien Reich, ce dernier ne lui étant de son côté pas opposé.

Il fut d'abord contacté par le chargé d'affaires de la Légation du Japon grâce à l'intermédiation d'un de ses amis, Henri Golay, secrétaire général du Bureau international de la Paix (fondé en 1892) – ce qui est un bon exemple des amitiés qui s'étaient nouées au-delà de son réseau de relations internationales – qui l'avait recommandé. Le 17 avril 1920, le chargé d'affaire japonais écrivit à Paul Moriaud pour lui indiquer combien son pays serait honoré de ce qu'il accepte de présider un Tribunal mixte germano-japonais qui pourrait être établi en Suisse. Paul Moriaud accepta dans un premier temps, à condition que les travaux du tribunal ne commencent qu'en septembre 1920, avant de refuser finalement au grand dam de ses interlocuteurs qui lui demandèrent de proposer un remplaçant. En fait, il venait d'être contacté par la Belgique qui tenait absolument à l'avoir.

La délégation de Belgique, installée à Berne, lui écrivit une longue lettre le 14 mai 1920. Ce courrier est intéressant ; on y lit que le gouvernement

1919" (1970) 8(22/23) Cahiers Vilfredo Pareto 123–36 – mais la présentation pédagogique de Paul Moriaud resta considérée comme ayant été essentielle.

belge interprétait les parties du Traité de Versailles se rapportant aux tribunaux mixtes de façon étroite : "le président (d'un TAM) devra être choisi parmi les ressortissants de puissances restées neutres au cours de la guerre", ce qui le conduisait à se tourner quasi automatiquement vers la Suisse, persuadé que seul "un juriste suisse serait particulièrement apte à remplir les fonctions dont il s'agit". Son choix s'était dès lors porté sur Paul Moriaud pour présider un Tribunal arbitral germano-belge. La missive était insistante, le délégué belge lui proposant d'emblée une indemnité d'un montant de 25 000 francs belges (montant approuvé par le ministre des Affaires économiques de la Belgique) et l'informait qu'une "distinction honorifique le concernant" avait été sollicitée auprès du Roi des Belges en vue de "reconnaître la sympathie active (qu'il avait) témoigné à la cause de la Belgique pendant la guerre tout en facilitant à la fois en Suisse romande et en Suisse alémanique la tâche de monsieur Waxweiler en prônant une attitude de soutien lors de l'odieuse campagne de l'avocat van Steenberghe d'Anvers".[64]

Ce courrier dit beaucoup de choses sur les relations entre Paul Moriaud et la Belgique et la manière dont des relations anciennes, dans ce cas précis, vont jouer un rôle essentiel pour la désignation d'un président de l'un de plus importants tribunaux arbitraux des années 1920. L'affaire Waxweiler en est un bon exemple.

Les lettres étaient accompagnées d'ouvrages, un exemplaire du livre *L'armée allemande à Louvain en août 1914* et un exemplaire du *Livre gris belge*, réponse au *Le livre blanc allemand du 10 mai 1915*, édité en 1917 par le gouvernement belge, ainsi qu'un livre sur *La campagne anglo-belge dans l'Afrique orientale allemande*. Ces envois furent suivis peu après d'une *Notice sur le fonctionnement de l'Office belge de vérification et de compensation* rédigée à l'usage des ressortissants belges ayant des dettes et des créances à régler avec des ressortissants ex-ennemis.[65]

Si le dernier envoi était "technique" et utile aux tribunaux arbitraux à venir, les premiers faisaient référence à deux intervention anciennes – datant de 1914 et de 1915 – qu'avait faites Paul Moriaud pour aider les Belges à se défendre des accusations allemandes sur leur "fausse neutralité"

64 Fonds Paul Moriaud, passim.

65 Fernand Mayence and Maurice Defourny, 'L'armée allemande à Louvain en août 1914' (Port-Villez, Armée belge, Imprimerie de l'Institut militaire des invalides et orphelins de la guerre 1917); *Le livre gris belge* (Librairie militaire Berger-Levrault 1914); *Die völkerrechtswidrige Führung des belgischen Volkskriegs* (Auswärtiges Amt 1915); Charles Stiénon, *La campagne anglo-belge de l'Afrique Orientale Allemande* (Berger-Levrault 1917).

et les exactions qu'auraient commises à leur encontre les francs-tireurs, exactions qu'ils avaient répertoriées dans un *Livre blanc allemand sur la guerre des Francs-Tireurs*, renforcé par toute une série de déclarations de responsables politiques allemands, de militaires mais aussi de journalistes et d'intellectuels qui avaient une certaine réputation internationale, déclarations qui toutes justifiaient la nécessité de pratiquer une guerre brutale en Belgique afin de mettre un terme à ces attaques. Paul Moriaud avait plus particulièrement soutenu le professeur belge Émile Waxweiler à un moment où celui-ci était bien seul.

Cette "affaire Waxweiler" est importante pour comprendre les liens qui unissent Paul Moriaud à la Belgique. En raison de la qualité de l'homme – ami personnel du Roi des Belges – et de l'importance que le gouvernement belge accordait à son combat, elle mérite que l'on s'y arrête un peu. Emile (Pierre Clément) Waxweiler était, à la veille de la guerre, une figure extrêmement importante en Belgique. Ingénieur de formation, professeur à l'Université Libre de Bruxelles après avoir rempli différentes fonctions au sein du Gouvernement en particulier à l'Office du Travail, il était devenu un spécialiste d'économie sociale appuyée sur des méthodes statistiques et le fondateur de l'Institut de sociologie de Bruxelles, ses mérites avaient été récompensés par son entrée à l'Académie royale de Belgique.[66] Très lié au Roi qu'il conseillait, il l'avait suivi dans sa fuite à Londres. Dans les premières années de la guerre, le gouvernement en exil lui confia différentes missions, en particulier une négociation à Paris, avec le ministre du Commerce Eugène Clémentel pour discuter de l'établissement d'un projet d'Union franco-belge. Mais dès 1914, il s'était surtout investi fortement dans le combat de la Belgique contre la propagande allemande. Le Reich avait mis en place des moyens importants pour affirmer qu'en fait la Belgique avait refusé ses demandes de passage des troupes allemandes sur son sol non pas au non d'une neutralité affirmée mais au contraire parce qu'elle n'était plus neutre et avait le choix de l'Entente; cette affirmation s'appuyait sur des "documents secrets" qui auraient été trouvés par les Allemands au ministère de la Guerre à Bruxelles lorsqu'ils s'emparèrent du bâtiment, documents qui prouvaient, selon l'état-major allemand, l'existence de liens militaires étroits entretenus par ce ministère avec les Anglais et de "complaisances vis-à-vis de la France". A cela s'ajoutaient de nombreux récits, publiés en Allemagne mais largement diffusés sur

66 Notice nécrologique d'Émile Waxweiler dans le Bulletin de l'Académie royale de Belgique et, pour ce qui est de son passage en Suisse, Ernest Bovet, "La Belgique à Zurich en automne 1914" (1928) 9(2) Revue de l'Institut de sociologie 296.

le "comportement odieux" qu'auraient eu les civils belges à l'encontre des soldats allemands ; on y trouvait en particulier des descriptions de scènes d'une grande violence : jets d'huile bouillante sur les soldats et surtout – image appelée à durer dans les processus de propagande – des femmes belges perçant les yeux des allemands blessés. Tout cela et bien d'autres choses (la supposée "trahison belge" bien avant la guerre) avait été consigné dans un *Livre blanc allemand sur la guerre des Francs-Tireurs* largement diffusé en Europe et particulièrement en Suisse. C'est pourquoi Emile Waxweiler, avant de rédiger deux ouvrages qui dénonçaient toutes ces accusations,[67] fit un premier séjour en Suisse en 1914 au cours duquel il contacta des universitaires locaux, en commençant par ceux de Zurich, pour éclairer ses collègues sur la situation exacte de l'occupation allemande dans son pays et contrecarrer la propagande du Reich surtout auprès de ce groupe d'internationalistes qui tentaient de constituer un organisme d'enquêtes neutre sur les exactions des belligérants réunis au sein de *Pro Luce et Jure*. C'est ainsi que se fit la rencontre avec Paul Moriaud qui reçut ensuite Emile Waxweiler le 20 mars 1915 à Genève où il lui fit tenir une conférence ce qui constitua, aux yeux de la Belgique un soutien explicite d'autant plus précieux tant il n'allait pas de soi eu égard aux prises de position plutôt pro-allemandes des Suisses alémaniques. Pour les Belges, il était clair que Paul Moriaud avait aidé la Belgique "à la propagation de la vérité sur [son] cas dans le monde entier »,[68] Émile Waxweiler garda d'ailleurs, jusqu'à sa mort en 1916 à Londres dans un accident, des liens étroits avec Paul Moriaud et en 1920 Paul Moriaud fut contacté lors du projet de création d'une Fondation Waxweiler en Belgique.

Le chargé d'affaires belge à Genève remercia aussi plusieurs fois Paul Moriaud pour son soutien (courriers, déclarations) lors de destructions commises par les Allemands en Belgique, en particulier dans les villes universitaires, réactions qui avaient été "très appréciées par le Gouvernement".[69]

Paul Moriaud refusa la décoration mais accepta l'offre belge de présidence après avoir conseillé son collègue internationaliste Eugène Borel à la délégation japonaise. Ce dernier, qui prit aussi la présidence du Tribunal mixte anglo-belge entra donc dans le jeu par Paul Moriaud, ce qui nous donne une autre indication sur le processus de désignation

67 Émile Waxweiler, *La guerre de 1914. La Belgique neutre et loyale* (Payot 1915); Émile Waxweiler *Le procès de la neutralité Belge* (Payot 1916)

68 Correspondance diverses, fonds Paul Moriaud.

69 ibid.

des présidents qui s'effectue en fait, dans les cas qui nous concernent, en réseau, à la charnière du monde universitaire suisse, des organisations internationales et de positions exercées pendant la guerre de 1914/1918 et dans l'immédiat après-guerre en 1919 et 1920 au moment du règlement du conflit et de la négociation des traités. Eugène Borel enseignait en effet à l'Université de Genève mais avait été le délégué de la Suisse à la Conférence de la paix de La Haye où il fut un des principaux contributeurs à la *Convention concernant les droits et les devoirs des puissances et des personnes neutres en cas de guerre sur terre*. Il était membre de l'Institut Universitaire de Hautes Etudes Internationales de Genève et de *l'International Law Corporation* et avait, avant la guerre obtenu un certain nombre de succès dans le domaine de l'arbitrage comme juriste intercesseur dans deux cas de litiges entre la Suisse et l'Italie et la Suisse et le France (il fit d'ailleurs par la suite une très belle carrière d'arbitre international).[70] Il faudrait toutefois faire une prosopographie générale des présidents de manière à

70 Eugène Borel (Neuchâtel 20 juin 1862 – Genève 18 mai 1955) fils d'un avocat au barreau de Genève qui avait finalement opté pour une carrière politique (président du gouvernement du canton de Neuchâtel, conseiller d'Etat et député de Neuchâtel au conseil des Etats de Berne qu'il finit par présider, vice-président du conseil fédéral en 1875). Après des études au gymnase de Berne, il fait ses études à Berne puis Londres, Strasbourg, Florence et Genève où il passe sa licence en droit. En 1886 il soutient sa thèse sur *La souveraineté et l'Etat fédératif*. Il est reçu la même année au barreau de Genève et, en 1889 devient procureur général avant de regagner le barreau en 1893 à Neuchâtel jusqu'en 1906. A cette date il entre à l'Université de Genève comme professeur de droit public fédéral suisse et, à partir de 1915 comme professeur de droit international dans la continuité de ses activités au congrès de La Haye et à l'Institut des Hautes Etudes Internationales de Genève. Eugène Borel est un personnage intéressant parce qu'à la différence de Paul Moriaud il accepta de se déplacer; il séjourna pendant cinq ans à Londres où étaient installés les Tribunaux arbitraux mixtes germano-japonais et germano-anglais qu'il présidait; il s'y fit des relations et le Conseil de la société des Nations le chargea comme arbitre de fixer la répartition entre les Etats successeurs de l'Empire ottoman le service des annuités de la dette publique ottomane et par la même le montant de cette dette. Eugène Borel est un personnage clef de l'arbitrage qui, à la différence de Paul Moriaud parlait couramment l'anglais et n'hésitait pas à se déplacer (il fit des conférences de droit international en Amérique Latine). En 1932 il fut amené à trancher un différend important entre la Suède et les Etats Unis, affaire plaidée en anglais à Washington pendant un mois par quatre mandataires de chacun des Etats. De 1928 à 1939 il fut désigné par le Conseil fédéral suisse comme membre de la Cour permanente d'arbitrage à La Haye. Il fut aussi, à la veille de Seconde guerre à faire partie et à présider plusieurs commissions de conciliation établies pour régler des litiges entre différentes puissances. De 1912 à 1932, il avait rempli le poste de juge au Tribunal militaire de cassation, de 1928 à 1942 il siégea à la Cour de cassation

vérifier si ce que l'on observe pour ces deux présidents est à confirmer ou à infirmer, et émettre, le cas échéant, le postulat de l'existence d'un vivier plus généralement même si l'on en décerne déjà les contours.[71]

L'Allemagne accepta sans barguigner la proposition belge estimant avoir de "bonnes relations" avec Paul Moriaud. Le juge allemand fut désigné au début de septembre 1920, il s'agissait du "juge à la Cour d'appel et conseiller privé de justice de Francfort, Richard Hoene" et celui-ci s'impliqua d'emblée dans le processus de constitution du Tribunal arbitral en particulier sur la question du Règlement de procédure, en soutenant ouvertement le travail de Paul Moriaud en ce domaine, estimant qu'à partir des règlement de procédure des tribunaux arbitraux franco-allemands et anglo-allemands, il devrait être possible d'aboutir très rapidement à un règlement idoine. Dans les relations entre la Belgique et Paul Moriaud, parfois tendues par la suite, les Allemands soutiendront toujours ce dernier…

La Belgique contacta de nouveau Paul Moriaud pour mettre en place le processus de la constitution du tribunal et fixer son siège. Si ces points, le second en particulier,[72] n'allèrent pas sans poser quelques problèmes particuliers, ce qui est nous intéresse ici au premier chef est la désignation du correspondant de Paul Moriaud en Belgique fin août 1920, avant la constitution du tribunal, qui témoigne de la volonté du gouvernement belge de donner au futur président du tribunal la possibilité de travailler avec une des plus hautes personnalités belges, ce qui était considéré à Bruxelles comme un témoignage d'honneur. Il s'agissait d'Albéric Rolin.

"Certaines familles sont plus que de simples familles […] elles finissent par faire partie de l'histoire intégrante de ce pays"[73] précisent plusieurs notices se rapportant à la famille Rolin, lesquelles ajoutent que depuis la naissance de la Belgique en 1830, les Rolin ont toujours fait parler d'eux. Très intégrée à la grande bourgeoisie belge par un dense réseau d'alliances, c'est aussi une famille de juristes depuis Hippolyte formé au droit à Gand

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qu'il présida à deux reprises. *Tribune de Genève* et *Journal de Genèv*e (Genève, 20 mai 1955).

71 Cf. Antoine Vauchez et Guillaume Sacriste, Les 'bons offices' du droit international : la constitution d'une autorité non politique dans le concert diplomatique des années 1920(2005) 26 Critique internationale 101.

72 Cf. la communication de Jacques Péricard (ch 8).

73 Vincent Genin, "Les Rolin, le sacrifice d'une famille d'intellectuels, site RTBF", <https://www.rtbf.be/14-18/thematiques/detail_les-rolin-le-sacrifice-d-une-famille-d-intellectuels?id=8286145> dernière consultation le 2 juillet 2020. A compléter par : Vincent Genin, *Le laboratoire belge du droit international : Une communauté épistémique et internationale de juristes (1869–1914)* (Académie royale des sciences, des lettres et des Beaux-Arts de Belgique 2018).

dans les années 1820 et jusqu'à Gustave et Albéric "qui font partie des fondateurs de la jeune discipline que représente alors le droit international autour de 1870".[74] Albéric Rolin, qui va être le contact de Paul Moriaud, a, en 1920, une longue carrière de professeur à l'Université de Gand (droit pénal et droit international privé) et de professeur invité dans plusieurs universités étrangères (Cambridge en particulier), d'avocat au barreau de la cour d'appel de Gand où il fut plusieurs fois bâtonnier et reconnu comme un ténor du barreau, de juge à Bruxelles et il a été aussi Secrétaire général de l'Institut de droit international avant d'en assurer la présidence (il sera même Bibliothécaire en chef du Palais de la Paix).[75] Il a exercé, à différentes périodes, plusieurs hautes fonctions politiques – membre du Conseil supérieur de l'industrie et du travail, il fut aussi conseiller en droit international privé du ministère de l'Intérieur – et il est très introduit dans les milieux gouvernementaux de Bruxelles y compris auprès de la famille royale. Il a perdu trois de ses fils à la guerre ce qui a ému le roi Albert qui, tout en lui présentant ses condoléances, a proposé de retirer du front ses deux autres enfants (ce qu'ils ont refusé) et surtout l'a admis dans la noblesse belge avec le titre de Baron.[76] C'est donc directement un "ami du Roi", comme l'était Emile Waxweiler, qui est adressé à Paul Moriaud. De Waxweiler il est d'ailleurs encore question dans cette affaire; en effet un des fils d'Albéric, Henri Rolin, participe aux travaux de l'Institut de sociologie de Bruxelles dirigé par Waxweiler et est partie prenante aux entreprises de contre-propagande belge de ce dernier en Suisse. Il est possible qu'il ait, à différentes occasions, rencontré Paul Moriaud. Par ailleurs, Gustave, le frère d'Albéric à la destinée singulière – il devient conseiller spécial du roi de Siam[77] – qui collabore à l'Institut de droit international et publie régulièrement dans la *Revue de droit international* s'est beaucoup intéressé à la "question d'Orient" avant et pendant le Première guerre et connaît très bien le dossier du génocide des Arméniens, sur lequel il se retrouve avec Paul Moriaud.[78]

La Belgique a tout fait pour que Paul Moriaud se trouve dans une situation exceptionnelle de liens interpersonnels étroits au-delà d'une sim-

74 ibid.
75 "Notice biographique" (1926) 14 Recueil des Cours 3.
76 ibid.
77 Voir, à ce sujet : Marcel Walraet, "L'œuvre des Belges au Siam à la fin du XIX[e] siècle" (1954) 25(2) Institut Royal Colonial Belge : Bulletin des séances 737.
78 Voir, en particulier : Gustave Rolin-Jaequemyns, "La question d'Orient, l'Arménie, les Arméniens et les traités" (1887) 19 Revue de Droit International et de Législation Comparée (1[re] série) 284.

ple demande de compétences. Le filet tissé par Bruxelles pour "avoir" Paul Moriaud comme président de tribunal arbitral était serré… Aussi les liens resteront-ils durables. Le 22 octobre 1920, le gouvernement belge lui proposera la présidence du tribunal arbitral mixte austro-belge avec le même "ticket" que pour le tribunal germano-belge : Paul Moriaud/Albéric Rollin…[79] Par la suite la Belgique fera encore appel à lui; il prendra ainsi la présidence du Tribunal arbitral mixte bulgaro-belge et du Tribunal arbitral mixe hungaro-belge. La confiance qu'avaient en lui aussi les Allemands les conduisit à lui proposer la présidence du Tribunal arbitral mixte germano-polonais.[80] On voit combien, au-delà de la relative taille du monde des grands juristes internationaux "neutres", le lien très serré entre la Belgique et Paul Moriaud joue ici à plein.

De liens de proximité, il est encore question dans l'entourage proche de Paul Moriaud. À l'Université de Genève, deux de ses collègues entrent comme lui dans l'aventure des tribunaux arbitraux mixtes : Eugène Borel, dont il a déjà été question et qui le devait à Paul Moriaud comme il a été dit précédemment, et Paul Logoz, qu'il avait rencontré lors des démarches faites pour la SDN (il était secrétaire de la délégation suisse) et à qui il facilita la prise de présidence du tribunal austro/yougoslave.[81] Dans le prolongement de nos remarques antérieures, on peut voir là un argument de plus en faveur du rôle des amitiés dans les réseaux et les viviers.

De tous pourtant Paul Moriaud, peut être en raison de sa mort prématurée, mais aussi par la manière dont il géra "ses" Tribunaux arbitraux mixtes,[82] allait passer très vite à la postérité en matière de justice arbitrale post-conflictuelle. En 1924, la presse commençait à prendre des photos lors de sa présidence du TAM germano-belge (cf. ci-dessous), mais la mort qui le frappa en septembre 1924 coupa net cette partie spécifique d'une longue carrière. C'est pourtant en ce domaine qu'il allait être honoré.

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79 Lettre d'Albéric Rolin, Fonds Moreau, Série 5, Ms fr 5314–5318, Bibliothèque de la ville de Genève.

80 Fonds Moreau, Série 5, Ms fr 5314–5318, Bibliothèque de la ville de Genève.

81 Paul Logo (Vevey 27 mars 1888 – Genève 30 juin 1973), diplômé en droit de Leipzig et Berlin (thèse soutenue en 1911) avait fait une carrière de secrétaire juridique au bureau des assemblées à Berne, de juge au tribunal de Genève avant d'entrer à la Cour de cassation et finalement de gagner l'Université de Genève ou il enseigna le droit commercial, le droit pénal et la procédure civile et pénale.

82 Voir la contribution de Jacques Péricard (ch 8).

Audience du Tribunal mixte arbitral germano-belge, affaire Cie des wagons-lits, Genève, vers 1924. CC Bibliothèque de Genève.

A l'été 1924, dans le *Recueil des décisions des Tribunaux arbitraux mixtes*, les collègues de Paul Moriaud déplorèrent "la disparition d'un juriste éminent dont les arrêts révélaient une science profonde, une haute noblesse de caractère et une impartialité appréciée pour tous ceux qui (avaient) eu l'honneur de collaborer aux travaux des tribunaux arbitraux, (un juriste) dont l'œuvre fait honneur à l'institution née du Traité de Versailles (et dont) la mémoire restera vénérée", soulignant combien "la justice internationale (perdait) en lui un champion convaincu".[83] C'est aussi, dans une carrière et une vie foisonnante, on l'a vu, l'homme des tribunaux arbitraux mixtes que décida de célébrer l'Université de Genève en 1933. Le 29 janvier, une importante cérémonie se déroula dans le grand vestibule du premier étage de l'Université à l'occasion du dévoilement de son buste dû à un sculpteur genevois Jules Trembley. Ce dernier avait choisi de *le représenter en juge* (souligné par nous) pour "rappeler la haute dignité qui lui avait été conférée après la guerre comme juge international entre deux pays en litige"[84]. Pour la postérité, Paul Moriaud resterait à jamais *le* grand

83 "Nécrologie" (1924) 4 Recueil TAM 177.

84 "Inauguration du buste…» (n 3). Des discours qui furent alors prononcés ressortent trois expressions résumant assez bien l'homme "dons extraordinaires, qualités de cœur, aptitudes variées". Il n'est pas impossible que l'Université ait alors regretté que Paul Moriaud n'ait pas exercé les fonctions de Recteur d'autant qu'en 1924, jusqu'en janvier, quelques mois avant son décès, il occupait les fonctions

juriste des tribunaux arbitraux mixtes – pour la première fois on donnait la liste exhaustive de ceux qu'il avait présidés et on ne faisait pas seulement référence au tribunal germano-belge – et sur ceux-ci rejaillirait une partie de son prestige; on rappela d'ailleurs qu'à la suite d'un important procès tenu devant le tribunal arbitral mixte germano-belge, ses "étudiants avaient fleuri sa chaire pour lui témoigner leur haute estime pour sa science et sa conscience"[85].

L'arbitrage post Première guerre mondiale venait de gagner un héros.

de vice-Recteur auxquelles il avait renoncé en raison d'un excès de travail (*Journal de Genève*, 10 septembre 1924). Il laissait par ailleurs peu d'ouvrages académiques en raison de ses charges internationales; le choix de l'artiste avait donc aussi du sens pour l'Université qui captait ainsi une partie de son prestige qu'il eut été plus difficile de faire apparaître à partir de ses activités universitaires.

85 "Inauguration du buste…" (n 3).

Chapter 8: Paul Moriaud and the Implementation of Mixed Arbitral Tribunals (1920–1924)

Jacques Péricard[*]

> *Mr Moriaud is definitely a remarkable chairman. With his alert face and bright eyes behind a pince-nez, still young despite his small, grizzled moustache, he follows the proceedings with unflinching attention. The litigants had better watch out! When they least expect it, a brief specific question or a shrewd comment will make them aware that the Chairman inconspicuously – but purposefully – recorded their arguments and points in shorthand.*

The above excerpt from the daily *La Nation Belge* published on 2 April 1921 reports on 'the initial hearings of an arbitral tribunal', which was in this case the German-Belgian Mixed Arbitral Tribunal which met in Paris in the spring of 1921.[1] The reporter describes both the Palais Galliera, where this tribunal started sitting, and its lively members, including Paul Moriaud. This newspaper article actually forms part of his private archives now kept in the collections of the Geneva City Library.[2] It is a remarkable corpus containing, among other things, voluminous correspondence that sheds light behind the scenes and helps us understand how the mixed arbitral tribunals (MATs) chaired by this professor from Geneva were organised month after month. The letters cover the period from 17 April 1920 to 5 August 1924.[3] As this documentation only consists of the letters

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1 Geneva City Library, Papiers Paul Moriaud, série 5, Ms. fr. 5314/2, f°89–90.

2 Geneva City Library, Papiers Paul Moriaud, série 5, Ms. fr. 5314 to 5318, four boxes (Ms. fr. 5314/1, 164 folios; 5314/2, 109 folios; 5315, 298 folios; 5316, 283 folios; 5317, 113 folios, 5318, 166 folios). The Library's staff is to be thanked for their assistance as I went through the archives.
The Geneva Iconography Centre provides alternative documentation illustrating Paul Moriaud's work and personality with a series of private-life snaps as well as other photographs taken in the more formal settings of the University of Geneva and the MATs.

3 The documentation ends one month before the sudden death of Paul Moriaud, on 8 September 1924. Two letters received *post mortem* by his widow are also available. These are claims: one from the Secretary of the German-Belgian MAT, in which

received by Paul Moriaud and not those that he sent – with a very few exceptions when the draft letters could be kept –, it may brook a significant bias. However, this still unpublished corpus – of which a few extensive excerpts have been reproduced here – is extremely valuable as it highlights how this peculiar jurisdiction came about. It focuses on the production of international law and the strained – yet often friendly – relationships between the various actors in these MATs, more than on specific legal and procedural issues. Obviously, the background and experience of these men shaped the way they saw their mission as they tried, as far as was possible, to avoid political issues.

Article 304 of the Treaty of Versailles on MATs is relatively loose in many regards. As a matter of fact, the tribunals' internal operation, their meeting place, the way rules were set, the procedure, selection of members and staff were at the Chairman's discretion depending on the circumstances.[4] Browsing Paul Moriaud's archives allows one to better understand how the leeway of MATs could give rise to the procedural innovations described in other papers in this book. These letters also demonstrate how strict application of the law was not necessarily the best approach, particularly in 1923, which was a critical year on the diplomatic front.

Two key concerns stand out from Paul Moriaud's papers. First, he and his correspondents needed to quickly set up the human and material organisation of MATs as the pressure from governments and plaintiffs mounted. The next step was to build the legitimacy of such unprecedented jurisdictions, which had a great deal to prove in a situation of mistrust. Caught between the vindictive and resentful 'old' enemies of the Great War, Paul Moriaud was certain to face, against his will, the following two challenges and to play an active part in this post-conflict period.

Mr Stevens (Ms. fr. 5317, f°111, 9 November 1924) requests the said widow to return the Treaty of Versailles in English and French, large format, should this document be in the library of 'our late Chairman'. The other (Ms. fr. 5317, f°112–13, 13 November 1924), sent by Thadée Lebinski [Tadeusz Łebiński], Secretary of the German-Polish MAT, calls upon Mrs. Moriaud to return books held in her late husband's library that belonged to the Polish delegation.

4 Art 304 (d): 'Each Mixed Arbitral Tribunal shall set its own procedure insofar as it is not governed by the provisions of the Appendix to this Article. It shall have the power to fix the costs payable by the losing party for outlays and costs of proceedings.'
§ 2. 'The Tribunal shall adopt procedural rules which serve the cause of justice and fairness. It shall decide the sequence and time frame for each party to deliver their submissions and set the formalities required for bringing evidence.'

1. Challenge Number One: Organising MATs ex nihilo and Urgently

Article 304 (a) of the Treaty of Versailles orders the establishment of mixed arbitral tribunals within three months after it has entered into force, ie on 10 January 1920. That deadline was met for the MATs under Paul Moriaud's chairmanship as his private archives indicate that they started operating in mid-April 1920. But at that time, some issues were still unsettled, and organisational problems started to arise quite soon; these related to staff neutrality and the meeting place of such MATs.

1.1 The Critical Matter of Neutrality

The existing pool of internationalist academics, preferably from countries not involved in the War, was examined for potential MAT members and chairmen. A kind of dual neutrality embodied by Paul Moriaud was fostered. Other people more involved in politics – such as Francisco Leon de la Barra – thought it right to reaffirm consistently, either in their doctrinal works or in the correspondence examined here, on the one hand, their faith in international law and, on the other hand, in the virtue of MATs.[5] With the low number of candidates, however, selecting arbitrators was no small feat: experts from neutral countries were few and often fairly busy. Moreover, subsequent resignations show that such an office, although prestigious, was not very appealing because it required a lot of travelling, which was irreconcilable with other professional activities. For pragmatic reasons, concurrent chairmanships were therefore common practice so as to share the combined knowledge of the best experts between several MATs, to minimise inconvenience and to speed up proceedings. As regards the appointment of government representatives to each tribunal, it was not much of a problem and seems to have been achieved quite rapidly. The MATs also benefited from the presence within their precincts of great legal minds such as Georges Sartini van den Kerckhove, Public Prosecutor to the Brussels Court of Appeal, and representing Belgium within the German-Belgian MAT.[6]

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5 See also Plas (ch 7) regarding the careers of these men in the political bodies of their countries or in the various internationalist circles.

6 Regarding the input of Belgian lawyers, see Vincent Genin, *Incarner le droit international: Du mythe juridique au déclassement international de la Belgique (1914–1940)* (Peter Lang 2018); Vincent Genin, *Le Laboratoire belge du droit international. Une communauté épistémique et internationale de juristes (1869–1914)* (Académie Royale

Finally, each tribunal was also responsible for organising its secretariat, whose task proved to be a difficult one as evidenced by the archives. This pivotal function of the tribunal faced frequent challenges. In some cases, the decisions were motivated by practical considerations, and the same person was often in charge of several secretarial assignments. This was widespread practice, but neutrality sometimes became an issue. The case of Jean Stevens epitomises this. On 6 January 1921, Albéric Rolin, the Belgian arbitrator sitting within the German-Belgian MAT, informed Paul Moriaud that the Belgian authorities had appointed Jean Stevens, a lawyer at the Brussels Court of Appeal, as the Tribunal's Secretary.[7] Five days later, the latter personally informed Chairman Moriaud of his arrival in Paris, where he had already met Mr Guérin, Secretary General of the French Office for Private Properties and Interests, and Mr Augier, Secretary of the Franco-German MAT. Both assured him that the German-Belgian Tribunal could use the same hearing room as well as two other rooms for the Belgian secretary.[8] One place, several tribunals. One secretary, several tribunals too: on 19 April 1921, the Belgian Ministry of Economic Affairs informed Moriaud that Jean Stevens had been appointed as the Belgian Secretary of the Belgian-Austrian MAT.[9] The rationale leading to the appointment of a single chairman to oversee a series of MATs therefore equally applied to the secretariats. That posed a problem that taxed Stevens himself. On 11 August, he advised Mr Moriaud, in his capacity of Chairman of the German-Polish MAT, that his [Stevens] name was proposed for the post of 'Secretary General'. Stevens was worried that his own neutrality could be challenged. He believed that he was clearly neutral vis-à-vis the Polish Government, but with respect to Belgium, although he was not a civil servant, his status might admittedly be problematic. He went on to suggest asking for the Belgian Government representative's opinion about that.[10] Stevens' doubts were fully justified and actually materialised within the framework of the Franco-German MAT, in which he also worked.[11]

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de Belgique 2018). The author is to be thanked for his valuable feedback and bibliographic information. Regarding the career of Mr Sartini van den Kerckhove, see F. Muller, La Cour de cassation belge à l'aune des rapports entre pouvoirs, Bruxelles, 2011. In general, regarding Belgian judiciary history and its figures involved in the MATs, see the Digithemis database: http://www.digithemis.be/index.php/en/ (which I consulted on 1 May 2020).

7 Ms. fr. 5314/2, f°4 and 5.

8 Ms. fr. 5314/2, f°8, 11 January 1921.

9 Ms. fr. 5314/2, f°97.

10 Ms. fr. 5315, item n°32.

11 Ms. fr. 5315, item n°43.

Indeed, in a letter to Moriaud on 21 December 1921, Mr Johannes, a German government representative, requested the Tribunal to reconsider the appointment of Jean Stevens as Secretary General. He invoked the text of the Treaty, and more specifically Paragraph 5 of the Appendix to Article 304, which provided that the tribunals were sovereign to choose their staff within the limits set by the Treaty. A relevant part of Johannes' argument must be quoted here:

> Each of the powers concerned shall be able to appoint a Secretary. Such secretaries shall make up the mixed secretariat of the Tribunal and shall work under its command. The Tribunal may appoint and employ one or more staff members who may be needed to assist the Tribunal in the performance of its duties. [The Tribunal] has no right to replace the secretariat formed by the government secretaries with another organisation, [or] the right to appoint a Secretary General without the consent of governments which, by approving such an appointment, act independently to confer on the Secretary General the secretarial function of their choice. This is how the Secretary of the Franco-German Mixed Tribunal was actually appointed. It is clear, anyhow, that the utmost care was taken in the Treaty of Versailles to ensure that the Mixed Arbitral Tribunals would comply with the highest standards of impartiality. To this end, it prescribed that each Tribunal be composed of a chairman elected by mutual agreement between the two governments or chosen from the nationals of powers that remained neutral during the war, as well as two arbitrators, one appointed by each government or who shall also be chosen from the nationals of neutral powers. Similarly, it prescribed that the key functions of the secretariat be carried out jointly by two national secretaries so as to ensure the same influence on each side. It would be utterly contrary to the spirit of the Treaty and to the principle of impartiality maintained by it if the secretariat's affairs were put into the hands of a German national or a national of an allied or associated country. That is why the German government may refuse to recognize the appointment of Mr Stevens, a Belgian national, or the appointment of another Secretary General made without its consent, and it should hesitate to contribute to the funds required for his remuneration.

Stevens' stand might be viewed as ambiguous. There was no doubt about his ability to serve as Secretary, but the 'how' could seem questionable when you read the strong recommendation Moriaud received about recruiting him. Jean Stevens did not come out of the blue, and the letter sent by Hector Maillart shows that it is indeed a small world. Maillart,

the former assistant doctor at the Geneva Cantonal Hospital, let Moriaud – with whom he used the familiar form – know that Jean Stevens was his cousin.[12] He deemed it necessary to tell him about his family: Jean was the son of Eugene Stevens, a well-known lawyer in Brussels and a friend of Jules Rankin, a member of government. He was the eldest of a strongly Roman Catholic family of sixteen children. Jean Stevens' mother was Melanie Dautzenberg, Maillart's cousin; her father, Philippe, was a partner in the Braquenie firm, a large Parisian tapestry manufacturer.[13] Then Maillart turned his attention to Jean Stevens, sparing no detail. He was 27 and three months, had attended the Jesuit Saint-Michel secondary school in Brussels before pursuing law studies, interrupted for some time by the War, during which he had fought as a sergeant. During the Battle of Namur, he was captured and remained a prisoner until the Armistice. His younger brother had left Belgium to enlist in the Belgian Army of France, where he was awarded the War Cross and the Order of Leopold Cross. Finally, Maillart ended his long letter by praising Stevens' skills which were relevant for the MAT. In his opinion, work would also be a good cure for the young man who had just suffered heartbreak, as his fiancée had left him for someone else These somewhat tedious details allow us to understand the risk of bias – and even resentment towards Germany – on the part of the Stevens family. If you add that the father, Eugene, defended Belgian applicants before the German-Belgian MAT, then absolute objectivity does indeed. become doubtful However, all recruitment was guided by proceeding in this way, which ensured that the person selected was satisfactorily skilled. On 14 January 1921, Alex Kaivers wrote to Paul Moriaud on the advice of his cousin, Fernand Leveque, a lawyer in Brussels. Having learned in *Le Moniteur* that he was the Chairman of the German-Belgian MAT, he asked him to earmark a post for his son in the Tribunal. He then touted the virtues of the 24-year-old, who had graduated in business administration and mastered five languages.[14] It is not clear whether Moriaud agreed to hire him as he did in February 1921 in the case of Annette Estoup for a stenographer's position. The latter was recommended by her father, Jean-Baptiste Estoup, himself a well-known

12 Ms. fr. 5314/2, f°13 and 14, 14 January 1921.

13 No detail about this family is spared: Philippe Dautzenberg was reportedly a recognised conchologist in his spare time. The mother, who was a Braquenie, as Maillart pointed out, was the third child born into a family of fifteen children.

14 Ms. fr. 5314/2, f°15.

stenographer and publisher of *La Vérité sténographique*. A shared passion for stenography certainly facilitated the whole process.[15]

Returning to Jean Stevens: given his essential role as Secretary of several MATs sitting in Paris, Moriaud found it necessary to write a swift and accurate reply to Johannes on 22 December 1921.[16] He stated that the German-Polish MAT never decided to constitute anything other than the mixed secretariat provided for in Article 304 § 5 of the Treaty of Versailles. For convenience, the Rules of Procedure of the German-Polish MAT were also the same as those of the German-Belgian MAT. His justification then led him to further describe the machinery of such a tribunal. If its internal organisation ultimately resembled that of any other jurisdiction, its setting up seemed rather basic.[17] Moriaud, the chairman playing the one-man band, recounted his challenges and the Secretary's beneficial work:

> Having learned from the unfortunate experiences in the organisation of the Franco-German secretariat, I felt it necessary to take care of all these issues myself when setting up the German-Belgian secretariat, and I settled everything in detail with the help of Mr Stevens before allowing him to act on his own authority under Mr Simon's supervision[18]. What had to be done to start up the German-Polish secretariat? We were aware that a young Polish jurist was already appointed as Secretary. He could devote all his time to this office, and, in all likelihood, Germany would not appoint a special Secretary and would entrust instead a Secretary already working in another Tribunal with our secretarial tasks as a secondary duty. The Tribunal decided that the most convenient modus operandi was to have the Polish Secretary go through a kind of training provided by Mr Stevens, who would at the same time be responsible for preparing with him all the necessary registers, forms and other documents. Were it not for Mr Stevens, the Chairman would have had to take on this whole task, and he would not have done as well as Mr Stevens, who had nearly one year of practice behind him and had got the opportunity to make many a change to the system originally devised with my collaboration. In order to secure the assistance of Mr Stevens as well as the right for the Polish Sec-

15 Ms. fr. 5314/2, f°35–37.

16 Ms. fr. 5315, document n° 44.

17 'The number of registers, their respective purposes, their headings, the wording of the different forms and wet stamps, the method for case filing, the procedure for records and documents registration and copying, etc. must be decided on.'

18 Mr. Simon was the German Secretary of the Franco-German MAT.

> retary to enter and work in the premises of the German-Belgian secretariat, Mr Stevens had to be made – at least temporarily – one of those officers whose appointment had been entrusted to the Mixed Arbitral Tribunal pursuant to Article 304, [Annex] § 5[19] of the Peace Treaty.

Returning to this office of Secretary General, which was the crux of the matter, Paul Moriaud considered it essential to clarify the following:

> What may have been confusing is the term 'Secretary General' used to refer to these duties performed by Mr Stevens. Of course, if the Tribunal had foreseen such a misunderstanding, it would have avoided that term, which it uses out of politeness. In the course of his temporary work, Mr Stevens shall never intervene in the Tribunal's affairs, neither for setting time limits, nor for keeping the minutes, nor for correspondence with the parties, nor for any act of a legal nature under the competence of the Secretariat as provided by the Rules of Procedure. In this way, the issue of neutrality, for which the neutral chairman is the first one to be most concerned, has no relevance here.

Because of this misunderstanding, Chairman Moriaud provided significant details about how MATs worked given their resources and time constraints. With cases piling up, new procedures had to be devised rapidly. However, suspicions of discrimination promptly resurfaced: on 24 May 1923, in a very tense atmosphere, the German Secretary of the German-Belgian MAT, Mr Uppenkamp, complained that he did not enjoy the same treatment as Stevens. The Tribunal's caretaker would stubbornly refuse to hand the mail to him in the absence of his Belgian colleague, he said.[20]

1.2 The choice of places for MATs was another stumbling block

The diplomatic and practical stakes were high: no one should be unduly favoured, and arbitral awards should be decided quickly and be coherent. The example of the German-Belgian Tribunal was characteristic as evi-

19 The text of this provision is as follows: 'Each of the powers concerned shall be able to appoint a Secretary. Such secretaries shall make up the mixed secretariat of the Tribunal and shall work under its command. The Tribunal may appoint and employ one or more officers who may be needed to assist the Tribunal in the performance of its duties.'

20 Uppenkamp asked Moriaud to restore equality (Ms. fr. 5316, f°150). His letter of thanks suggests that the Chairman took action (Ms. fr. 5316, f°151, 28 May 1923).

denced by the arguments put forward by the parties to justify its location. In Moriaud's correspondence, an anonymous note dated October 1920 recommended that the Tribunal be based in Brussels – a choice that would be relevant to Germany because of 'rapid communications'.[21] In any case, Moriaud was pressured on several occasions to make a prompt decision on this subject. During the summer of 1920, Albéric Rolin informed him that Belgium eagerly wanted the German-Belgian MAT to be set up in Brussels, whereas the Germans wanted it in Bern. He also regretted the delay in the formation of the German-Belgian MAT while 'the Franco-German MAT had been up and running for months.'[22] On 26 October 1920, Rolin again criticised the Chairman for hesitating to confirm the choice of Brussels as the MAT's location.[23] 'Make up your mind!', ordered Belgian government representative Georges Sartini van den Kerckhove the following day.[24] When Moriaud finally set up the MAT in Paris, reactions came flying from all sides. 'Outrageous!', Rolin wrote.[25] 'What a disappointment!', the representative of the Ministry of Economic Affairs protested.[26] Semantics also barged in, giving away the power of symbols: Albéric Rolin requested that the MAT be called 'Belgo-German' instead of 'German-Belgian', wording frowned upon in Belgium, according to him.[27]

Yet, Paul Moriaud was aware of the fact that sitting in Brussels was not an obvious choice. The fact that he requested a list of hotels where Germans would be accepted speaks volumes about the atmosphere in the city.[28] Cost saving considerations may also have determined the choice of location, and Paris had many advantages. Franz Scholz, the German judge on the German-Polish MAT, readily admitted that meeting in the French capital was cheaper for his government.[29] But in 1923, at the height of the crisis over the occupation of the Ruhr area, the streets of Paris did not seem safe enough for German nationals. Mr Lenhard, who represented the German government on the German-Polish MAT, therefore thought that

21 Ms. fr. 5314/1, f°64.
22 Ms. fr. 5314/1, f°49. A letter from the German Government dated 27 September 1920 asked Moriaud to have the German-Belgian MAT based in Bern and even suggested that 'MATs be grouped together in Switzerland.'
23 Ms. fr. 5314/1, f°68.
24 Ms. fr. 5314/1, f°69, 27 October 1920.
25 Ms. fr. 5314/1, f° 73, 3 November 1920.
26 Ms. fr. 5314/1, f°77, 13 November 1920.
27 Ms. fr. 5314/1, f°63, undated draft on the surveillance of 'Germans', f°80, 18 November 1920.
28 Ms. fr. 5314/1, f°62.
29 Ms. fr. 5316, f° 43, 1 February 1923.

it was necessary to move the MAT out of Paris.[30] Practical considerations may also have led the members of the various MATs to meet in another place. The same Mr Lenhard, without even referring to the prevailing crisis, wrote to Moriaud on 29 March 1923 to remind him of two urgent cases pending before the German-Polish MAT. He pointed out that German arbitrator Scholz, Professor Kaufmann, representing German applicants in these cases, as well as himself would be present in Geneva from 6 April for the sessions of the Yugoslav and Czechoslovak MATs. 'In my view, the most convenient place for the oral proceedings would be Geneva, and at the shortest possible notice.'[31]

The previous examples provide an overview of the context in which the MATs started operating, spurred on by Moriaud. In addition to this, another problem was the need to deal simultaneously with a dispute that started worsening in its very first months. At the same time, proving the legitimacy and integrity of MATs in a climate of European tension was urgent.

2. *Challenge Number Two: Conferring Legitimacy and Authority upon the MATs*

Paul Moriaud and the other chairmen strove to build up this authority by harmonising the functioning and case law of the new jurisdictions despite the ongoing political tensions. These were numerous and, unsurprisingly, originated in Germany.

2.1 Harmonising Rules and Case Law was Essential

Harmonising rules was of concern to the various chairmen. Moriaud being in charge of several MATs already ensured some sort of cohesion. Combining multiple chairmanships as Moriaud did – he was by no means the only one – naturally tended to homogenize the rules. A letter sent in 1920, probably by the Chairman of the Franco-German MAT – André Mercier – underlined the proximity of different MATs, which sat almost in the same fashion, often in the same place and to hear a similar dispute. Rules must be similar:

30 Ms. fr. 5316, f°33, 26 January 1923.
31 Ms. fr. 5316, f°116.

> From the conversation we just had in which I tried to answer the questions I was asked by you and your colleagues, I omitted to highlight a point worthy of interest; unless significant changes are required in terms of principle or procedural system, I would consider it desirable that both our Rules be as completely harmonised as possible. This would avoid potential confusion that could occur and would make it easier either for government representatives – who may serve in two MATs and may also be deputies replacing one another – or lawyers and legal advisers of parties, who could be called upon to assist parties before various MATs [in particular] the Germans" … Being required to know several Rules of Procedure would complicate their work, which will already be very difficult.[32]

In the summer of 1920, the Belgian arbitrator of the German-Belgian MAT, Albéric Rolin, insisted that the rules of procedure had to be simple:

> One of the issues which need to be deliberated over promptly is the procedure to be established. I have on my lap the Franco-German Rules of Procedure, which I find really complicated, overly meticulous and particularly demanding for the parties. We should avoid having too many formalities and simplify proceedings insofar as compatibility with the need for sound justice is guaranteed.[33]

In another letter dated 2 October 1920, Rolin informed Moriaud that he had received two copies of his draft proposals:

> You have worked hard and made some changes to our initial version while keeping its main lines …. Mr Sartini, whom I have just seen and who is our government's representative, has received and skimmed through his copy. He believes that these Rules of Procedure are better than the Franco-German ones – and even far better, I would say. We have thoroughly scrutinized it together. He is a high-ranking judge with a sharp mind. He will make a close study of your work and will send his observations to me in writing.[34]

Accordingly, Rolin suggested that the Rules of Procedure already laid down be used as templates for subsequent ones. On 4 October 1920,

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32 Ms. fr. 5314/1, f°44. Mail with the header of the Franco-German MAT without a specific date (1920). One can assume that this letter was sent by André Mercier, Chairman of the first section of the Franco-German MAT.

33 Ms. fr. 5314/1, f°31.

34 Ms. fr 5314/1, f°55.

acknowledging receipt of the Anglo-German Rules, he wrote in confidence to Moriaud that, after reading the document, he found that the German-Belgian text did not need any amendment.[35] The search for efficiency thus guided the drawing up of these Rules. In a letter dated 19 March 1921, Rolin wrote again that Dr Rosenberg, the Austrian arbitrator of the Belgo-Austrian MAT, also chaired by Moriaud, would have no objection to the Rules of Procedure being the same as the German-Belgian MAT's.[36]

They then had to become familiar with the procedure. Appendix 2 to Article 304 provides that 'the Tribunal shall adopt procedural rules which serve the cause of justice and fairness. It shall decide the sequence and time frame for each party to deliver their submissions and set the formalities required for bringing evidence.' Judging by the letters that Secretary Stevens sent to Moriaud, time frames were a recurring issue. To address this, some flexibility was necessary. Ultimately, it was a matter of reaching a practical agreement on the way this procedure should be applied and on the terms of both justice and equity – as a matter of urgency. The Treaty of Versailles was ratified on 10 January 1920 and Article 304 (a) provided that a 'Mixed Arbitral Tribunal shall be set up between each of the allied or associated powers, on the one hand, and Germany, on the other hand, within three months after this Treaty has entered into force.' The correspondence, which admittedly starts in April 1920, seems to reveal some delay, at least as regards implementation. While Belgian traders ignored the MAT, as evidenced by one previous example, actions for relief piled up rapidly even though the Rules of Procedure had not yet been published. In 1921, there was a growing sense of urgency to make them public rapidly. This resulted in a sometimes hasty process, particularly in the case of the German-Belgian MAT. Belgian arbitrator Albéric Rolin complained that he had not actually seen the proofs of the German-Belgian MAT's Rules of Procedure before the Belgian authorities published them.[37] Government representative Sartini van den Kerckhove hastened to explain that the lack of proofs was due to the urgency.[38] He added that he had complied with the copy sent to him that bore the signatures of Paul Moriaud as well as Rolin and Hoene, members of the MAT, having only corrected a few misprints. Sartini's initiative was understandable given the universally acknowledged backlog of cases. In

35 Ms. fr 5314/1, f°56.
36 Ms. fr. 5314/2, f°83, f°55.
37 Ms. fr., 5314/2, f°4 and 5, 6 January 1921.
38 Ms. fr. 5314/2, f°9 and 10, 12 January 1921.

a letter dated 1 October 1920, Albéric Rolin informed Moriaud that he had sent a report to the Belgian Minister of Economic Affairs 'on what we have done …, the number of cases filed (which is considerable, about 8000) [and the fact that] a lot of cases can probably be completed without debate.'[39] Despite suitable solutions for the parties prior to litigation, the pressure on MATs increased as claims were piling up. In a postscript at the bottom of a letter dated 16 April 1923 informing Moriaud of the routine proceedings of the German-Belgian MAT, Secretary Jean Stevens mentioned that someone had come to the secretariat at least twenty times asking whether there had been a judgement 'in the Louis cases.'[40]

Expectations were high, and the press soon reported on the tribunals' activity, if not about their lapses. Eugène Borel, Chairman of the German-English MAT based in London, who gave an account of the work of his Tribunal in a letter to Moriaud in January 1921, thought that the process was slow:

> We have already had a sitting (on provisional measures), and tomorrow, we are going to give our ruling which I have to make public verbally with summarized grounds. This is all the more delicate because there will probably be a reporter from *The Times*, and everything said will be taken down in shorthand. Well, we shall see.[41]

Harmonisation of case law was also raised. In February 1921, Francisco León de la Barra informed Moriaud of his appointment as Chairman of the Franco-Bulgarian, Greco-Bulgarian, Franco-Austrian and Greco-Austrian MATs.[42] Sensing that these jurisdictions would have to deal with similar disputes, he considered it necessary that their chairmen should consult one another about the problems to be solved. La Barra, who regarded international mediation processes as highly noble, as evidenced by his lectures at The Hague Academy,[43] considered that such collaboration was paramount:

> [it] would be most propitious and allow for the setting up of a uniform procedure and, above all, uniform case law in the various

39 Ms. fr. 5314/1, f°53.
40 Ms. fr. 5316, f°125. In a marginal note, Chairman Moriaud wrote: 'judgements written'.
41 Ms. fr. 5314/2, f°27, 25 January 1921.
42 Ms. fr. 5314/2, f°38, 7 February 1921.
43 Francisco León de la Barra, 'La médiation et la conciliation internationales' (1923) 1 Recueil des Cours 553–67.

> Mixed Arbitral Tribunals. This outcome would, among other benefits, strengthen further the authority of this new type of inter-nation jurisdiction.

However, such harmonisation should be flexible: La Barra agreed with Moriaud (whose opinion may be inferred from a letter from his Mexican colleague) to attune the decisions of MATs while preserving their freedom of action and judgement.[44] To harmonise such case law, various means were used. First, communication between MAT chairmen was frequent. For instance, it was proposed to invite members of other arbitral tribunals present in Paris to a meeting of the various chairmen of the Franco-German MAT.[45] Taking on multiple chairmanships was obviously another way to harmonise solutions, and the Belgian Minister of Economic Affairs put forward that argument when he asked Moriaud to chair the Belgo-Hungarian MAT:

> I would be happy if I could count on your valuable collaboration, in order not to disrupt the unity of views and methods that must prevail throughout the operation of the various mixed arbitral tribunals to which Belgium is a party.[46]

Coordinating sessions arose from the same intent. Chairman Paul Logoz responded to German representative to the German-Yugoslav MAT Dr Lehnard's 'perfectly justified' wish to have the spring sessions of the German-Yugoslav, German-Czechoslovak and German-Belgian Tribunals 'following one another as much as possible without interruption.'[47] He copied this letter to Robert Fazy, Chairman of the German-Czechoslovak MAT as well as Moriaud to make this meeting possible, presumably in Venice around Easter. The result of this convergence was a pragmatically emerging case law based on the experience of the tribunal staff: Secretary Stevens, writing to Moriaud about a case dealt with by the Bulgarian-Belgian MAT, thus suggested that the chairman should adopt the solution chosen by the Franco-German MAT.[48] Such case law was all the more welcome since matters were technical. On 3 September 1921, Andre Merci-

44 Ms. fr. 5314/2, f°41, 11 February 1921.
45 Ms. fr. 5314/2, f°61, Paris, 24 February 1921, letter (unidentified writer) addressed to Paul Moriaud to invite him to a conference of MAT chairmen on 15 March, as La Barra, Botella and the writer wanted.
46 Ms. fr. 5315, n°36, 19 September 1921.
47 Ms. fr. 5316, f°1, 8 January 1923.
48 Ms. fr. 5316, f°111. 27 March 1923.

er, Chairman of the first section of the Franco-German MAT, received petitions from French nationals against Germany for the refund of taxes levied by German authorities.[49] Assuming that such complex cases must also be brought before other MATs, he proposed to Charles Asser and Paul Moriaud, chairmen of the Franco-German and German-Belgian MATs respectively, that they consider them and then jointly define uniform principles of case law.

Finally, the publication of proceedings was another effective means of harmonising case law. Attention was given to disseminating it relatively quickly. In February 1921, Charles-Hervé Alphand, head of the French Office for Private Properties and Interests within the French Ministry of Foreign Affairs, presented Moriaud with the form and purpose of the publication of the MAT awards that the Ministry was going to propose.[50] Specific guidelines were provided to the chairmen of the MATs for the twelve monthly booklets, which would form a complete volume at the end of the year. The aim was to render the awards in full. 'Too much,' Moriaud noted in the margin. Along the same lines, the publisher required the inclusion of case law reference notes to facilitate consultation and comparison. The primary purpose of the compendium was to serve the MATs, and their chairmen were invited to be members of the Editorial Board. Furthermore, it was hoped that rulings should be disseminated in the language in which they had been delivered (English, French or Italian). Those in Japanese would be published in English. Similarly:

> Each award shall be preceded by a summary analysis written in the two languages other than the one in which it was written. These summaries will allow interested parties to quickly find the decisions they are looking for and have the relevant ones translated. They will also make it easy to compare the case law of the various mixed tribunals.[51]

Alphand's letter addressed two fundamental subjects: the translation and proper understanding of legal concepts in tribunals where several traditions converged. While the text of the Treaty actually contemplated the language used, it left it to the lawyers to agree on this point.[52] Rudolf Blüh-

49 Ms. fr. 5315, n° 35.

50 Ms. fr. 5314, f°55s, 24 February 1921.

51 It was welcomed by Alphand, who, on 24 February 1921, informed Moriaud of the publication of MATs' rulings, allowing comparison and translation of awards (Ms. fr. 5314/2, f°55–58).

52 This issue of language – carrying in itself a legal culture – and of translation challenges remained the cornerstone of international jurisdictions. Olivier Moreteau,

dorn, who participated in the MATs as the Austrian government's representative, referred to the language issue in the courses which he later gave at The Hague Academy. He noted that the Rules of Procedure favoured the language of the Allied power, if it was English, French or Italian. As for the other MATs, language arrangements varied. The tribunals in which Greece or Romania took part chose French just like the German-Yugoslav MAT, German being accepted only by mutual agreement of both States.[53] While emphasising a good command of foreign languages in Germany, Blühdorn noted the German government's difficulty in finding civil servants with such language proficiency in a litigation context. Elaborating, he added that 'the language used in an international tribunal wields its influence on the whole procedure and hence, on the decision itself. Practice has shown that the party who can use their mother tongue is – *caeteris paribus* – more likely to win.'[54] For practical reasons, it was decided to bring together in one capital the MATs using the same language. Paris was one such city, so was London; it was decided in June 1920 that the MATs using the English language would be grouped in Great Britain's capital.[55]

The language issue left no one indifferent, and MATs were an interesting experiment in this regard. On 26 September 1920, a Dr Müller wrote to Moriaud from Düsseldorf informing him that he was 'writing a booklet on the problem of languages in international conflicts', and asking about the language policy within the MATs.[56] Moriaud's interest in translation matters is an acknowledged fact. His report on the preliminary draft of a Swiss Civil Code submitted by Eugen Huber, seemingly commissioned by the *Ad Hoc* Drafting Committee,[57] was part of his private archives. Actually, his numerous criticisms of both substance and form were based on problems raised by the translation of sources and legal concepts permeating such a draft. He pointed out inaccuracies and even confusion in the use of German and French texts as well as their combination in this preliminary draft. One could imagine that he showed the same interest during the debates in MAT hearings.

'Les frontières de la langue et du droit : vers une méthodologie de la traduction juridique' (2009) 61(4) Revue internationale de droit comparé 695–713; Pascal Plas (ed), *La langue du procès* (Institut Universitaire Varenne 2017).

53 Rudolf Blühdorn, 'Le fonctionnement et la jurisprudence des Tribunaux arbitraux mixtes créés par les traités de Paris' (1932) 41 Recueil des Cours 137, 177.

54 ibid, p. 178.

55 Ms. fr. 5314/1, f°6–9.

56 Ms. fr. 5314/1, f°48.

57 Ms. fr. 14.

Despite harmonizing efforts, these tribunals still had to face several unknown factors. In the first few months, questions were raised about their competence and its combination with that of national courts.

On the sidelines of hearings, the members discussed this subject, as evidenced for instance in a letter the Belgian government representative Georges Sartini Van de Kerckhove sent to Moriaud on 11 February 1921 about the difficult case of a Belgian textile merchant doing business with German traders in 1919.[58] While the first deliveries took place normally, the merchant was not able to properly fulfil his delivery obligations thereafter due to a shortage of transportation. The German contracting partners then filed a lawsuit with a German court, 'thus contravening Article 304b subparagraph 2 of the Treaty of Versailles', Sartini underlined. The precautionary seizure of the goods stored on German territory and of 400 000 German Marks remitted to a bank in Germany in payment of the first deliveries was then ordered without adversarial argument. The Belgian merchant, unaware of the possibility of bringing an action for relief before the German-Belgian MAT, tried to appeal before the German court that ordered the seizure – in vain. Deeply concerned about this unfortunate man who, deprived of his fabrics and the funds seized in Germany, risked impending bankruptcy, Sartini asked Chairman Moriaud how to speed up the procedure before the MAT and release the goods.[59] Despite information given to the press and publicising the existence and functioning of the MATs better known, such setbacks most probably happened again.[60] Furthermore, due to jingoism, conflicts of competence were not uncommon. Facing national courts, MATs had to conquer their places.[61]

58 Ms. fr. 5314/2, f°42–44.

59 Ms. fr. 5314/2, f°44. Sartini did not reveal the names of the parties to this dispute.

60 Ms. fr. 5314/2, f°88: Moriaud kept in his archives an unidentified newspaper clipping, probably published in 1920, announcing the setting up of the German-Belgian MAT and its functioning modalities. Among its powers, he highlighted the following: 'Compensation due to a Belgian or German national as a result of the invalidation of an agreement between them for total or partial failure to perform or in respect of a right provided for in the said agreement.'

61 Here is another example: Ms. fr. 5314/2, f°84, letter of 22 March 1921 from Xavier Janne, a Belgian lawyer, concerning a case on which no other information is available (it was Moriaud who underlined specific words): '[I] do not insist on getting your authorised opinion on the matter of competence, which I believed is outside the scope of the possible dispute to be submitted to the arbitral tribunal since the issue could only concern the Belgian courts currently dealing with the matter… and could be sorted out when your enlightened jurisdiction would hear only the merits of the case! … Mr Sartini has already been kind enough to tell me that, in his opinion, the only competent tribunal was the mixed tribunal,

2.2 Diplomatic Hurdles

In spite of all the efforts, the MAT process was also slowed down by the Germans' lack of cooperation Although the problem was well-known, Chairman Moriaud's correspondence offers new insight into the various sequences of such disruption.

As early as 1921, the German-Belgian MAT faced difficulties caused by the recurring absence of the German judge, Mr Hoene. The latter alleged that he was not able to sit because he had difficulty in getting his passport and the German Government's clearance – an excuse that was not readily accepted by the other members, who felt that it was above all a delaying tactic.[62] For Albéric Rolin, the pretext of the German Government's permission did not hold water: he and Sartini said that they only needed Chairman Moriaud's invitation to go and sit in Paris.[63] So, he urged Moriaud to act without waiting for Hoene, noting that claims were piling up, taking the case of a manufacturer from Luxembourg whose shortfall added up to millions as an example. Doing without Hoene was possible at this stage because it was only a matter of meeting up to prepare the Secretariat's Rules. Moriaud tried to spark a reaction by sending a telegram to Hoene: 'urgent decisions to be made. If you cannot come over to Paris, shall immediately convene Brussels.'[64] Facing the same pretexts again, Moriaud wrote more curtly: 'unacceptable that every invitation faces obstacle. … neither tribunal nor government have the right to delay. Rules must be applied.'[65] Obviously, the problem ran deeper, as a letter from Dr Zwehl, a Berlin lawyer and friend of Paul Moriaud, brought home.[66] Initially, Zwehl contacted his former professor at the University of Geneva to give him the details of a Belgian colleague who may be able to defend

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and, despite his opinion, which was known to the court of Tongres, the Belgian judiciary gave a ruling approving its competence! … NB: I submit the dispute to the Liege Court of Appeal.'

62 For example, Ms. fr. 5314/2, f°12, 14 January 1921.

63 Ms. fr. 5314/2, f°17, 19 January 1921.

64 Ms. fr. 5314/2, f°19, 21 January 1921.

65 Ms. fr. 5314/2, f°20, 22 January 1921. The subsequent letters still contained the same arguments (Ms. fr. 5314/2, f°21, 22 January 1921) and the same insistence on the part of Moriaud, who also contacted the German Ministry of Foreign Affairs (Ms. fr. 5314/2, f°22, 24 January 1921).

66 Ms. fr. 5314/2, d°47–48, 16 February 1921.

his German client before the German-Belgian MAT.[67] Politeness quickly gave way to a fatalistic overview of the situation:

> Unfortunately, the problem is to find one in Brussels who accepts to take on the case of a '*boche*'! … Before the war, I would be nearly as good a European as a good German. Now, I'm chauvinistic. By all means! Everyone else is becoming chauvinistic here. If the [Triple] Entente hopes to prevent a future war forcibly by disarming us, by leaving a sizeable part of our population to starve and imposing its yoke on us, it is sorely mistaken! It's been attempted many times since Pharaoh's time. But humanity learns nothing from history. A slave revolt, more horrendous than a war between free peoples, will hurl our poor Europe into the abyss on the brink of which it is tottering sooner or later.

But there was a will from all sides to take MATs away from the political context. Their non-German members often used this argument in order for preliminary hearings to be held. But the Germans, at the behest of their government, baulked at attending hearings under pretences that Moriaud would no longer tolerate. In a memo he wrote in 1922 in response to Hoene's arguments about the economic mess undermining the solvency of German debtors, the Chairman took exception and reminded him of the MAT's primary mission:[68]

> Why are we discussing all this, anyway? Is it our concern, as a Mixed Tribunal? Not in the least. In my capacity as Chairman responsible for leading our debates, I object to the claim to bring such considerations in our discussions, in the motives – even secret ones – which determine us. We are a tribunal of lawyers whose mission is only to enforce the law, the positive law of the Peace Treaty, on the one hand, and the positive law of the different countries, on the other hand. We do not have to wonder whether defendants are solvent or to what extent they are. What we have to say is whether they owe some money and how much. Otherwise, we would lapse into the realm of fantasy, just as well as we would go beyond our remit. I appeal here to you as the gd (sic) you are: in your practice in Germany, do you consider bringing

67 Ms. fr.5314/2, f°69, 28 February 1921: Sartini sent a copy of the roll of barristers appearing before the Brussels Court of Appeal. In particular, he referred him to Mr Léon Hayoit de Termicourt, whose office was based at 50, rue du Trône in Brussels.

68 Ms. fr. 5315, n°48, 3 January 1922.

> reasons of that sort into play in your decisions and deliberations? I beg you to examine all issues disregarding completely the fact that the German State or a German citizen is a defendant. Otherwise, you will be under the influence of emotional factors which are foreign to legal matters, and you will uphold unfair solutions.

Albéric Rolin agreed with this, hoping that some cases would be settled quickly:

> Despite endless discussions by our dear German colleague on questions of banknotes and coins that we can so well assess and judge *ex aequo et bono*. That is what tribunals do at all times. The truth is that on many issues, the judge knows as much as experts do.[69]

Following a period of relative calm, the situation worsened in 1923. As early as January, Secretary Stevens warned Moriaud of the German government's attitude: it was holding back its arbitrators, representatives and secretaries.[70] The Chairmen of the different sections of the Franco-German MAT, 'despite the Germans' objections', decided to maintain the hearings. During the first hearing, in response to the protests from the German government's representative, Chairman Mercier declared that 'the Tribunal was above political circumstances and should still sit.' Stevens was worried about the proper functioning of the German-Belgian MAT, knowing that his German Secretary, Mr Uppenkamp, 'received a telegram from Berlin ordering him not to leave [his country] without further instructions.' Mercier and then Sartini in turn notified Moriaud of such tension by telegram.[71] The crisis in Germany and the occupation of the Ruhr area from January 1923 clearly accounted for German misgivings and protests. Despite the efforts of the internationalist community to keep the MATs safe from external tensions, the diplomatic crisis took hold. The German government's representative sitting on the Franco-German MAT wrote directly to Raymond Poincaré, Head of the French Government and Minister of Foreign Affairs to inform him of the non-participation

69 Ms. fr. 5315, n°64, 15 February 1922.

70 Ms. fr. 5316, f°7, 17 January 1923.

71 Ms. fr. 5316, f°10, 19 January 1923. His telegram quoted the message sent by the German General Representative: 'I have the honour to deliver the following communication to you: on behalf of the German government and arbitrators, as the current political situation does not seem to allow for fruitful cooperation between the German and French bodies, the arbitrators of the German Agency believe that they must abstain from attending the Tribunal hearings until further notice.' See Sartini's warning (Ms. fr. 5316, f°11, 20 January 1923).

of the German arbitrators and Agency cooperation between French and German bodies was impossible.[72] This absence was particularly noted at a hearing of the Franco-German MAT on 22 January 1923.[73] After reading out the German arguments, the French government's representative, Mr Jaudon, lamented such non-participation, 'which can only be detrimental to the proper functioning of arbitral justice as well as to all the interests involved.' The Chairman of the MAT, Mr Mercier, was in complete agreement with that. Moriaud's archives include a copy of one of his letters:

> As an instrument of peace, the Tribunal's High Jurisdiction has been established independently of any political consideration, and I believe that this is a great advance in the evolution of International Law. From the moment I had the honour to accept the chairmanship of this High Jurisdiction, I have deliberately considered it my duty to uphold its prestige.[74]

Mercier demanded the strict application of the principles established by the Treaty, despite German representative Johannes' telegram reporting a time of 'political agitation' unsuited for 'judicial cooperation.' As a response, he then explained to him that he could not accept this excuse:

> I hasten to inform you that I cannot see in this situation any ground for suspending the high mission of justice which has been entrusted to the Mixed Arbitral Tribunal. The latter is absolutely non-political and can pursue the fulfilment of its task, with all the peace of mind which constitutes its duty and honour. By doing so, it can only serve the cause of peace.[75]

Since the activity of the MATs should be continued, measures were taken according to law by the respective governments involved. In the framework of the German-Belgian MAT, Sartini informed Moriaud that the Belgian Government considered that the German arbitrator Hoene should be replaced, as permitted under subparagraph 3 of Article 304 of the Treaty of Versailles.[76] Then, another argument emerged: indeed, the Germans

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72 Ms. fr. 5316, f°15, 21 January 1923.
73 In the matter of Malet de Graville v German State (Ms. fr. 5316, f°21–22).
74 Ms. fr. 5316, f°23–25. Moriaud received a copy of this letter.
75 ibid.
76 Ms. fr. 5316, f°35, 29 January 1923.
Subparagraphs 2 and 3 of Article 304 are reproduced here:
-subpara 2: 'In the event that such agreement cannot be reached, the Chairman of the Tribunal and two other persons, each of whom being in a position to

invoked a security problem. According to Dr Lenhard, the German representative within the German-Polish MAT, who wrote to Moriaud on 26 January 1923, it was impossible to hold the hearing scheduled for February in Paris for this reason.[77] Even if he believed that the tribunal's operational continuity was necessary, he requested the Chairman not to hold a sitting in Paris:

> The political situation is now such that it does not seem possible for a German national to stay in this city. It is feared not only that hotels may refuse to accommodate Germans, but also, apart from such inconvenience, that we may find ourselves in more serious trouble. Finally, the atmosphere in Paris seems to me so strained for the time being that I cannot really believe that the debates could be dispassionate.

In one of his rare typescript letters – probably a draft judging by the handwritten corrections between the lines and in the margin – Moriaud expressed his views on the current crisis.[78] In the face of the Belgians' eagerness to find substitutes for German judges and representatives within the German-Belgian MAT, he proposed that time be allowed for reflection. He actually sensed the limitations of the Treaty's provisions, which did not guarantee an exit from this crisis – indeed, quite the contrary. Moriaud also feared that international law would not emerge greater and stronger from this challenge, and he proposed, first of all, to play for time as he did not know for sure if the Germans had relinquished their offices entirely, although they refused to sit at that time. They still received the documents sent by Secretary Stevens, and Moriaud himself drafted the preliminary versions of the decisions which he was going to send to the parties, including the German parties.[79] He therefore feared that the Belgian approach, which was admittedly permitted by the Treaty, would ultimately be counterproductive in any event. Moriaud reviewed and considered different scenarios. If the German representative rejected any cooperation, his

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substitute him, if necessary, shall be chosen by the Council of the League of Nations …. Such persons shall belong to powers that remained neutral during the war.

-subpara 3: 'If a government fails to provide the appointment, as set forth above, of a member of the tribunal within one month, in the event of a vacancy, such member shall be chosen by the opposing government from among the two above-mentioned persons, other than the Chairman.'

77 Ms. fr. 5316, f°33, 26 January 1923.

78 Ms. fr. 5316, f°39–40, 31 January 1923.

79 Ms. fr. 5316, f°40: 'It may well be that, while refusing to sit in new cases, the German judge considers it his duty to clear the old ones.'

government would back him saying that since Belgium and France had violated the Peace Treaty, its execution could be suspended. The Chairman also considered that Germany could regard the occupation of the Ruhr as an act of hostility. The resulting state of war would therefore exclude the application of the Treaty entered into by both countries. Finally, Moriaud followed his line of thought and assumed that pursuant to subparagraphs 2 and 3 of Article 304, Belgium would bring the case before the League of Nations, which would have to appoint two neutral arbitrators, and Belgium would need to choose one of these to replace Mr Hoene. At this stage in his analysis, Moriaud pointed out the unreasonableness of strictly applying the law:

> in which case the Tribunal will have to sit without a German judge, without a German representative and without a German Secretary. Let us even concede that these provisions of the Treaty are applicable to the current situation, which is questionable. You can see the kind of difficulties we are going to run into.

He discerned the limitations of the MAT and feared that justice administered by victors would generate frustration. The MATs' legitimacy was clearly at stake:

> Should not the Rules of Procedure be changed? The German State appears neither as a defendant, nor as a representative – the other defendants will not appear either. How to gather evidence? And if we are forever to render decisions in absentia against defendants whose absence will constitute everlasting protest, is it not a travesty of justice? Will there be neutral nations complacent enough to be part of that? What kind moral authority will the decisions of such a tribunal have? And how will its judgements be enforced? There are German assets to be liquidated, you may say. It will be possible do so only for some sentences, and then, the unilateral character of such enforcement will deprive the Tribunal of even a semblance of an international jurisdiction.

In this letter, Chairman Moriaud therefore called for patience, restating the mission of the MATs, which were supposed to operate in times of peace. Besides, he wondered whether that peace existed legally between Belgium and Germany. He finally hoped to convince the Belgian representative not to use the much-talked-about Article 304. Above all, it was important, by means other than strict law, to put an end to an international conflict.

Moriaud was very careful not to express any opinion on the political context, simply referring to the occupation of the Ruhr that started on 11 January 1923.[80] But the German-Polish MAT's German judge, Franz Scholz, who wrote to him on 1 February 1923 from Berlin, definitely confirmed that this occupation was the reason for the Germans' non-participation.[81] Moreover, he validated Moriaud's intuitions: Germany's political stand did not prevent the Tribunal's routine proceedings and he assured him of his own availability: even if he was henceforth 'on leave (involuntarily, alas!)', Scholz could keep on working for the Tribunal. Placing the MAT's seat in Switzerland – as the Germans had already suggested before – would be too costly for his country, and the French capital had all the necessary resources.[82] There were still German civil servants, as well as German committees in Paris and his files remained in the French capital. So, Scholz assured Moriaud that he could find a way to travel to Paris for the hearing that Moriaud wanted to arrange. Such goodwill expressed in this letter – its author wanted it to remain confidential – enabled Moriaud to reassure his Belgian partners about German intentions.[83] Scholz, however, completely changed his tune in a letter he sent shortly after, on 16 February:

> The French government and the troops it sent to the Ruhr Basin are relentlessly committing acts of brutality. Officers and soldiers are brutalizing the population with rifle butts, bayonnets (sic) and riding krops (sic). In Rhineland, they even went as far as imprisoning a judge for refusing – and it was his duty – to jail German civil servants arrested by the French against any rule of law. I fully agree with Mr Lenhard that we cannot travel to the capital of a country whose government is using such means against a defenceless people whose only crime is to do their duty to their country.[84]

80 In this regard, see Stanislas Jeannesson, Poincaré, la France et la Ruhr, 1922–1924: histoire d'une occupation, (Presses Universitaires de Strasbourg 1998).

81 Ms. fr. 5316, f°43.

82 In a short letter dated 13 February, he asked for organisational purposes whether the seat issue had been settled. If sitting in Paris was not feasible, he would prefer Geneva. He remained at Moriauds' disposal.

83 Ms. fr. 5316, f°46, 2 February 1923. In another typescript letter written the day after receiving Scholz's letter, he could therefore confirm (without quoting Scholz) that the Germans certainly did not end their cooperation.

84 Ms. fr. 5316, f°70, 16 February 1923.

A letter from the German Ministry of Foreign Affairs revealed that Belgium was also targeted in explaining why Judge Hoene did not attend the German-Belgian MAT.[85] Paul Moriaud's situation became extremely complicated for he was torn between enforcing the Treaty sternly and betting on the wisdom of the protagonists.

This diplomatic in-between state held until April. The League of Nations played its part by appointing neutral lawyers who could potentially replace the German judges within the MATs.[86] Ultimately, the decision was in the hands of Moriaud, as the representative of the Belgian government, Georges Sartini van den Kerckhove, notified him on 27 April 1923. After giving him the list of neutral arbitrators selected by the Council of the League of Nations to address the Germans' failings, Sartini stated: 'It is well understood that I will urge the government to make the appointment official only after you and I have agreed on the appropriate timing for making it public.'[87]

The chairmen and arbitrators, who formed a kind of community with some sense of solidarity, kept on communicating to find the best possible outcome.[88] Moriaud's correspondence reveals how these internationalists

85 Ms. fr. 5316, f°55, 12 February 1923.

86 Ms. fr. 5316, f°49. On 6 February 1923, Stevens informed Moriaud that the Council of the League of Nations had just appointed neutral lawyers to potentially replace the German judges in the French tribunals. On 28 February 1923, the Belgian Ministry of Foreign Affairs also notified Moriaud of this appointment (Ms. fr. 5316, f° 89). A document (Ms. fr.5316, F°131, unlocated, undated) listed the names of neutral lawyers proposed for the different MATs. It is reproduced here to give an indication about the pool available:
-German-Belgian MAT: 1) Count Mörner, Swedish; Judge to the Stockholm Court of Appeal; 2) Domingo de las Barcenas, Spanish; Barrister in Madrid, former arbitrator in the Arbitration Panel for Mining Disputes in Morocco.
-Austro-Belgian MAT: 1) Dr Erland Tybjaerg, Danish; Judge to the Danish Supreme Court, proposed for the Permanent Court of International Justice; 2) Dr H. Jansma, Dutch; Doctor of Law, lawyer to the Amsterdam Court of Appeal.
-Belgo-Hungarian MAT: 1) Dr Franz Dahl, Danish; University Professor, former Secretary of the Council of State; 2) Mr Larreta, Argentinian, former Minister of Foreign Affairs.
-Belgo-Bulgarian MAT: 1) Mr Nyholm, Danish; Judge at the Permanent Court of International Justice and member of the Permanent Court of Arbitration in The Hague; 2) Mr Alvarez, Chilean; Member of the Permanent Court of Arbitration in The Hague.

87 Ms. fr. 5316, f°132.

88 As an example of these ever cordial exchanges of views, we have this short letter from Scholz sent to Moriaud (Ms. fr. 5316, f°82, 22 February 1923), an opportunity to exchange compliments. He also sent an article he had just authored; he

were discreetly approached on the sidelines of hard-line official statements. Mexican lawyer Francisco León de la Barra thus wrote to Moriaud on 19 February to inform him that German judge Franz Scholz and some of his colleagues had consulted him over their government's decisions.[89] Drawing on his diplomatic experience, La Barra was also aware that, while Article 304 was perfectly applicable, it was better to find common ground in order to avoid serious difficulties. Behind the scenes, such a solution seemed to be favoured, and in La Barra's understanding:

> … [t]hrough a declaration based on the best interests of International Justice, the German government would accept that the tribunals continue to operate normally, and the Chairmen of the tribunals may consider it appropriate not to schedule hearings for a certain period of time.[90]

Communications with Germany were maintained over this period, even though the Secretary of the German-Belgian MAT was concerned about the Germans' delays, and he feared that some of the pending cases would become time-barred. While the documents were actually passed on to the Germans, they were not processed during the three months of acute crisis.[91] On 18 April 1923, the representative of the German government in the German-Belgian MAT did report the resumption of communication, and he hoped to get a deadline extension until 15 May in order to examine the two hundred replies, rejoinders and observations that had reached his office.[92] He was also aware that his request would exceed the first extension to 22 March already granted by the Chairman, but he took the liberty of mentioning the occupation of the Ruhr and the postal disturbance that occurred during this 'invasion', complicating the information gathering work necessary for his submissions.

So, unintentionally, the members of the MATs got caught in the political pincer grip. For his part, Chairman Moriaud tried as hard as he could to avoid the assumption of duties by a neutral arbitrator and to preserve

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would be 'quite proud to have this small copy in [his] library.' In another letter dated 28 March 1923: Scholz announced that he would soon make a short stay in Geneva for the German-Yugoslav and German-Czechoslovak MATs, replacing his colleague Mr Heinze; he was looking forward to meeting up with Moriaud on this occasion (Ms. fr. 5316, f°113).

89 Ms. fr. 5316, f°78–79.

90 ibid.

91 Ms. fr. 5316, f°96, 7 March 1923.

92 Ms. fr. 5316, f°128.

a fair balance within the MAT, if needs be, by relaxing the rules. From a letter sent to him by Belgian representative Sartini, it can be inferred that Moriaud had suggested earlier to have the MAT sit without letting government representatives attend the hearing for cases in which the German State was not directly a party.[93] Sartini thought otherwise:

> Rightly or wrongly, my fellow countrymen feel that my presence or that of my collaborators is supportive to them, and that the right to submit written notes does not entirely replace this support.

Out of respect for Moriaud, who acted only in the interest of parties and for the continuity of the MAT, Georges Sartini van de Kerckhove was willing to accept this proposal, which was not the case of Belgian Prime Minister, Georges Theunis. He thought that since the German seat was vacant, subparagraph 3 of Article 304 should apply. Admitting that Belgian representatives could abstain from sitting would legitimate the Germans' attitude and would shift the responsibility for the slowness of the German-Belgian MAT onto Belgium.[94] German filibustering, he argued, was actually the cause of the problems that forced the Belgian Government to turn to the Council of the League of Nations to replace 'the defaulting German arbitrator' with a neutral arbitrator. Chairman Moriaud's leniency was thus viewed with suspicion by the Belgian Government.

There was a lot of pressure, and the Franco-German MAT was the first to give in. We learn from Sartini van de Kerckhove that the Belgian government decided to replace the German arbitrator with Mr de Las Barcenas, a neutral arbitrator whose name was on the list sent by the Council of the League of Nations. However, he was also approached to take on the same role within the German-Belgian MAT. For 'practical and budgetary reasons', this lawyer at the Madrid bar, a former arbitrator in the Arbitration Panel for Mining Disputes in Morocco and already residing in Paris, was given the edge over Swedish judge Mörner: 'It is feared that the Count Mörner's travelling from Stockholm to Paris would lead to lavish expenses that must be avoided at present.' But such expenses could not be avoided. On 28 August 1923 – the late date reveals the MAT's delay – Sartini van de Kerckhove informed Moriaud that Las Barcenas had declined the offer.[95] So, Mörner was finally approached, and if he

93 Ms. fr. 5316, f°140 and 141.
94 Georges Sartini attached to his letter a copy of this letter from the Prime Minister (Ms. fr. 5316, f°140).
95 Ms. fr. 5316, f°206.

refused the position, the Council of the League of Nations would have to choose two new candidates, and Sartini feared that the German-Belgian MAT would not be able to start operating again before early October. Unfortunately, he was right, and on 25 September 1923 he announced that Mörner's would not agree to participate in the tribunal.[96] The Council of the League of Nations subsequently appointed two potential arbitrators, but Sartini hoped that their participation might not be necessary as 'the withdrawal of German injunctions to resist passively may result in the regular resumption of the work of our tribunal.'[97] Indeed, the talks were revived following the agreement reached in London on 2 November, and German collaboration with the MATs restarted from 15 November. However, the correspondence between the German government representative, Mr Lenhard, and Moriaud shows the time lost. Indeed, Lenhard informed the Chairman that the backlog of cases had led to a game of musical chairs between the various MATs.[98] Moriaud believed that the German judge must reside in Paris, the *sine qua non* for 'continuous work'. He personally struggled to reconcile his function in the MAT with his academic duties, so much so that he contemplated applying for leave from the University of Geneva. Furthermore, in view of the number of cases, he believed that it was appropriate to create a second chamber within the German-Belgian Tribunal.[99] Finally, to avoid a repetition of the unfortunate experience of 1923, he recommended that a neutral arbitrator be appointed directly to head this new chamber. With 500 new cases already pending, perhaps increasing to about 700 in a few months' time, further delay would be unmanageable. The Belgian Government agreed in principle, and diplomatic negotiations were initiated between the two countries involved.[100]

96 Ms. fr. 5316, f°234.

97 On 11 October, Georges Sartini gave Moriaud the names of the two neutral arbitrators appointed by the Council of the League of Nations: Mr. Corragioni d'Orelli, a Swiss national and a former legal adviser to the Siamese government, and Mr. Thorbeke, a Dutch lawyer practicing in The Hague (Ms. fr. 5316, f°243).

98 Ms. fr. 5316, f°271, 14 November 1923. We learn that Mr Scholz returned to Paris where he was reinstated to his former position, so he had to give up his arbitrator office in the German-Polish MAT. He was then replaced by Dr Heinze, a former Minister of Justice.

99 Ms. fr. 5316, f°278–279, 17 December 1923.

100 Ms. fr. 5316, f°272, 17 November 23. Ms. fr. 5316, f°281, 17 December 23: Sartini informed Moriaud that his government had accepted the proposal to create a second chamber and that he would initiate diplomatic contact with the German government about this.

But appointing neutral arbitrators did not seem to be a silver bullet, as Franz Scholz hinted somewhat mischievously in a letter which he regarded as 'totally confidential'.[101] This member of the German-Polish MAT chaired by Moriaud explained that he could make himself somewhat available in the coming weeks as he had little to do at the beginning of 1924:

> The Franco-German MAT, which had kept me really busy, now has its doors closed because of the strange behaviour of the substitute neutral judges. … You will definitely be interested to learn that the *Corriere della Sera* wrote a punchy, bitterly sarcastic article about these Gentlemen, referring to the *Cri de Paris* which reportedly had published an equally ironic story. Most recently, the *Vossische Zeitung* also published a rabid paper and other newspapers are likely to follow suit. Dear Chairman, you share my view about this. Public criticism may well be the only effective way to awaken a dormant sense of honour.[102]

Despite criticisms, the MATs seemed to have picked up pace, which is reflected in diminished size of Paul Moriaud's archives for the year 1924. Of course, he died in September, but the content of the documents he had accumulated was different: on the one hand, the MATs he chaired no longer seemed torn by infighting, and on the other hand, procedural matters were more or less sorted out. It was now all about managing quite commonplace routine proceedings as compared to what happened at the launch of these MATs in 1920 or in the fateful year of 1923. Thus, over the first four years of activity, Paul Moriaud's papers add value to the classic literature by revealing how the members of these MATs tried to dispense international justice, staying as far away as possible from the political uproar of the 1920s. Enough data can definitely be found in case law and articles of doctrine to analyse these jurisdictions and their influence in terms of procedural innovation. However, Chairman Moriaud's private archives are an extremely valuable resource because of the amount of trial and error, pressure and failures they contain – in short, major factors underlying the creation of law.

101 Ms. fr. 5317, f°14.
102 ibid.

Part IV.
The Promises and Limitations of 'Peace Through Law': MATs and the International Adjudication of 'Mega-Politics'

Chapter 9: An Example of International Legal Mobilisation: The German-Belgian Mixed Arbitral Tribunal and the Case of the Belgian Deportees

Michel Erpelding[*]

1. *Introduction: 'Un grand procès international'*

Paris, Hôtel Matignon, Monday, 7 January 1924, shortly after 09:30 am. The dining hall of the grand 18th-century townhouse, once a scene for aristocratic distractions, had been set up for a new type of spectacle. Attendees were met by a decidedly classic decor of massive chandeliers, gilded woodpanelling, and chubby cupids. Screens emblazoned with the double-headed eagle of the now-defunct Austro-Hungarian Empire, whose embassy had occupied the premises before the Great War, added a slightly unreal touch to the scene.[1] The new type of performance set to begin against this backdrop was that of a new type of justice – international justice. The public had come to witness what the Belgian newspaper *Le Soir* advertised as '*un grand procès international*', a major international trial.[2] This trial took place before the German-Belgian Mixed Arbitral Tribunal, one of 17 MATs domiciled at the Hôtel Matignon, which at that time was effectively an international judicial hub – its current use as the official residence of the French Prime Minister only dates back to 1935.[3] It was the first time that the Tribunal had reconvened since January

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1 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 8 January 1924).

2 'Un grand procès international: Les déportés belges contre le Reich' *Le Soir* (Brussels, 9 January 1924).

3 After sequestrating the Hôtel Matignon in 1919 as private enemy property, alleging that it had been ceded in 1889 by its previous owners to Emperor Franz Joseph in person, the French Government eventually agreed to consider it as Austrian and Hungarian government property and to buy it from these countries for 13.5 million francs in 1922. In the meantime, it had already installed the Paris-based MATs there in 1921. Christian Albenque, 'Un hôtel particulier parisien' in Christian Albenque, David Bellamy et al (eds), *L'Hôtel de Matignon: Du XVIII*[e] *siècle*

1923, when French and Belgian troops had occupied the Ruhr, causing Germany to suspend its participation.[4] The proceedings would last for four days, attracting reporters from major European newspapers and even a photographer from the Meurisse press agency. The pictures he took to immortalise the event and its protagonists were widely reprinted at that time, especially in France and Belgium.[5]

The Tribunal in session on 7 January 1924. At the main table, from left to right: Alfred Lenhard, Richard Hoene, Paul Moriaud, Albéric Rolin, Henri Gevers, Georges Sartini van den Kerckhove. In the foreground: Walther Uppenkamp (left) and Jean Stevens (right). Press photograph by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

à nos jours (La Documentation Française 2018) 49–50. When the French Prime Minister contacted the MATs' 'College of Presidents' in 1925 with the request to consider vacating the premises, they refused, noting that their lease was only due to end in 1930. French National Archives (ANF) AJ/22/170. The MATs only left the Hôtel Matignon in November 1934. To mark the building's new role, the French Government symbolically held a council of ministers there on 28 May 1935. David Bellamy, 'Le siège du chef du Gouvernement' in Christian Albenque, David Bellamy et al (eds), *L'Hôtel de Matignon: Du XVIII^e siècle à nos jours* (La Documentation Française 2018) 60.

4 Otto Göppert, 'Zur Geschichte der auf Grund des Vertrags von Versailles eingesetzten Gemischten Schiedsgerichte' (unpublished typoscript, Berlin, March 1931, on file with the author) 94, 97.

5 Press clippings conserved by the deportees' lawyer, Jacques Pirenne, include articles from Belgian, French, Swiss, German, Dutch, British, Italian, Spanish, and Danish newspapers. National Archives of Belgium (AGR), BE-A0510/I 530/5595.

One of the photographs taken for Meurisse shows the Tribunal in session. In the middle of the picture, taking notes, one can clearly distinguish its President, the Swiss law professor Paul Moriaud (1864–1924), whom both Belgium and Germany appreciated for his impartiality and deep knowledge of both the Germanic and the Francophone legal cultures.[6] On Moriaud's left, looking at the public, one can see the Belgian member of the MAT, Albéric Rolin (1843–1937). As a renowned professor and author of books on both private international law and the laws of war, a longtime Secretary-General of the *Institut de droit international* (1906–23) and the Hague Academy of International Law (1914–37), Rolin was undoubtedly the Tribunal's most prestigious member.[7] To Moriaud's right, also taking notes, rises the tall figure of Richard Hoene, the German Judge. As opposed to his two colleagues, Hoene had the profile of a senior career magistrate, having been a member of the Frankfurt Court of Appeals and presided over a Chamber at the Berlin Court of Appeals.[8] During the Ruhr crisis, based on the practice of the Franco-German MAT, the Belgian Government had tried to replace him with a neutral judge appointed by the Council of the League of Nations. However, President Moriaud had been able to derail this project owing to his own resistance and Hoene's discrete cooperation in some of the MAT's work.[9] Sitting closer to the public and facing his Belgian counterpart Jean Stevens, a Brussels lawyer, the German Secretary, Walther Uppenkamp (1893–1980), has raised his head. Despite allegedly subject to less favourable treatment than Stevens by the MAT staff,[10] he would soon rise to state agent at several MATs before being appointed to the position of German Judge at the Mixed Courts of Egypt in 1926.[11] On the two far ends of the large table used by the Tribunal are the state agents. Belgium has sent two of them. Next to the moustachioed Henri Gevers, a Deputy Prosecutor before the Brussels Criminal Court,[12] Georges Sartini van den Kerckhove (1871–1940), an Advocate-General before the Belgian Court of Cassation who was also

6 See Plas (ch 7) and Péricard (ch 8).
7 Charles de Visscher, 'Nécrologie: Le Baron Albéric Rolin' (1937) 18 Revue de droit international et de législation comparée 5–9.
8 'Répertoire alphabétique des Tribunaux Arbitraux Mixtes et de leurs Membres', undated (late 1930s?) ANF, AJ/22/NC/33/2.
9 Göppert (n 4) 95. See also: Péricard (ch 8).
10 ibid.
11 'Répertoire alphabétique…' (n 8); Cilli Kasper-Holtkotte, *Deutschland in Ägypten: Orientalistische Netzwerke, Judenverfolgung und das Leben der Frankfurter Jüdin Mimi Borchardt* (De Gruyter Oldenbourg 2017) 190.
12 ibid.

his country's Agent-General before the MATs, has taken a seat. While at times critical of the MATs' performance,[13] Sartini van den Kerckhove would soon become one of their main promoters, actively encouraging his government to make them permanent.[14] On the opposite side of the room, partly hidden behind members of the public, one makes out the German State Agent Alfred Lenhard (1875–1929). A senior magistrate like Hoene, who had been President of the Court of Appeals in the Lower Saxon town of Celle and a member of the Frankfurt Court of Appeals[15], Lenhard knew that he, and his country, would have to answer some difficult questions over the coming days.

The authors of these questions faced the Tribunal from the other side of the room. Jules Loriaux, a slightly stout man of 38 years, who had to lean on a cane to support himself, was one of them. His presence in front of the Tribunal and Germany's representatives was already a statement in itself. Born on 5 May 1885 in Jumet near the Belgian city of Charleroi, Loriaux had worked as a glassmaker in his hometown. On 24 November 1916, the German occupation authorities in Belgium deported Loriaux, a married man and father to three sons, the youngest of whom was still an infant, to a camp near the fortress of Boyen near Lötzen in East Prussia (nowadays Giżycko in Poland). Here, he was asked to sign a work contract with a German employer. When he refused, his captors exposed him to a programme that was supposed to break his will. It consisted of hard outdoor physical exercise, followed by exposure to ice-cold temperatures for several hours, followed by food deprivation. After enduring this treatment each day for more than a month, Loriaux contracted pneumonia and was hospitalised. After more than a month, he was deemed unfit for work and given a release form allowing him to be sent back to Belgium. However, while Loriaux was transiting through the camp of Preußisch Holland (today Pasłęk), local authorities confiscated his release form and sent him off to another East Prussian camp in Elbing (today Elbląg). Here, he was once again asked to sign a work contract. When he refused, a soldier bashed his head with a club. He was then locked in an underground cell, where he was subjected to starvation and regular beatings, causing him to develop epilepsy after three days. Following one of his fits, he was first transferred to the camp's infirmary before being sent back to Preußisch Holland,

13 Georges Sartini van den Kerckhove, *Les Tribunaux arbitraux mixtes: Extraits du discours de rentrée prononcé à la Cour d'appel de Bruxelles*, *le 2 octobre 1922* (Larcier 1922) 27–28.

14 See Erpelding and Zollmann (Epilogue).

15 'Nécrologie' (1929) 8 Recueil TAM 3.

where he was hospitalised for a cardiac disorder. After his release from the hospital on 7 July 1917, he was transferred to the camp of Guben in Lower Lusatia, where he was finally sent back home on 16 July 1917. Although reunited with his family, Loriaux had, according to his medical certificate, returned from Germany 'a wreck' ('*une épave*'). Once a robust young man of 70 kg, he had shrunk to 35 kg and was unable to walk again for months. Even after regaining some strength, he remained marked for life, displaying various neurological and heart ailments that left him permanently disabled at an estimated 75 % of his pre-detention capacity.[16] Loriaux was the main claimant against the Reich in the case now examined by the German-Belgian Mixed Arbitral Tribunal.

Although he was the only former deportee in the room, Jules Loriaux was not alone. Nine other Belgian forced labourers or their families were also suing the Reich. Jean Poelemans, from Sint-Amandsberg near Ghent, had not been deported to Germany but to occupied France, where he had suffered severe rheumatisms, resulting in total permanent disability.[17] A fellow Gantois, Hortense Gillis's husband Gustave, had also been deported near the frontlines in France, where he had died from pneumonia.[18] Four claimants hailed from the Walloon town of Lessines, from which the first convoy of Belgian deportees had left. Joséphine Musette had lost her husband Émile, who, like the three other claimants from Lessines, had been part of that convoy.[19] After being deported and suffering the same kind of abuse as Loriaux, Émile Musette had contracted tubercular bronchitis and died in captivity.[20] Alphonse Dubois had fallen ill with pleurisy and remained an invalid at 50 % of his pre-detention capacity.[21] Désiré Marbaix had developed a bone infection and was now a total invalid.[22] Auguste Foucart had lost a leg as a result of tuberculosis.[23] Joseph Van Boekstael, from Jumet, had his left foot amputated following exposure.[24] Joseph Bar-

16 Some of the factual information (with a few slight spelling mistakes) can be found in the MAT's published decision: *Loriaux c État allemand* (3 June 1924) 4 Recueil TAM 674. Loriaux's lawyer's file on his client is preserved at the National Archives of Belgium: AGR, BE-A0510/I 530/5605.

17 AGR, BE-A0510/I 530/5605.

18 ibid.

19 'Introduction' (undated opening arguments, presented on 7 January 1922) AGR, BE-A0510/I 530/5607, 17c.

20 ibid.

21 ibid.

22 ibid.

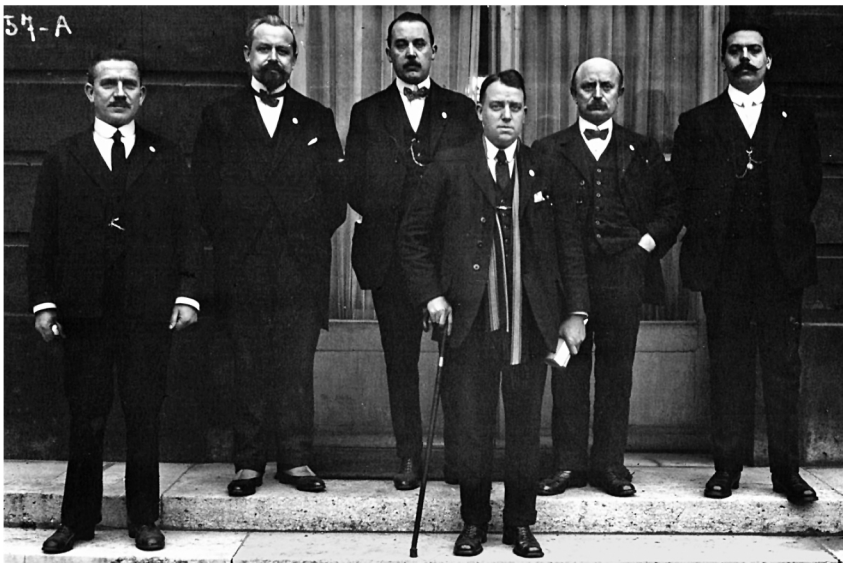
23 ibid.

24 ibid.

daux, from Erquelinnes, had suffered liver damage and remained an invalid at 30 % of his pre-detention capacity.[25] Finally, Marie Dossche, from Ghent, demanded compensation for the death of her husband Charles, who was shot by a German guard while trying to escape from captivity.[26]

All ten claimants were members of the *Fédération nationale des déportés de Belgique*, the National Federation of Belgian Deportees (FND). Founded in April 1919 as an alliance of various local deportees' committees, the Federation had two main aims. The first was to commemorate the deportations. The second was to obtain reparations from those responsible for them. At first, it tried to do so by vowing to help set up a list of German officials to be extradited to Belgium pursuant to arts 228–30 Versailles Peace Treaty (VPT).[27] However, this avenue had proved a dead-end: although Belgium had produced a list of 900 Germans accused of various violations of the laws of war,[28] in 1920 Germany obtained the right to organise its trials before its supreme court, the *Reichsgericht* in Leipzig. These trials were largely a sham, particularly with regard to the deportations, as Germany's highest court systematically found that those responsible for this policy had not violated any provisions of the Hague Regulations.[29] Soon afterwards, the FND set its eyes on the German-Belgian Mixed Arbitral Tribunal.

25 ibid.
26 ibid.
27 Arnaud Charon, 'Les déportés belges au sortir de la Grande Guerre: Un combat de longue haleine' (2018) 272 Guerres mondiales et conflits contemporains 107, 112–16; Arnaud Charon, 'The Claims of the Belgian Deported Workers at the Paris Mixed Arbitral Tribunal in 1924' in Ornella Rovetta and Pieter Lagrou (eds), *Defeating Impunity: Attempts at International Justice in Europe Since 1914* (Berghan, 2022) 49–50.
28 ibid, 50.
29 On this issue, see: Gerd Hankel, *Die Leipziger Prozesse: Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburger Edition 2003) 388–95.



The main plaintiff, Jules Loriaux (foreground, leaning on a walking stick) and his entourage from the National Federation of Belgian Deportees. From left to right: Oscar Doornaert (President of the Flemish Committee), Eugène-Paul Lévêque (Secretary-General), Wicaert (Secretary of the Flemish Federation), Brigode (Treasurer), Demaret (President of the Walloon Committee). Press photography by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

Sometime in the spring of 1921, its Secretary-General, Eugène-Paul Lévêque, had contacted a young Brussels lawyer, Jacques Pirenne (1891–1972), with the idea of suing the Reich for compensation before the German-Belgian MAT. Together with his father, the historian and public intellectual Henri Pirenne (1862–1935), Jacques Pirenne had participated in the work of the Belgian Government's official commission of enquiry on the violations of international law committed by the German occupier, acting as its permanent secretary on questions of legislation enacted by the latter. After a series of consultations, Pirenne had agreed to take on the case.[30] By doing so, he had taken upon himself the responsibility for an early example of mass claims litigation: when adopting its decision to

30 Jacques Pirenne, *Mémoires et notes politiques* (André Gérard 1975) 105–107; 'Inventaire de la Commission d'enquête sur la violation des règles du droit des gens, des lois et des coutumes de la guerre', AGR, BE-A0510/I 298.

bring the matter before the MAT on 2 October 1921,[31] the FND had urged every single of its 48 000 members to give Pirenne an individual mandate using a standardised form, and nearly all of them had accepted to follow suit.[32]

Of these tens of thousands of individual cases, Pirenne selected those of the ten abovementioned deportees or their widows to the MAT as 'test cases' ('*cas types*') that could then be used to settle all the others.[33] In these cases, he requested the MAT to award the following types of compensation: 1. A lump sum for the loss and the wear and tear of clothes (300 francs); 2. a sum for living expenses borne by the deportee's family (150 francs per month of deportation); 3. a sum corresponding to the salary owed for each day of deportation (10 francs per day); 4. a sum corresponding to damages owed for each day of partial or total disability, whether temporary or permanent (eg 25 francs per day of total disability for a specialised worker, 15 for an unqualified worker); 5. a pension for each deportee suffering from permanent disability, or for the surviving spouse or other beneficiaries (calculated along the same lines as the damages for bodily harm).[34] Based on these principles, the damages claimed by Loriaux alone amounted to 101,705 francs.[35] With these figures in mind, the financial and political importance of the Belgian deportees' case before the German-Belgian Mixed Arbitral Tribunal could hardly be overstated. In February 1924, not even a month after the tense hearings at the Hôtel Matignon, officials at the German Ministry of Foreign Affairs estimated the costs of losing this case at roughly 5 billion francs[36] – ie almost eight times the compounded sums that Belgium had demanded for its civilian casualties (500 million francs) and the unpaid salaries due to its deportees (144 million francs) before the Reparations Commission established pursuant to the Treaty of Versailles.[37]

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31 'Tribunal arbitral mixte germano-belge' *L'indépendance belge* (Brussels, 29 October 1921) 2.

32 Pirenne, *Mémoires…* (n 30) 106–107.

33 Jacques Pirenne, 'Le procès des déportés belges contre le Reich allemand' (1924) 51 Revue de droit international et de législation comparée 102.

34 See, eg, the pre-printed petition for Joséphine Musette: 'Requête à Messieurs les Président et Membres du Tribunal arbitral mixte germano-belge' (undated, late 1921) AGR, BE-A0510/I 530/5609.

35 *Loriaux c État allemand* (n 16) 676.

36 Minutes of a meeting held at the *Auswärtiges Amt* (1 February 1924) Political Archive of the German Ministry of Foreign Affairs (PAAA), RZ 403/53269.

37 Charon, 'The Claims…' (n 27) 47.

To be sure, for Germany, the case was extremely sensitive. In the summer of 1923, when the MAT was paralysed as a result of the Ruhr crisis, it had even informally conveyed to President Moriaud that it would be willing to settle to avoid any public hearings because of the negative impact they might have on Belgian-German relations.[38] That said, the Belgian Government, whose relationship with the deportees would always remain uneasy,[39] would also have preferred a quiet settlement. This was at least what one could infer from its Minister of Economic Affairs' opposition to the lawsuit[40] and the encouraging words of its Agent-General before the MATs, describing Germany's settlement proposal as 'quite interesting' ('*assez intéressante*').[41] Jacques Pirenne's priority was exactly the opposite. He wanted to gain as much public attention and sympathy for the deportees and their quest for reparations before the MAT as possible, taking active steps to promote their atypical lawsuit with the press. Already in July 1922, he had secured the *pro bono* participation of a lawyer whose mere presence was certain to draw the attention of both the media and the public: Paul Hymans (1865–1945).[42] Before becoming Pirenne's *maître de stage* at the Brussels bar,[43] Hymans had been Belgium's Minister of Foreign Affairs during the Versailles Peace Conference and the first President of the Assembly of the League of Nations. In a similar vein, only a few days before the hearings in the deportees' case were due to take place, Pirenne gave an interview to the liberal Brussels daily *La Dernière Heure*. After seemingly protesting the reporter's intrusion into his office, he provided him with a detailed description of the upcoming proceedings, which he ended up advertising as 'the most poignant trial of our time' ('*le plus poignant procès de notre temps*').[44]

The press coverage seemed to prove Pirenne right. With the possible exception of the land reform disputes opposing large estate holders to

38 Sartini van den Kerckhove to Pirenne (30 July 1923) AGR, BE-A0510/I 530/5592.

39 On this issue, see: Stéphanie Claisse, 'Le déporté de la Grande Guerre : Un "héros" controversé : Le cas de quelques communes du Sud Luxembourg belge' (2000) 7 Cahiers d'histoire du temps présent 127; Charon, 'Les déportés belges…' (n 27).

40 Pirenne, *Mémoires…* (n 30) 107.

41 Sartini van den Kerckhove to Pirenne (n 38).

42 Pirenne, *Mémoires…* (n 30) 108.

43 Georges-Henri Dumont, 'Pirenne, Jacques' in *Nouvelle biographie nationale* (vol 4, Académie Royale des sciences, des lettres et des beaux-arts 1997) 307.

44 'Le procès des déportés belges à Paris : Comment il se présente : Une visite à M^{e} Jacques Pirenne' *La Dernière Heure* (Brussels, 6 January 1924).

former Little Entente states,[45] few cases before the MATs seem to have attracted as much attention as that of the Belgian deportees. If anything in the interwar period came close to the idea of a 'major international trial' in the sense that it was followed not only by a small number of upper-class specialised jurists but elicited interest from a much broader and socially diverse public, this was certainly it. Triggered by an association of tens of thousands of working-class individuals, it was also a prime example of 'legal mobilisation', ie the invocation of legal norms 'as a form of political activity by which the citizenry uses public authority on its own behalf'.[46] Legal mobilisation often occurs after changes in the normative environment have taken place,[47] including by encouraging social actors to claim rights that have not been formally recognised or enforced by the authorities.[48] In the deportees' case, these changes had been brought about by the Versailles Treaty. One might even assert that the deportees' lawsuit was consistent with the wishes of one of the treaty's main drafters, Woodrow Wilson, who had shocked the members of the *Institut de droit international* in May 1919 by telling them that he wanted post-World War I international law to be handled less by socially privileged lawyers, and more by ordinary folk.[49] However, as this chapter will show, the case of the Belgian deportees makes clear that the limitations inherent to legal mobilisation also apply – and perhaps even more strongly – in international law. After presenting the reader with the factual and legal background of the case, this chapter will take a close look at the parties' arguments during both the written and oral phases of the proceedings, relying on previously uncommented archival material.[50] It will then analyse the MAT's decision, questioning its frequent characterisation as a major German victory, before concluding on the long-term legacy of the case.

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45 See Papadaki (ch 10) and Stanivuković and Djajić (ch 13).

46 Frances Zemans, 'Legal Mobilization: The Neglected Role of Law in the Political System' (1983) 77 American Political Science Review 690.

47 ibid, 697.

48 Michael McCann, 'Law and Social Movements', in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (John Wiley & Sons 2004) 506, 508.

49 Michel Erpelding, 'Versailles and the Broadening of "Peace Through Law"', in Michel Erpelding, Burkard Hess and Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Disute Settlement After World War I* (Nomos 2019) 11–26.

50 Although Arnaud Charon's article provides an excellent overview of the deportees' case, it does not include a detailed examination of the legal arguments at hand. Charon, 'The Claims…' (n 27).

2. The Facts and Background of the Case: the Belgian Deportations, 1916–18

Between 1916 and 1918, facing acute labour shortages as a result of military conscription, Germany deported about half a million civilians from occupied territories and subjected them to forced labour. While most of these deportations took place in Poland and Russia, those imposed on the occupied parts of France and Belgium received more international attention.[51] In Belgium, the deportations followed an unsuccessful campaign launched in 1914 to recruit voluntary contractual workers for the German industry. They took two main forms. Between October 1916 and February 1917, about 61 000 Belgians residing in the 'Government-General', the central part of occupied Belgium, were deported to Germany. Here, they were interned in camps and subjected to various pressures to sign work contracts with local industries relevant to the war effort. About 13 500 deportees gave in, leaving the camps as 'free civilian workers'. The remaining three-fourths were subjected to forced labour within the camps. Partly to coerce the deportees into signing work contracts, the working and living conditions were deliberately left in a catastrophic state, resulting in a death rate of about 2 %.[52] The second type of Belgian deportations took place in the 'Operations and Staging Area' ('*Operations- und Etappengebiet*'), the parts of Belgium and Northern France that were closer to the frontlines and had therefore been placed under the direct administration of the High Command of the German Army ('*Oberkommando des Heeres*', OHL). In this Area, between October 1916 and the end of the war, some 62 000 civilians, the majority of whom were Belgians, were pressed into 'Civilian Workers' Batallions' ('*Zivil-Arbeiter-Bataillone*', ZAB) and made to work on military fortifications. With a mortality rate of up to 5 %, working and living conditions were even worse than in the German camps.[53]

The legal basis of the German deportation policy resided in a series of executive orders presented as a response to the 'aversion to work' of occupied populations. The German military Governor-General in Belgium, Moritz von Bissing (1844–1917), issued the first of these orders on 22 August 1915. It made it a criminal offence for jobless people to refuse work

51 Mark Spoerer, 'Zwangsarbeitsregimes im Vergleich: Deutschland und Japan im Ersten und Zweiten Weltkrieg', in Klaus Tenfelde and Hans-Jürgen Seidel (eds), *Zwangsarbeit im Europa des 20. Jahrhunderts: Vergleichende Aspekte und gesellschaftliche Auseinandersetzung* (Klartext 2007) 195–99.

52 Jens Thiel, *'Menschenbassin Belgien': Anwerbung, Deportation und Zwangsarbeit im Ersten Weltkrieg* (Klartext 2007) 140–56.

53 ibid, 125–32.

the authorities offered to them.[54] Less than a year later, Article 2 of the order was amended by a provision stating that, in lieu of facing criminal prosecution before Belgian courts, individuals guilty of 'aversion to work' could now be 'deported to the [assigned] place of work' by the competent military and civilian authorities.[55] Although this provision would provide the legal basis for the deportations from the Government-General, von Bissing did not resort to it before late October 1916.[56] By then, under the influence of Erich Ludendorff (1865–1937), the Great General Staff of the Germans had already adopted an even more straightforward version of the order.[57] Amounting to a radicalised version of the 1876 German Criminal Code's provisions on 'aversion to work',[58] it had immediately been implemented in the Operations- and Staging Area.[59] This move, designed to increase pressure on Berlin and Brussels, had the desired result,[60] as German authorities would from now on consider themselves justified to automatically deport any jobless person who refused to 'voluntarily' agree to the contracts 'offered' to them, whether in Germany or for the army in the field.[61] In their radical negation of individual freedom, these executive

54 Verordnung gegen die Arbeitsscheu (22th August 1915) 108 Gesetz- und Verordnungsblatt für die okkupierten Gebiete Belgiens. Cited in: Johannes Bell (ed), *Völkerrecht im Weltkrieg: Dritte Reihe im Werk des Untersuchungsausschusses* (vol 1, Deutsche Verlagsgesellschaft für Politik und Geschichte, 1927) 235.

55 '*An Stelle der Strafverfolgung kann von den Gouverneuren und gleichberechtigten Befehlshabern, sowie von den Kreischefs die zwangsweise Abschiebung zur Arbeitsstelle angeordnet werden*'. Verordnung gegen die Arbeitsscheu (20 May 1916) 213 Gesetz- und Verordnungsblatt für die okkupierten Gebiete Belgiens. Cited in: ibid, 236.

56 Thiel (n 52) 136–40.

57 Persons that are able to work may be forced to do so – even outside their place of residence – in cases where, as a result of gambling, drunkenness, idleness, lack of work or laziness, they require the assistance of third parties for their own subsistence or that of the people in their care.' ('*Arbeitsfähige Personen können zwangsweise zur Arbeit – auch ausserhalb ihres Wohnsitzes – angehalten werden, sofern sie infolge von Spiel, Trunk, Müssiggang, Arbeitslosigkeit oder Arbeitsscheu für ihren Unterhalt oder zum Unterhalt derjenigen, zu deren Ernährung sie verpflichtet sind, fremde Hilfe erhalten oder beanspruchen*'). Verordnung betreffend die Einschränkung der öffentlichen Unterstützungslasten und die Beseitigung allgemeiner Notstände (3 October 1916) Hauptstaatsarchiv Stuttgart J 151 Nr 14, Bild 1.

58 Although §§ 361–62 of the 1876 German Penal Code also made 'aversion to work' a criminal offence punishable either by imprisonment or forced labour, they only targeted jobless individuals that required or had applied for public assistance.

59 Thiel (n 52) 123–24.

60 ibid.

61 Hankel (n 29) 381–82.

orders were not unlike the general obligations to work imposed by certain colonial rulers over their local subjects.[62]

The German authorities were fully aware that this practice was highly problematic from the perspective of international law. Granted, at that time, no conventional rule expressly forbade the deportation of civilians from occupied territories to forced labour. Article 52 of the 1899 and 1907 Hague Regulations concerning the Laws and Customs of War on Land, broadly accepted as representing customary international law, actually allowed requisitions in services from civilians under certain conditions:

> Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and services shall only be demanded on the authority of the commander in the locality occupied. The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.[63]

However, based on the general context in which it was adopted, this rule could hardly be interpreted as justifying German deportation policies. During the 19th century, most European states had broken with the *Ancien Régime* practice of *corvée* labour and subjected their power to requisition the goods and services of their populations to strict regulations, including in times of war.[64] And while Germany had recently broken with this tradition by introducing a 'patriotic auxiliary service' ('*vaterländischer Hilfsdienst*') in 1916, which allowed it to requisition all male Germans aged 17–60 years for the war effort,[65] it had remained isolated in doing so, with neither France nor Britain resorting to similar measures during the conflict.[66] In any case, even if one held the minority view that states might

62 On this issue, see: Michel Erpelding, *Le droit international antiesclavagiste des 'nations civilisées' (1815–1945)* (Institut Universitaire Varenne 2017) 269–72.

63 Art 52 1907 Hague Regulations merely includes the additional requirement that 'the payment of the amount due shall be made as soon as possible'.

64 Alain Laquièze, 'Réquisition' in Denis Alland and Stéphane Rials (eds), *Dictionnaire de la culture juridique* (PUF 2003) 1339–41.

65 Gesetz über den vaterländischen Hilfsdienst (5 December 1916) *RGBl*, 1916, no 276, 1333.

66 Hartwig Bülck, *Die Zwangsarbeit im Friedensvölkerrecht: Untersuchung über die Möglichkeiten und Grenzen allgemeiner Menschenrechte* (Vandenhoeck & Ruprecht 1953) 78–79.

requisition a virtually unlimited range of services from their nationals, it was clear that this proposition could not apply to civilians in occupied territories. Based on the consideration that occupiers were no longer invested with full sovereignty over occupied territories but merely entrusted with their temporary administration, they could not impose the same kind of obligations on the local population as on their nationals.[67] Using a radicalised version of German legislation to deport civilians from their hometowns and subject them to forced labour seemed hardly compatible with this principle.

The German leadership was aware of these issues and the likely illegality of the deportations. Between March and October 1916, von Bissing had opposed the planned measure, which he deemed not only contrary to international law but a potential threat to Germany's status as a member of the community of 'civilised nations'.[68] The German Ministry of War itself recognised the illegality of the deportations, adding, however, that considerations of international legality had to give in to the 'absolute necessity to allocate every worker under Germany's control to the most productive function from the point of view of the war economy.'[69] This latter view was shared by the High Command and Germany's industrial elites,[70] who saw Belgium as a 'human reservoir' ('*Menschenbassin*') that needed to be tapped.[71] Nevertheless, the German authorities were convinced that they had 'to find a legal basis for forced labour that would not be in total contradiction with the Hague Convention',[72] as indicated by the minutes

67 The Hague Regulations included, *inter alia*, the obligation to apply local laws (Art 43), including 'as far as possible', local tax laws (Art 48) and the prohibition to force inhabitants to pledge allegiance to the occupying power (Art 45).

68 Bissing would finally agree to the deportations on 6 October 1916. One should note, however, that he had always been in favour of indirect coercition (eg economic pressure) that would have forced Belgian labourers to sign work contracts with German industrialists. For a detailed discussion of von Bissing's role, see: Thiel (n 52) 64–88, 136–40; Isabel Hull, *A Scrap of Paper: Breaking and Making International Law During the Great War* (Cornell University Press 2014) 128–38. See also: John Fried, 'Transfer of civilian manpower from occupied territory' (1946) 40 AJIL 308; Lothar Elsner 'Belgische Zwangsarbeiter in Deutschland während des ersten Weltkrieges' (1976) 24 Zeitschrift für Geschichtswissenschaft 1259–60.

69 '*Etwaige völkerrechtliche Bedenken dürfen uns nicht hindern, sie müssen der unentrinnbaren Notwendigkeit weichen, jede in deutscher Gewalt befindliche Arbeitskraft der kriegswirtschaftlich produktivsten Verwendung zuzuführen*'. Elsner (n 68) 1260.

70 Hull (n 68) 130–31.

71 Thiel (n 52) 109.

72 '[…] ob sich eine juristische Begründung für Zwangsarbeit finden ließe, die der Haager Konvention nicht allzu offensichtlich widerspräche'. Elsner (n 68) 1260.

of a meeting held on 28 September 1916 between representatives of the OHL, the Ministries of War, of the Interior, and of Foreign Affairs, as well as the Governments-General of Belgium and Warsaw.[73] While radicals like Ludendorff and the industrialist Walther Rathenau (1867–1922) would have contented themselves with a mere reliance on the state of necessity, most German officials thought that more sophisticated and widely-accepted arguments were required.[74] They eventually agreed to rely on a justification reluctantly put forward by the lawyer and diplomat Johannes Kriege (1859–1937), who had been part of Germany's delegation at the 1907 Hague Peace Conference and had headed the Legal Department of its Ministry of Foreign Affairs since 1911. In a memorandum addressed to that Ministry, Kriege had suggested that Germany invoke the power of the occupant to uphold public order set out in Article 43 Hague Regulations.[75] The provision went as follows:

> The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

According to Germany, the naval blockade established by Britain had resulted in an industrial crisis which had rendered many Belgian workers jobless. Since these workers were said to engage in activities that threatened public order and safety out of 'idleness', the occupation authorities felt compelled to react to that threat by deporting them to forced labour.[76] Of course, the German authorities failed to mention that they had actively contributed to mass unemployment in Belgium by asphyxiating and dismantling Belgian industries in favour of their German competitors.[77] Nor did they address the fact that, contrary to von Bissing's suggestions, they had not used deportation as an individual sanction against workers convicted for having troubled public order but had organised systematic

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73 Hankel (n 29) 381.

74 Hull (n 68) 41–50.

75 Hankel (n 29) 382. The contents of the memorandum were subject to prior negotiations between Kriege and his assistants, Paul Eckardt and Friedrich von Keller (1873–1960), on the one hand, and represenatives of the OHL, on the other hand. Hull (n 68) 133.

76 Jules Basdevant, *Les Déportations du Nord de la France et de la Belgique en vue du travail forcé et le droit international* (Paris, Sirey, 1917) 58.

77 Thiel (n 52) 40–46; Elsner (n 68) 1258–59.

mass deportations of individuals more or less arbitrarily described as 'jobless workers'.[78]

Despite these precautions, Germany's attempt to reinterpret the Hague Regulations failed miserably. The deportations sparked an international protest wave that extended well beyond the Allied Powers. Amongst the neutral countries, the United States, Spain, Switzerland, and the Netherlands condemned them, as did the Holy See, whereas spontaneous demonstrations took place in Italy, France, Ireland, and the United States.[79] Even in Germany, the social-democratic members of the Reichstag reacted with indignation.[80] Generally speaking, those opposing the deportations had many legal arguments on their side.

Some observers noted that deporting workers to another country to allow the local workers to be sent to the front was hardly compatible with Article 52 Hague Regulations and their requirement that civilians not be involved in military operations against their country.[81] Others replied to Germany's invocation of Article 43 Hague Regulations by stressing that the occupier's power to uphold public order was linked to its obligation to respect local laws, 'unless absolutely prevented' and that no motive whatsoever was strong enough to justify ignoring the fundamental principle of free labour.[82] More generally, other commentators objected that Article 46 Hague Regulations, according to which '[f]amily honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected', could not be set aside by invoking a state of necessity.[83] For the Dutch Government, the deportations were a violation of the 'Martens Clause' set out in the preambles of the 1899 and 1907 Regulations and which stated:

78 For instance, Passelecq notes that in Nivelles, at least half of the deportees were not jobless workers, but farmers, small business owners, or even qualified workers with a valid employment in Belgium. Fernand Passelecq, *Les déportations belges à la lumière des documents allemands* (Beger-Levrault 1917) 44.

79 Hull (n 68) 137.

80 Fried (n 68) 310.

81 James W Garner, 'Contributions, Requisitions, And Compulsory Service in Occupied Territory' (1917) 11 AJIL 105–106.

82 Basdevant (n 76) 60.

83 ibid. At the 1899 Hague Conference, Germany had suggested a reference to the state of necessity that would have limited the impact of this provision. Faced with the general hostily of the other participants, it had retracted its proposal. Hull (n 68) 73.

> that in cases not included in the Regulations …, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[84]

This clause was generally understood at the time as referring to customary laws of war,[85] which, at least since the Congress of Vienna, included the occupier's obligation not to treat occupied territories as part of its territory.[86] Another provision cited in this regard was Article 23 of the 1863 Lieber Code,[87] which stated that:

> Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.[88]

The parallel established in this provision between deportations and slavery in the context of the US Civil War was still considered relevant in the context of the Belgian deportations. In a memorandum addressed to Allied and neutral governments, Belgium itself described the deportations as a 'white slave trade' ('*traite des blancs*') contrary to the 'laws of humanity'.[89] A joint statement by France, Great Britain, Italy and Russia was even more explicit, solemnly declaring that Germany had violated international rules on the repression of slavery:

> The Germans, after promising to respect the freedom of labour, have used the joblessness provoked by themselves as a pretense to provoke, organize and establish slavery, which they had solemnly vowed to abolish in Africa as part of the 1890 Brussels Convention.[90]

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84 ibid, 137.

85 Jochen von Bernstorff, 'Martens Clause', in Rüdiger Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (OUP 2009).

86 Fried (n 68) 310–11.

87 Jules Van den Heuvel, 'La déportation des Belges en Allemagne' (1917) 24 Revue générale de droit international public 273, 296.

88 US War Department, 'General Orders No 100: Instructions for the Government of Armies of the United States in the Field' (24 April 1863).

89 'Note du gouvernement belge aux puissances alliées et neutres protestant contre le travail forcé et la déportation auxquels l'autorité allemande soumet la population belge' (10 November 1916) 24 RGDIP (documents) 49–51.

90 '*Les Allemands, après avoir promis de respecter la liberté de travail, ont, prétextant le chômage qu'ils avaient eux-mêmes provoqué, organisé et établi l'esclavage qu'ils s'étaient*

The barrage of international criticism finally led Germany to give in. In February 1917, it halted the deportations of Belgians and Poles to the Reich. This was a major, yet limited, concession, as the occupier would maintain conscriptions into the ZAB and deportations of Russian workers until the end of the war.[91] The international outcry against Germany's policies would eventually find its way into the 1919 Versailles Peace Treaty. However, it would do so in a way that did not necessarily provide effective relief to the victims of the deportations.

3. The Written Phase: Reparation of Wartime Injuries as an Individual Right?

The Versailles Treaty expressly provided for the compensation of damages suffered by victims of Germany's deportation policy in its Part VIII regarding reparations. Following Article 231 VPT, which held Germany '[responsible] for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies', Article 232 para. 2 VPT specified that '[t]he Allied and Associated Governments … require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers'. Specifying the categories of damage covered by this provision, Annex I to Part VIII VPT expressly mentioned two items covering the plight of the deportees and their relatives:

> 2. Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence of imprisonment, *deportation*, internment or evacuation, of exposure at sea *or of being forced to labour*), wherever arising, and to the surviving dependents of such victims. …
> 8. Damage caused to civilians *by being forced by Germany or her allies to labour without just remuneration*.[92]

Based on these provisions alone, one might have expected full reparation payments for the victims, both direct and indirect, of the deportations. However, the reparations scheme under Part VIII VPT had established

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engagés solennellement par la convention de Bruxelles de 1890 à abolir en Afrique'. 'Protestation des États alliés contre la déportation en masse des civils belges en Allemagne' (6 December 1916) 24 RGDIP (documents) 52–53.

91 Spoerer (n 51) 195–98.

92 Emphasis added.

two major principles with regard to the compensation of private individuals that would somewhat dampen such expectations. The first was of a substantive nature insofar as it limited the global extent of Germany's obligation to compensate for the damages resulting from the war it had started. Under Article 232 para. 1 VPT, the authors of the Versailles Treaty recognised that full compensation was simply impossible:

> The Allied and Associated Governments recognise that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present Treaty, to make complete reparation for all such loss and damage.

To define the amount of reparations and to resolve the issues of allocation that would inevitably arise from a situation in which a limited amount of resources had to be distributed to various categories of actors, Part VIII VPT relied on a second principle, which established a procedural requirement. Pursuant to Article 233 and Annexes II-VII Part VIII VPT, the amount of damages due under Article 232 VPT was to be established by an Inter-Allied Commission known as the Reparation Commission.[93] Exclusively composed of government delegates from the victorious powers (including Belgium), it was described in para. 12 Annex II Part VIII VPT as having 'wide latitude as to its control and handling of the whole reparation problem as dealt with in this Part of the present Treaty' and as 'the exclusive agency of [said victorious powers] respectively for receiving, selling, holding, and distributing the reparation payments to be made by Germany under this Part of the present Treaty.' Whereas the German Government had the right to be heard by the Reparation Commission, individuals were not mentioned as being part of that process. These provisions seemed to indicate that it was for the Belgian State authorities alone to negotiate a sum on behalf of the deportees and distribute it amongst them. Before long, this solution would prove deeply disappointing to many deportees.

This was not due to a lack of responsiveness on behalf of the Belgian State but rather to its selectiveness in identifying the recipients of and calculating the sums allotted under the reparations.[94] On 10 June 1919, (ie even prior to the signature of the Versailles Peace Treaty on 28 June

93 On the Reparation Commission, see: Jean-Louis Halpérin, 'Reparation Commission (Versailles Treaty)', in Hélène Ruiz Fabri (ed) *Max Planck Encyclopedia of International Procedural Law* (OUP 2021).

94 For a more detailed description of the domestic compensation process offered to Belgian deportees, see: Charon, 'The Claims…' (n 27) 44–47.

1919) the Belgian Parliament had unanimously passed a law that allowed civilians who had suffered bodily damage as a result of the war to file for compensation – including pensions in case of disability – with the Belgian State. In addition, it specifically allowed deportees subjected to forced labour for more than three months without fair pay to request a lump sum of 150 francs before dedicated domestic administrative courts.[95] As noted by Arnaud Charon, this law left many civilian war victims unhappy, especially since pensions were considered too low. Moreover, the deportees perceived the lump-sum system as unjust, as it left forced labourers deported for less than three months without any compensation and did not award higher damages to long-term deportees.[96] Eventually, the law was revised on 25 July 1921, allocating 50 francs per month of deportation for deportees, but only for those either subjected to unpaid forced labour or who had never given in to coercion by signing a work contract.[97]

This was still a far stretch from what deportees considered their due and were now claiming in front of the German-Belgian MAT as just compensation for themselves and their families. Apart from variable damages and pensions for bodily harm, Loriaux and his fellow deportees were asking Germany to award them compensation for material losses, namely 150 francs per month in living expenses and a 300 francs lump sum for worn and torn clothes – something which the Belgian legislation had not even contemplated. Moreover, the 10 francs per day in unpaid salaries they were claiming were not only a major improvement on the 50 francs per month allocated by the Belgian State.[98] They were also vastly superior to the 144 million francs that the Belgian Government had demanded on their behalf before the Reparation Commission. This sum had been calculated based on an estimated salary of 6 francs per day for a maximum of 150 days, multiplied by 160 000 deportees.[99] However, in order for these claims to succeed, Pirenne knew that he would have to overcome one major obstacle: he would have to persuade the MAT that it actually had jurisdiction over them.

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95 Belgium, 'Loi sur les réparations à accorder aux victimes civiles de la guerre' (10 June 1919) Moniteur Belge, 22 June 1919, 2785.

96 Charon, 'The Claims…' (n 27) 46.

97 Belgium, 'Loi portant révision de la loi du 10 juin 1919 sur les réparations à accorder aux victimes civiles de la guerre' (25 July 1921) Moniteur Belge, 28 August 1921, 6954.

98 'Réparation des pertes matérielles subies par les déportés' (undated memorandum, probably mid-1921) AGR, BE-A0510/I 530/5591, III.

99 Charon, 'The Claims…' (n 27) 47.

It was clear from the start that this was going to be an uphill battle. Before agreeing to let Pirenne take on the case, the National Federation of Deportees had contacted Eugène Hanssens (1865–1922), a liberal politician and lawyer before the Belgian Court of Cassation, asking him whether Belgian deportees should sue Germany before the MAT. The reply had been categorical. The deportees had been told that 'in most cases, these suits [stood] no chance at success'.[100] The author of the letter agreed that under the 'general principles of law', the Belgian deportees would have had the right to full compensation for the damage that Germany had caused them and that Belgian domestic legislation had failed to provide them with such compensation. However, positive law – in this case, the Versailles Peace Treaty – had clearly left it to the Reparation Commission to define the amounts due as compensation for wartime acts against civilians explicitly mentioned in Annex I Part VIII, including deportations and forced labour.[101] Accordingly, suing for additional compensation 'would amount to ask Germany to pay twice'.[102] The only damage that could possibly come under the jurisdiction of the MAT was that resulting from the loss of parcels and other goods belonging to the deportees, but only if one could prove that this loss could be assimilated to a form of confiscation, which seemed doubtful.[103] Visibly irked by the FND's decision to contact Hanssen directly,[104] Pirenne soon realised that the legal opinion had, in fact, been drafted by another ambitious young lawyer: Henri Rolin (1891–1973).[105] Pirenne's senior by only one month, Henri Rolin had worked as a secretary for Paul Hymans during the Paris Peace Conference. Later a prominent international lawyer in his own right, Henri Rolin was no other than the son of Albéric Rolin, the Belgian member of the MAT that

100 French original: '*dans la plupart des cas, pareille demande n'aurait aucune chance à aboutir*'. Hanssens to Lévêque (4 August 1921) AGR, BE-A0510/I 530/5591.

101 French original: '*ce serait demander que l'Allemagne paie deux fois que de lui réclamer une indemnité supplémentaire*'. ibid.

102 ibid.

103 ibid.

104 In his memoirs, Pirenne depicts this consultation as his own initiative. Pirenne, *Mémoires…* (n 30) 107. However, Pirenne's own archives show that Lévêque had contacted Hanssens directly, and that Pirenne had resented this move, stating that 'a consultation on this issue could only be useful following a conversation on the precise point of law with the consulted lawyer' ('*une consultation sur la question ne pourrait être utile qu'après une conversation en droit sur le point précis, avec l'avocat consulté*'). Pirenne to Lévêque (8 August 1921) AGR, BE-A0510/I 530/5591.

105 Pirenne, *Mémoires…* (n 30) 107.

Pirenne wanted the deportees to seize.[106] Following this discovery, either the FND or Pirenne himself contacted Henri Rolin, who confirmed that he had indeed co-authored the opinion with Hanssens. He also reaffirmed his view that it was '[i]mpossible to claim one further cent from Germany [in compensation for forced labour]' and that even compensation for lost parcels was unlikely.[107] In order to persuade the FND to ignore this view and press ahead with the suit before the MAT, Pirenne had come up with an alternative, rather intricate and sometimes contradictory, reasoning. This argument would considerably evolve during the written procedure, which, pursuant to the German-Belgian MAT's Rules of Procedure (RoP), not only comprised the four classic stages of a claim ('*requête*'), response ('*réponse*'), reply ('*réplique*'), rejoinder ('*duplique*'),[108] but also allowed the parties to reformulate their submissions ('*conclusions*') until the end of the oral hearing ('*jusqu'à la clôture des débats*', '*bis zum Schlusse der Verhandlung*').[109]

Pirenne's basic assertion, which can already be found in a letter addressed to Lévêque in August 1921[110] and constituted the main argument used in the original claims submitted to the MAT before the end of that year,[111] was that Articles 231–32 VPT did simply not impact the deportees' right to individual compensation. According to Pirenne, what these provisions actually aimed to compensate was not the personal damage the German State had inflicted upon private individuals but the additional costs it had caused to the Belgian State, notably in the form of a diminished workforce, as well as disability and survivors' pensions.[112] In the initial claim, submitted before 31 December 1921, Pirenne argued that the deportees could sue the German State before the MAT based on Article 297 (e) VPT.[113] This provision went as follows:

106 Jean Salmon, 'In memoriam Henri Rolin (1891–1973)' (1973) 9(2) Revue belge de droit international x-xxvi.

107 French original: '*impossible d'encore réclamer à l'Allemagne un [centime] à ce sujet*'. Rolin to unknown recipient (undated, probably summer 1921), AGR, BE-A0510/I 530/5591.

108 RoP Belgian-German MAT, Arts 20–34. Reprinted in: *Reichsgesetzblatt*, 1921, 108.

109 ibid, Art 25.

110 Pirenne to Lévêque (8 August 1921) AGR, BE-A0510/I 530/5591.

111 'Requête à Messieurs les Président et Membres du Tribunal arbitral mixte germano-belge' (undated, late 1921) AGR, BE-A0510/I 530/5609.

112 Pirenne to Lévêque (n 110).

113 'Requête à Messieurs… (n 111).

> The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI …

Germany's response, written by its Agent-General, Hermann Johannes, and State Agent Lenhard, was sent to the MAT on 24 July 1922.[114] Replying to the deportees' factual descriptions of their exploitation and mistreatment, it made generic statements about how Germany had always well treated, fed, and paid 'Belgian civilian workers' ('*ouvriers civils belges*').[115] Addressing the legal aspects of the claim, it flatly rejected the MAT's jurisdiction under Article 297 (e) VPT using two arguments. First, it stressed that the MAT did not have territorial jurisdiction under that provision since the latter only covered 'damage or injury inflicted … in German territory as it existed on August 1, 1914'.[116] Secondly, and perhaps more crucially, it asserted that deporting a civilian was 'a measure exclusively aimed at the latter's person' ('*une mesure exclusivement dirigée contre la personne de celui-ci*'), not at their 'property, rights and interests'.[117] Echoing the point already made by Henri Rolin, it argued that injuries to the health and life of civilians, as well as the repercussions of such injuries on the surviving dependents of such victims, were already 'covered by the 132 billion Goldmark that Germany had been forced to pay under the reparations'.[118] It stressed that this sum, and notably the '640 million francs' claimed by the Belgian Government on account of the deportations, covered all damages suffered by the Belgian deportees, even if they had not been declared individually to the Reparation Commission.[119]

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114 'Réponse du défendeur' (24 July 1922) AGR, BE-A0510/I 530/5609.
115 ibid, 2–6.
116 ibid, 6–8.
117 ibid, 8.
118 French original: '*couverts par la somme de 132 milliards marks d'or, dont le paiement a été imposé à l'Allemagne au titre des réparations*'. ibid, 9.
119 ibid, 10.

The deportees' reply, which reached the German State Agents on 9 December 1922,[120] detailed the argument that Pirenne had already outlined to Lévêque in the summer of 1921 but had not fleshed out in the initial claim. The factual part of the reply essentially provided a detailed and statistically backed-up account of the mistreatment, starvation and health issues suffered by the Belgian deportees, as well as information regarding the non-payment of their salaries, thereby severely undermining Germany's idealised account.[121] In the legal part of the reply, Pirenne provided a bold but also somewhat lengthy and meandering explanation as to why the deportees had a right to sue Germany before the MAT.[122]

The first part of Pirenne's legal arguments regarded Article 297 (e) VPT. With reference to the provision's territorial scope, he noted that the provision only mentioned 'injury inflicted … in German territory' but did not in any way require the measures that had caused that injury to have been adopted in Germany. Moreover, Pirenne specified that, for the purposes of Article 297 (e) VPT, the term 'German territory' had to be interpreted as covering not only Germany itself but also the Operations and Staging Area, which had been under the direct control of the German High Command. He based this argument on the consideration that, under international law, the German military in that area had benefitted from the extraterritorial application of German law and that this also applied to the Belgian forced labourers drafted into the ZABs, which had been placed under German military control.[123] While contradicting the letter of Article 297 (e) VPT – and the widely accepted principle, reaffirmed by the 1899 and 1907 Hague Regulations, that occupying a territory militarily does not automatically result in its annexation[124] –, Pirenne's argument seemed to imply a teleological reading of the Versailles Treaty maximising the compensation owed to individuals, not unlike that given today by certain arbitral tribunals regarding the application of investment treaties to illegally annexed territories.[125] That said, Pirenne's main argument with

120 Schuster (German State Agent before the German-Belgian MAT) to the Reich Ministry of Justice (12 December 1922) German Federal Archive ('BA') (Lichterfelde), R/3001/7476.

121 'En fait' (undated reply, late 1922) AGR, BE-A0510/I 530/5609.

122 'En droit' (undated reply, late 1922) AGR, BE-A0510/I 530/5609.

123 ibid, 5.

124 See, eg, Article 43 Hague Regulations, which renders the occupying power's authority conditional upon its 'unless absolutely prevented, the laws in force in the country'.

125 On this issue, see, eg: Sebastian Wuschka, 'Investment Tribunals Adjudicating Claims Relating to Occupied Territories – Curse or Blessing?', in Antoine Duval

regard to Article 297 (e) VPT concerned the legal characterisation of the deportations.

Pirenne did not deny that the deportations had constituted injuries to the life and health of civilians as described under Annex I Part VIII VPT. What he denied was that they could be *exclusively*, or even predominantly, characterised as such. For Pirenne, the essence of the deportations lay elsewhere. Their purpose was 'to force [the Belgian workers] to execute the work contracts that they had refused to sign'.[126] Citing a literature overview by the centre-left French economist Charles Gide (1847–1932), Pirenne noted that work contracts were analysed either as sales contracts, rental lease agreements, or partnership agreements revolving around Karl Marx's (1818–83) concept of 'labour power' ('*force de travail*'), which was a form of property. The main purpose of the Belgian deportations had been to confiscate this type of property from Belgian workers, even though the measures used to implement this confiscation had also impacted the bodies of these workers. The deportations could therefore be characterised as 'exceptional war measures' targeting the 'property, rights or interests' of individuals under Article 297 (e) VPT.[127] From a theoretical perspective, and perhaps even more so than his considerations about the definition of 'German territory', Pirenne's characterisation of labour power as 'property' was somewhat problematic. For one, as opposed to liberal jurists and economists, the workers' movement – including Karl Marx himself – had always emphasised that it was impossible to separate a worker's labour power from the worker as a person. As a matter of fact, Article 427 VPT had recently affirmed the idea that 'labour should not be regarded merely as a commodity or article of commerce' as the first guiding principle of the newly-founded International Labour Organisation.[128] Moreover, in the

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and Eva Kassoti (eds), *The Legality of Economic Activities in Occupied Territories: International, EU Law and Business and Human Rights Perspectives* (Routledge 2020) 235–57; Kit De Vriese, 'The Application of Investment Treaties in Occupied or Annexed Territories and "Frozen" Conflicts: *Tabula Rasa* or *Occupata*?', in Tobias Ackermann and Sebastian Wuschka (eds), *Investment in Conflict Zones: The Role of International Investment Law in Armed Conflicts, Disputed Territories, and "Frozen" Conflicts* (Brill/Nijhoff 2020) 319–58.

126 French original: '*contraindre [les ouvriers belges] à exécuter les contrats qu'ils se refusaient à signer*'. 'En droit' (n 122) 1.

127 ibid, 1–5.

128 Stein Evju, 'Labour is not a commodity: reappraising the origins of the maxim' (2013) 4 European Labour Law Journal 222; Maria Vittoria Ballestrero, 'Le "energie da lavoro" tra soggetto e oggetto' (2010) WP CSDLE "Massimo D'Antona". IT – 99/2010.

colonial context, European lawyers often found it useful to describe forced labour as resulting 'merely' in the confiscation of the labour power of local individuals because it allowed them to distinguish this 'civilising' practice from the 'barbarous' institution of slavery, which they described as confiscation of the whole individual.[129] That said, within the limited context of the procedure before the MAT, Pirenne's characterisation of the deportees' labour power as a form of property distinct from their bodies could also be seen as a form of empowerment. Regardless of its wider theoretical implications, it allowed working-class people to claim the kind of procedural avenues and substantive protection a conventional reading of Article 297 (e) VPT would ordinarily have reserved for members of the bourgeoisie.

However, Pirenne also envisaged the possibility that the MAT might not follow his reading of labour power as a form of property under Article 297 (e) VPT. Noting that Germany had denied in its response any general characterisation of the deportees as forced labourers, including by asserting that they had benefitted from the salary grid applied to free workers, he concluded that this implied the existence of labour contracts. Accordingly, he asserted that the MAT, in any case, had jurisdiction under Article 304 (b) VPT, which had included within its remit

> all questions, whatsoever their nature, relating to contracts concluded before the coming into force of the present Treaty between nationals of the Allied and Associated Powers and German nationals.[130]

Having thus characterised the deportations as measures impacting private rights, Pirenne concluded that their legal nature depended on the perspective one adopted. From the perspective of the relations between Belgium and Germany, they could be characterised as a violation of Article 52 of the 1899 and 1907 Hague Regulations.[131] As such, they 'undoubtedly [pertained] to public law, endowing the Belgian Government with a right against the German Government'.[132] Conversely, 'from the perspective of each individual deported worker … they [appeared] as pertaining exclusively to private law, more precisely, to the German Civil Code.[133] In

129 Erpelding, *Le droit…* (n 62) 309–313.
130 'En droit' (n 122) 7–8.
131 ibid, 8–9.
132 French original: '*elles relèvent sans contredit du droit public et comme telles créent au profit du gouvernement belge un droit contre le gouvernement allemand*'. ibid., 9.
133 French original: '*du point de vue de chaque ouvrier déporté … ells apparaissent comme relevant exclusivement du droit privé*'. ibid.

Pirenne's reading, the Versailles Treaty took into account both aspects, which it had 'distributed' between the Reparation Commission (which dealt with the public law aspect) and the MAT (which dealt with private rights).[134] This contradicted the conventional view that the drafters of the Versailles Treaty had barred the deportees from claiming damages beyond those earmarked for them by the Reparations Commission. In support of his argument, he cited Article 1 of Belgium's 1919 law on the compensation of civilian war victims, which had provided that the establishment of domestic procedures in this regard did not impact 'the right of the nation and private individuals to seek reparation of acts contrary to the law of nations committed by enemy powers, their agents or nationals'.[135]

Dated 10 April 1923, Germany's rejoinder, signed by Government Agent Thiene, included three legal arguments.[136] The two first regarded Article 297 (e) VPT. Regarding the territorial scope of this provision, Germany vehemently denied that it could have applied to the Rear and Staging Area in occupied Belgium and France since 19th-century state practice, the Hague Conventions, and even the Versailles Treaty itself made clear that 'the *occupatio bellica* of foreign territories in no way changes the territorial sovereignty of the occupied country'.[137] With regard to deportations to Germany itself, the rejoinder essentially asserted that, by focusing on the issue of labour power, Pirenne had artificially reframed the issue at hand. For Germany, even if one accepted that labour power could be characterised as property under Article 297 (e) VPT, the mobilisation of this power was merely the consequence of the deportees' forcible transfer to Germany, which was clearly a measure targeting the individual as such. Moreover, Germany categorically denied that a person's labour power could be considered property under the Versailles Treaty. It first noted that this was contrary to all legal logic and everyday language and that the 'measures of supervision, of compulsory administration, and of sequestration' mentioned by para. 3 Annex to Article 297 (e) VPT could hardly apply to labour power. Dealing a heavy blow to what had been Pirenne's main argument, the rejoinder concluded by citing the German-Belgian MAT's recent decision in *Richelle c État allemand*. In that decision,

134 ibid, 10–14.

135 French original:'*[le] droit de la nation et des particuliers de poursuivre la réparation des actes contraires au droit des gens, commis par les puissances enemies, leurs agents ou ressortissants*'. 'Loi sur les réparations…' (n 95).

136 'Duplique' (10 April 1923) AGR, BE-A0510/I 530/5609.

137 French original: '*l'*occupatio bellica *de territoires étrangers ne modifie en rien la souveraineté territoriale du pays occupé*'. ibid, 9–11.

Moriaud's Tribunal had expressly rejected the notion that the assimilation of labour to property made by certain economists could apply to the legal context as well.[138] The third and last part of the German rejoinder reaffirmed the absorption of private rights by the provisions of Part VIII VPT on reparations. According to Germany, the fact that these provisions were of a public nature did not preclude them from dealing with private rights. Defending a traditional view of international law, Germany noted that only states were subjects of international law and endowed with the power to conclude treaties. Therefore, any treaty-based right to compensation was, at least in principle, reserved to states alone. Private persons could benefit from such a right only on an indirect and exceptional basis, ie if states expressly concluded an express provision to that end. This had also been the system adopted by the drafters of the Versailles Treaty. By mentioning both the damages suffered by the Allied and Associated Governments and their nationals in Part VIII VPT, they had implied that the reparations process established therein covered both public and private rights. Conversely, the right to sue for damages awarded to certain private persons pursuant to Part X VPT had to be considered exceptional and subjected to a restrictive interpretation. Therefore, only damages that had not already been mentioned as subject to reparations under Part VIII VPT could be brought before the MAT – which was not the case for the injuries suffered by the deportees or their relatives.[139]

The arguments exchanged during the written stage of the proceedings made it clear that the deportees' case pitted two very different visions of the Versailles Treaty against each other. On the one hand, the Belgian deportees, represented by Jacques Pirenne, were defending an unconventional interpretation of the treaty centred on the protection of the individual. Based on little more than principles of civil law and considerations of social justice, they were implying that the peace treaty placed the protection of all private rights on a par with those of the signatory states. On the other hand, Germany merely had to rely on established state practice and conventional doctrine to assert that the signatories of the Versailles Treaty could make, and had indeed made, the final determination that some of their nationals would never be able to claim full compensation for their wartime injuries. Based on his previous correspondence with Henri Rolin – whose father was, after all, sitting in the deportees' case – and, more recently, the MAT's rather conservative decision in *Richelle c État allemand*,

138 ibid, 7–8. *Milaire c État allemand* (13 January 1923) 2 Recueil TAM 715.
139 ibid, 11–18.

Pirenne probably knew that his chances of securing a fully-fledged victory for the deportees were limited. It might therefore seem somewhat surprising that he never seems to have replied to the settlement offer made by Germany in July 1923 through the Belgian Agent-General.[140] However, accepting such an offer would have deprived Pirenne and the deportees of something that both of them were expecting impatiently:[141] the publicity of a day in court.

4. The Hearing: Addressing the 'Conscience of Europe'

The publicity of their hearings was one of the most salient features of the MATs, distinguishing them from both 19th- and 20th-century mixed claims commissions and present-day investor-state arbitral tribunals.[142] The deportees' case showed that, much more than the physical attendance of the broader public, which remained limited,[143] the main potential consequence of publicity was media coverage. A classic '[magnifier of] the public power of legal mobilisation pressure tactics',[144] this factor did not appeal equally to both parties. The German Government clearly perceived it as a major liability, fearing that a public discussion of the deportations might exacerbate tensions between Germany and Belgium.[145] Conversely, for Pirenne and the deportees, pleading their case to a large audience had at least two major advantages. First, the hearing and associated media coverage provided the deportees with a platform from which they could attract public attention and sympathy for their plight, something which they felt they had not been given enough. Second, showing the MAT that the deportees enjoyed wide-ranging public support well beyond Belgium might embolden it to embrace at least some of Pirenne's unconventional arguments. The four day-hearing, held from Monday, 7 to Thursday, 10 January 1924, reflected these opposing considerations.

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140 Sartini van den Kerckhove to Pirenne (n 38).

141 Pirenne to Belgian FM Jaspar (17 October 1923) AGR, BE-A0510/I 530/5593.

142 See the Introduction of this volume.

143 According to the Belgian daily *Le Soir*, during the first session of the hearing, the public was limited to 'three ladies' and 'seven gentlemen'. However, the same newspaper later reported increasing attendance numbers, both among Parisians lawyers and jurists and members of the public. 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 8, 9, and 10 January 1924).

144 McCann (n 48) 514.

145 Sartini van den Kerckhove to Pirenne (n 38).

Representing the deportees: Jacques Pirenne (seated) and Paul Hymans (standing). In the background: their client Jules Loriaux (first row, first from the right). Press photography by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

The first two days of the hearing were entirely taken up by Pirenne, who spoke for a total of nine hours and 45 minutes.[146] While remaining very factual and generally refraining from hyperbolic statements, he nevertheless adopted a markedly more solemn tone than in his written arguments. In his opening statement, he stressed that the deportees' suit was not about 'reigniting barely extinguished hatreds' ('*réveiller des haines mal calmées*'), but essentially about law ('*c'est essentiellement un procès de droit*'). Its aim was to:

> provoke a decision which might subsequently become a part of the law of nations … in the interest of all peoples and, more particularly, of the working class of all lands … [to protect civilian populations] against the servitude inaugurated by Germany in 1916.[147]

146 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 8 and 9 January 1924).

147 French original : '*afin de provoquer par une sentence qui puisse à l'avenir être incorporée au droit des gens … dans l'intérêt de tous les peuples et particulièrement de la classe ouvrière de tous les pays … [pour protéger les populations civiles] contre la*

By referring to the centrality of the law of nations and the necessity to develop it further in the interest of civilians and workers, Pirenne had reframed the deportees' suit in much broader terms, resonating with the Allies' assertions that WWI had been a war 'for law'[148] and that the institutions created by the Versailles Peace Treaty sought to establish 'peace through law'.[149] Building on this idea, he stressed that the MAT was 'ideally suited' ('*tout désigné*') to set such a precedent, as it represented 'the conscience of all Europe' ('*la conscience de l'Europe entière*').[150] Moving on to the facts at hand, Pirenne provided the Tribunal with a detailed restatement of German deportation policies, partially relying on classified documents one of his acquaintances, the historian Armand Wullus (1893–1969), had stolen from an archive in Potsdam.[151] Amongst his findings, Pirenne highlighted the responsibility of German jurists, including university professors, in encouraging the Reich authorities to simply not consider themselves bound any longer by the laws of war,[152] as well as Governor von Bissing's acknowledgement that the deportation policies violated the Hague Regulations.[153] In order to dispel any doubts about the harshness of the deportations, he provided the Tribunal with a detailed description of their concrete implementation, as well as the inhumane living and working conditions of the deportees, often citing first-person witness accounts.[154]

In the legal part of his statement, Pirenne presented the Tribunal with partly modified and refined arguments. He was able to do so because of the German-Belgian MAT's liberal Rules of Procedure, which, as already mentioned, allowed the parties to submit their final submissions ('*conclusions*') until the end of the oral hearing.[155] This allowed him to take into account the Tribunal's *Richelle* decision, which had discredited his earlier characterisation of the deportations as exceptional war measures against Allied private property. Accordingly, in his 'oral submissions' ('*conclusions*

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servitude inaugurée par l'Allemagne en 1916'. 'Exorde' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607, 1.

148 On this subject, see: Hull (n 68).

149 See: Michel Erpelding, 'Versailles…' (n 49) 11–28.

150 'Exorde' (n 147), 2.

151 Pirenne, *Mémoires…* (n 30) 108–109.

152 'Introduction' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607, 10–12.

153 ibid, 17–17a.

154 ibid, 18–80.

155 Art 25 RoP Belgian-German MAT.

d'audience'),[156] Pirenne all but renounced the use of Article 297 (e) VPT, invoking it only to secure compensation for worn and torn clothes and lost parcels.[157] Instead, he now relied on one main argument: the contractual nature of the relationship between the Belgian deportees and the German Reich. In support of this characterisation, he pointed out that Germany had not only paid, housed, and fed the deportees in return for their work (albeit insufficiently) but had always categorised them as 'free civilian workers' ('*freie Zivilarbeiter*'). For Pirenne, such a relationship could only be considered as a work contract, both *de facto* and *de jure*, 'whether or not that contract had been confirmed in writing' ('*que ce contrat ait été ou non confirmé par écrit*').[158] In his oral statement, using a principle from civil law, he added that the deportees' lack of consent could in no way allow Germany to deny the legal effects of these contracts, as only the party subjected to the violence could have done so.[159] In any case, the deportations could not be described as requisitions, since the latter could only have taken place 'within the bounds of Article 52 of the [1907] Hague Convention' ('*dans les limites de l'article 52 de la Convention de La Haye [de 1907]*'), which the deportations had violated.[160] Were the Tribunal to refuse Pirenne's characterisation, it could only end up with an even further-reaching and potentially dangerous conclusion:

> it would be obliged to consider that by hiring Belgian workers, the German State had created for them … a legal status characterized by a violently imposed deprivation of all rights and individual freedoms to the benefit of a master …, [i.e. a status which] could only be characterized as slavery.[161]

156 The term was used by the Tribunal itself: *Loriaux c État allemand* (n 16) 676. Although RoP do not specify when exactly the *conclusions d'audience* were to be delivered, press reports suggest that they were read out loud by Pirenne at the very end of his statement, on Tuesday afternoon. 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 9 January 1924).

157 'Conclusions' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607, 5–6.

158 ibid, 1–2.

159 'En droit' (n 122) 33.

160 'Conclusions' (n 157) 2.

161 French original: '*il serait obligé de considérer que l'emploi des ouvriers belges par l'État allemand, a créé pour ceux-ci … un état juridique comportant privation de tous droits et de toute liberté individuelle, au profit d'un maître imposé par la violence…, [c'est-à-dire un état qui] ne pourrait être qualifié que du nom d'esclavage*'. ibid.

Conversely, were the Tribunal to follow Pirenne's characterisation and decide that the deportees had benefitted from work contracts, it would also have to declare itself competent under Article 304 (b) VPT and provide the deportees with full compensation for their personal injuries.[162] In this context, he noted that the German-Belgian MAT, in its recent decision in *Milaire c État allemand*, had used this provision to award damages for work injuries to a Belgian who had signed a work contract with the German Military Railways Directorate.[163] Asserting that Milaire had only signed this contract to avoid deportation, he concluded that, from a legal perspective, there was no difference between the situation of Milaire and that of the deportees – although the former was 'a weak man' ('*un homme faible*') whereas the latter were 'heroes' ('*des héros*').[164] Since work contracts were inherently of a private nature, claims resulting from them could not have been addressed by the Reparation Commission, whose competence was limited to the public aspect of the deportations. Pirenne acknowledged that the deportations had indeed given rise to forced labour, but only 'beyond the private relationship between the parties themselves' ('*en dehors des rapports privés entre les parties elles-mêmes*').[165] Thereby, he essentially broke down the deportations into two phases: whereas the initial mobilisation of the deportees had been the result of Germany abusing its powers as a state and was, therefore, a matter of international law, the actual implementation of the forced labour was a contractual matter under domestic private law.[166] For Pirenne, it was 'legally impossible' ('*juridiquement impossible*') for either Belgium or Germany to renounce private contractual claims on behalf of their nationals.[167] Accordingly, the Reparation Commission could only have made determinations regarding the collective damage suffered by the Belgian State both as a result of having to take care of the deportees and of the consequences of the deportations on Belgium as a society and a nation.[168]

Pirenne's argument regarding slavery might seem surprising at first sight, given the Allies' previous condemnation of Germany's forced labour policies as a violation of its international antislavery obligations. Nevertheless, it fell squarely within the overall logic of his statement. For Pirenne,

162 ibid, 2–4.
163 *Milaire c État allemand* (n 138).
164 'En droit' (n 122) 34(1).
165 'Conclusions' (n 157) 3.
166 ibid, 3. See also: En droit' (n 122) 49–50.
167 'En droit' (n 122) 16.
168 ibid, 2–4.

recognising the existence of labour contracts between the deportees and the German State was likely to be more beneficial to workers and civilians than recognising that Germany had engaged in acts of slavery. As he concluded in his oral remarks, requiring Germany to pay the Belgian deportees the salaries they were due based on German labour legislation might have a dissuasive effect on future aggressors:

> Will new wars perhaps afflict the world? Could such a thing happen again? In this case, the lives of hundreds of thousands of human beings will depend on the decision that the Tribunal will have taken. According to the respondent, our claim must be rejected, since the Belgian State was paid a lump-sum indemnity. This means that, according to the respondent, in times of war, the inhabitants of occupied territories will not enjoy any rights any longer. They will remain at the mercy of the occupier, who may carry them away into slavery. They will be human material whose use will either result in an indemnity paid to the state should the occupier lose or will be considered legitimate should he emerge victorious.[169]

169 '*Peut-être de nouvelles guerres désoleront-elles le monde? Pareille chose pourra-t-elle se reproduire? De la décision qu'aura prise le Tribunal dépendra – dans ce cas – le sort de centaines de milliers d'hommes. Pour le défendeur, il faut nous débouter parce qu'une indemnité forfaitaire a été payée à l'État Belge, c'est-à-dire pour lui donc – en cas de guerre les populations des territoires occupés n'ont plus aucun droit – sont livrées à la merci de l'occupant qui peut les entraîner en esclavage – elles sont du matériel humain dont l'emploi donnera lieu au paiement d'une indemnité à l'État au cas où l'occupant est vaincu et qui sera légitime s'il est vainqueur*'. 'En droit' (n 122) 46.

Defending the Reich: Max Illch, counsel for Germany. Press photography by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

Compared to Pirenne's detailed and solemn account on behalf of the deportees, Germany's reply was a much more compact affair. As in other cases that were considered to be of exceptional importance, the Reich had not left its defence exclusively to the German State Agents but had appointed a lawyer.[170] Counsel for Germany was Max Illch (1872–1958), registered at the Berlin bar, who, according to the Brussels newspaper *La Dernière Heure*, had lived in France for 14 years and spoke a French 'of great purity and without any accent' ('*avec une grande pureté et sans aucun accent*').[171] Illch, whom Nazi Germany would later bar from exercising certain of his legal activities due to his Jewish ancestry, ultimately causing him to emigrate in 1936,[172] proved to be a sensible choice. Speaking for only two hours and 15 minutes,[173] he avoided any discussion of the facts

170 Göppert (n 4) 14.

171 'L'Allemagne plaide en droit contre les déportés belges' *La Dernière Heure* (Brussels, 10 January 1924).

172 He first emigrated to Italy, later to the United States. 'Illch, Max' in Simone Ladwig-Winters and Rechtsanwaltskammer Berlin (eds), *Anwalt ohne Recht: Das Schicksal jüdischer Rechtsanwälte in Berlin nach 1933* (3rd edn, Bebra 2022) 262.

173 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 10 January 1924).

presented by Pirenne, choosing instead to highlight the contradictions within his opponent's legal arguments. Rebutting Pirenne's most salient accusation, Illch started by presenting Germany as firmly committed to implementing the Treaty of Versailles. He stressed that the Reich was in no way suggesting a new incentive for wartime slavery in occupied territories. Quite to the contrary: it was actually recognising the right of all deportees – including those not represented before the MAT – to reparations pursuant to the peace treaty.[174] Seeking to cast doubt on Pirenne's understanding of that treaty and the consistency of his legal strategy, Illch then pointed out that the deportees' lawyer had already had to abandon his initial main argument based on Article 297 (e) VPT, which the German-Belgian MAT had clearly rejected in *Richelle c État allemand*.[175] With regard to the claimants' new main argument based on Article 304 (b) VPT, he noted that there was a profound contradiction in providing a detailed factual description of the deportations as resulting from coercion while simultaneously alleging their contractual nature. In his view, the Tribunal could not ignore these factual allegations when assessing the legal nature of the deportations.[176] Moving on to Pirenne's central thesis, according to which Belgium could not have deprived its nationals of their right to additional remedies for private injuries, Illch noted that this was precisely what established state practice allowed governments to do:

> Whatever the theory one adopts regarding the nature of the state, everybody agrees that states, even without any mandate from their nationals, rule over them and may determine over their rights pursuant to established treaties and domestic laws. There is no question that the Treaty of Versailles is for all of its signatories also an act of domestic legislation binding upon their nationals. In this regard, states are all-powerful. Besides, gentlemen, where could one find a better example [of such a treaty] than in the Treaty of Versailles itself? Over and over again, it subjects the rights of nationals on both sides to measures that impact them deeply, or even give them up altogether … Gentlemen, there is no question that the Treaty of Versailles's signatory states

174 'Plaidoirie de M[e] Hilsch [sic], de Berlin' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607.
175 ibid, 3–4.
176 ibid, 5–7.

> could do whatever they wanted with [their] nationals and the rights of [their nationals].'[177]

After this transparent allusion to Germany's many grievances about the Versailles Treaty's impact on its nationals, Illch presented the Tribunal with his own analysis of the reparations regimes established by that treaty. From his perspective, as opposed to the measures that fell within the jurisdiction of the MAT, those attributed to the Reparation Commission pursuant to Article 232 VPT and Annex I Chapter VIII VPT all had one feature in common: they consisted of 'particularly flagrant violations of the law of nations' ('*des infractions particulièrement flagrantes au droit des gens*'). The Allied and Associated Powers, who had drafted the Versailles Treaty, had included the deportations under these provisions.[178] This was a remarkable statement, as counsel for Germany seemed to acknowledge that the deportations had been illegal under international law – an acknowledgement which he later repeated.[179] It also stood in sharp contrast to the unanimous decision made in February 1923 at a meeting involving State Agent Lenhard and representatives of various ministries not to discuss the legality of the deportations in front of the MAT because of its 'questionable' ('*zweifelhaft*') nature.[180] However, the criterion put forward by Illch also allowed him to discard as irrelevant whether such egregious violations of international law had been formally based on unilateral normative acts governed by public law or on contracts governed by private law. From his perspective, Pirenne's distinction between the private law and the public law aspects of the deportations was utterly pointless. Conversely, stating that Article 232 VPT only covered reparations for flagrant

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177 '*Quelle que soit la théorie à laquelle on se rattache pour dire ce qu'est l'État, tout le monde est d'accord pour reconnaître que l'État sans avoir de mandat de ses ressortissants, en est le maître en tant qu'il dispose d'eux et de leurs droits d'après les conventions et lois intérieures en vigueur, et il est hors de doute que le Traité de Versailles est en même temps pour chacun des États signataires un acte de législation intérieure et que cette législation intérieure lie les ressortissants; que l'État à cet égard est tout puissant. Et d'ailleurs, Messieurs, où pourrais-je trouver un meilleur exemple que dans le Traité de Versailles lui-même? Maintes et maintes fois dans ce Traité, les droits des ressortissants de part et d'autre sont l'objet de mesures qui les aliènent profondément … Messieurs, il me semble sans conteste que les États signataires du Traité de Versailles pouvaient faire de [leurs] ressortissants et de leurs droits ce qu'ils voulaient.*' ibid, 8.

178 ibid, 12–13.

179 ibid, 14.

180 Minutes of a meeting at the German Ministry of Foreign Affairs (24 February 1923) BA (Lictherfelde), R/3001/7476.

violations of international law also allowed to account for the existence of two different sets of procedural avenues. For Illch, it made sense that the Allies would have left the reparations under Article 232 VPT to a Reparation Commission, not including Germany, thus allowing them to unilaterally determine the amount that the Reich would have to pay for its violations. On the other hand, all belligerents had adopted exceptional war measures not amounting to egregious violations of international law. It was for claims arising from such measures alone that the Allies and Germany had created the MATs, ie judicial bodies in which Germany could participate on an equal footing.[181] To illustrate his claim, Illch turned to the MAT's decision in *Milaire c État allemand*. Far from backing up Pirenne's argument regarding the Tribunal's jurisdiction over all employment relationships between Belgians and the German occupier pursuant to Article 304 (b) VPT, it had actually noted that:

> all parties agree that Milaire was not subjected to forced labour under [para. 2 Annex I Chapter VIII VPT], but had willingly committed himself to be hired by the German railways administration in occupied Germany.[182]

Having thus undermined Pirenne's second main legal argument, Illch was able to rest his case. Concluding his speech, he stressed that, just like Pirenne, he hoped for a general appeasement between the former enemies. However, unlike Pirenne, he did not believe that making Germany pay twice based on the deportees' claims would contribute to this appeasement.[183]

Speaking after Illch, the deportees' second counsel, Paul Hymans, essentially provided a summarised version of Pirenne's arguments,[184] drawing an equally repetitive reply from Illch.[185] However, the point of his participation was likely to raise public awareness about the deportees' case. In this regard, it was a success. Not only did the attendance at the hearing

181 'Plaidoirie de M[e] Hilsch [sic], de Berlin' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607, 13.

182 *Milaire c État allemand* (n 138) 717.

183 'Plaidoirie…' (n 181) 19–20.

184 Unfortunately, there does not seem to be any archival record of Hymans's speech. However, the reporters present at the hearing have left us with numerous accounts and citations.

185 'Réponse de l'avocat allemand, M[e] Hilsch [sic] à M[e] Hymans (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607.

soar on the afternoon of 9 January 1924.[186] Building on the facts and legal arguments assembled by Pirenne, he provided the press with lively descriptions of the deportations and rhetorical flourishes, including a vibrant appeal to the Tribunal to embrace a more human-centred vision of international law:

> The law of nations – which yesterday was still called the law of war – is currently being rewritten. May you contribute to this endeavour, Gentlemen of the Court, taking your inspiration from the sacred rights of man.[187]

'My mission here is strictly defined': German State Agent Alfred Lenhard. Press photography by Meurisse news agency. Source: gallica.bnf.fr / Bibliothèque nationale de France.

Held on Thursday, 10 January 1924, the last session of the hearing was dedicated to a public exchange of arguments between the Belgian and German State Agents. It would end with a minor incident. The first to speak was the Belgian State Agent Gevers. After repeating the arguments already put forward by Pirenne and Hymans, he concluded by declaring that the most important part of the hearing was yet to come, as the German State Agent Lenhard would undoubtedly provide the Tribunal with a formal declaration about his country's opinion on the deportations.[188]

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186 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 10 January 1924).

187 *'On est en train de refaire le droit des gens, ce qu'on appelait hier le droit de la guerre. Apportez-y, Messieurs de la Cour, votre collaboration, vous inspirant des droits sacrés de l'homme.*' 'Les déportés belges contre l'Allemagne' *La Libre Belgique* (Brussels, 10 January 1924).

188 There does not seem to be any archival record of the statements made by the Belgian State Agents. However, the reporters present at the scene provided a

Considering the formal decision taken by the German Government in 1923 to avoid a discussion of the legality of the deportations,[189] Gevers's appeal put Lenhard in a very difficult position. Replying to his Belgian colleague, he declared that his role was purely legal and that he could neither intervene in nor make declarations on political matters. He then moved on to repeating the legal arguments already presented by Illch.[190] After Lenhard had finished his statement, the Belgian Agent-General Sartini van den Kerckhove, adopting a solemn and emotional tone, noted that his counterpart had not made a single gesture or issued a single word of regret to the deportees and accused him of heartlessness.[191] To this, Lenhard replied that 'all victims of the war deserve the compassion of civilised people' ('*la commisération des gens civilisés est acquise à toutes les victimes de la guerre*'), but that in his opinion, it would have been an insult to express his compassion to the deportees while simultaneously denying them the right to the direct remedy they were claiming.[192] Following this statement, the Tribunal's President, Paul Moriaud, took the floor. According to the reporter from *La Libre Belgique*, the following exchange ensued:

> [Moriaud:] May I ask you a few simple questions, Mr State Agent? Do you think that the law of nations – which is not a law based on conventions alone, is it? – may be breached without impunity by any country when it is in that country's interest? Isn't the violation of the law of nations a legal question? Don't you think that the international law questions that are part of the ten cases before us today are legal questions that deserve to be discussed before you?
>
> …
>
> [Lenhard:] Mr President, I apologize for not giving you the answer that you expect. As I already mentioned, my mission here is strictly defined.

relatively consistent account thereof. See: 'Le duel belgo-allemand' *La Dernière Heure* (Brussels, 11 January 1924); 'Les déportés belges contre l'Allemagne' *La Libre Belgique* (Brussels, 11 January 1924); 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 11 January 1924); 'Taktlosigkeiten gegen Deutschland' *Deutsche Allgemeine Zeitung* (Berlin, 11 January 1924).

189 Minutes of a meeting… (n 180).

190 'Le duel belgo-allemand' *La Dernière Heure* (Brussels, 11 January 1924).

191 ibid.

192 'Réponse de l'agent du gouvernement allemand' (undated typoscript, January 1924) AGR, BE-A0510/I 530/5607.

> …
> [Moriaud:] Do the ten test cases before us not pertain to international law?
> …
> [Lenhard:] It is not for us, but for the Tribunal, to say whether these cases pertain to international law. For us, they pertain to the Treaty of Versailles.
> …
> [Moriaud:] Recently, a Bulgarian-Belgian Tribunal[193] had to deal with a case quite similar to the ones before us today. The case was about measures taken against a Belgian national. It was a very painful case on which the Tribunal had to decline jurisdiction. Well, the Bulgarian Agent, Mr Theodoroff, did not in any way hesitate to express his pain at having won this case – and I commend him for that. He spoke like a decent man.[194]

Having uttered these words, Moriaud declared the proceedings closed.[195] Predictably, they led to opposing reactions in Belgium and in Germany. Whereas *Le Soir* welcomed the exchange as 'a moving incident' ('*un émouvant incident*'),[196] the *Deutsche Allgemeine Zeitung* lambasted Moriaud for what it saw as 'acts of tactlessness' ('*Taktlosigkeiten*') and 'improprieties'

193 Moriaud also presided the Bulgarian-Belgian MAT. See Péricard (ch 8).

194 '*[Moriaud :] Vous me permettrez de vous poser ces simples questions : Est-ce que vous estimez que le droit des gens – qui n'est pas un simple droit conventionnel, n'est-ce pas? – peut être violé impunément par un pays quand il y a intérêt? Est-ce que la violation du droit des gens n'est pas une question juridique? Est-ce que les questions du droit des gens qui se trouvent incluses dans les dix articles dont nous nous occupons ne vous paraissent pas des points de droit qui méritaient d'être posés devant vous? … [Lenhard :] Monsieur le président, je m'excuse mille fois si je ne vous donne pas la réponse que vous désirez. La mission pour laquelle je suis venu ici est strictement délimitée, comme je l'ai déjà dit. … [Moriaud :] Les dix cas-types présentés au tribunal ne relèvent-ils pas du droit des gens? … [Lenhard :] Si cela relève du droit des gens, ce n'est pas à nous de le dire, c'est au tribunal. Pour nous, il s'agit du traité de Versailles. … [Moriaud :] Dans une affaire qui s'est déroulée devant un tribunal bulgaro-belge, il s'est passé quelque chose qui se rapproche beaucoup du procès actuel. Il s'agissait de mesures prises contre un Belge; il s'agissait d'un cas très douloureux dans lequel le tribunal s'est déclaré incompétent. Eh bien, l'agent bulgare, M. Théodoroff, a exprimé sans hésitation – fait dont je lui rends hommage – la douleur qu'il avait été vainqueur dans le procès. Il parlait comme un honnête homme.*' 'Les déportés belges contre l'Allemagne' *La Libre Belgique* (Brussels, 11 January 1924).

195 ibid.

196 'Les déportés belges contre le Reich' *Le Soir* (Brussels, 12 January 1924).

('*Entgleisungen*').[197] As for the deportees, they felt vindicated by the President's declaration. Back in his home town of Jumet, the main plaintiff, Jules Loriaux, welcomed it as a 'moral condemnation' issued by a neutral judge against the 'crime of the deportations' committed by Germany.[198]

5. The Verdict: a German Victory?

The German-Belgian Mixed Arbitral Tribunal handed down its verdict in *Loriaux c État allemand* and the nine other test cases on 3 June 1924.[199] Both parties had had good reasons to remain cautious about the result. Perhaps still under the impression of the President's damning remarks to State Agent Lenhard, officials at the German Ministry of Foreign Affairs had not excluded a mostly negative outcome for the Reich. For this eventuality, they had already been envisaging a broad press campaign denouncing the 'absurdity' ('*Widersinnigkeit*') of burdening Germany with another 5 billion francs in reparations only four years after the entry into force of the Versailles Treaty.[200] As for Pirenne, his initial display of optimism – he had told a reporter a few days after the hearing that his impression was favourable and that he hoped for a positive outcome as soon as February[201] – very likely concealed more guarded feelings. The deportees' lawyer had known from the beginning that the odds were not necessarily in his favour. Moriaud's mention of the Bulgarian-Belgian MAT having to decline jurisdiction in a similarly 'painful' case, combined with the German-Belgian MAT's rather discouraging own case law in *Richelle* and *Milaire*, would only have deepened this impression. But there had also been encouraging news. A few days after the end of the hearing, Jean-Maurice Marx, a member of the Belgian delegation at the Reparation Commission, had informed Paul Hymans that Germany's argument about it having to 'pay twice' should the deportees win before the MAT was

197 'Taktlosigkeiten gegen Deutschland' *Deutsche Allgemeine Zeitung* (Berlin, 11 January 1924).

198 'Le retour des délégués des déportés' *La Dernière Heure* (Brussels, 12 January 1924).

199 Only the Loriaux decision was published in the MATs' official collection: *Loriaux c État allemand* (n 16). Of the remaining nine decisions, seven (Poelemans, Musette, Dubois, Marbaix, Van Boekstael, Bardaux) have been preserved in Pirenne's personal archives: AGR, BE-A0510/I 530/5594.

200 Minutes of a meeting (n 36).

201 'Après le procès des déportés' *La Dernière Heure* (Brussels, 13 January 1924).

baseless. The Commission had recently determined that in cases of overlap between one of its own decisions and that of a MAT, the latter would take precedence.[202] Whatever his personal intuition about the outcome of the case, Pirenne had not mentioned this new development in the article sent in March 1924 to the prestigious *Revue de droit international et de législation comparée* and published later that year, which was basically a summarised restatement of the arguments already presented to the MAT.[203]

Pirenne had been right to refrain from making any sanguine statements about the deportees' prospects for compensation. The decision in *Loriaux c État allemand* and the other test cases turned out to be quite similar to the precedent mentioned by Moriaud, with the German-Belgian MAT declining jurisdiction on all but one of the claims put forward by the deportees. Most of the decision addressed the deportees' claim regarding unpaid salaries, which it examined both with regard to Article 297 (e) and 304 (b) VPT. Regarding the former, the Tribunal started by noting that 'not a single domestic legal system in the world' ('*le droit positif d'aucun pays*') considered 'the labour capacity of a worker' ('*la capacité de travail de l'ouvrier*') as property and that,

> based on the unquestionable intention of the authors and signatories of the Peace Treaty, as well as on the unanimous case law of the MATs, "property, rights or interests" are patrimonial assets, i.e. things which are distinct from a person and on which that person owns rights …[204]

Mentioning its own decisions in *Richelle*[205] and *Caro*,[206] but also the Franco-German MAT's decision in *Coquard*[207] and the Anglo-German MAT's decision in *Brueninger*,[208] it declared that 'the deportations were nothing else but measures against persons' ('*la déportation n'est pas autre chose qu'une mesure contre la personne*').[209] It concluded by adding that regarding deportations as exceptional war measures under Article 297 (e) VPT was

202 Marx to Hymans (14 January 1924) AGR, BE-A0510/I 530/5593.
203 Pirenne, 'Le procès…' (n 33) 102.
204 '… *selon l'indubitable intention des auteurs et des signataires du Traité de paix, de même que selon la jurisprudence unanime des TAM, les "biens, droits et intérêts" sont des éléments du patrimoine et supposent des choses distinctes de la personne et sur lesquelles celle-ci a des droits*'. *Loriaux c État allemand* (n 16) 678–79.
205 *Richelle c État allemand* (20 October 1922) 2 Recueil TAM 403.
206 *Pierre Caro c État allemand* (4 April 1922) 2 Recueil TAM 14.
207 *Coquard Pierre c État allemand* (12 July 1922) 2 Recueil TAM 297.
208 *FW Brueninger v German Government* (26 January and 27 March 1923) 3 Recueil TAM 20.
209 *Loriaux c État allemand* (n 16) 679.

excluded for two more reasons. On the one hand, such measures had to be taken in Germany. On the other hand, Article 297 (d) VPT implied that exceptional war measures could be recognised as final and binding. Being 'the most flagrant and most atrocious violation of the law of nations' ('*la violation la plus flagrante et la plus atroce du droit des gens*'), the deportations could in no way have benefitted from such recognition.[210] Moving on to Article 304 (b) VPT, the MAT held that the existence or not of a work contract between the deportee and the Reich was irrelevant since Annex I Part VIII VPT did not make that distinction when mentioning forced labour and that the Belgian Government had adopted the same view within the Reparation Commission. Noting that the 144 million francs earmarked for the deportees by that Commission were part of the 132 billion Goldmark set as 'the extent of [Germany's] obligations' ('*le total [des] obligations [de l'Allemagne]*') mentioned in Article 233 VPT, it stressed that this expression did not cover claims such as those made by the deportees before the MAT. Quite to the contrary: it exclusively referred to Germany's obligation to pay the reparations due pursuant to Part VIII VPT, using the procedures provided for under Part VIII VPT. The only exceptions to this principle were set out in Article 242 VPT, which only mentioned Sections III and IV Part X VPT, notably Article 297 VPT, but not Article 304 VPT, which was part of Section VI Part X VPT. Accordingly, the potentially more than 100 000 decisions issued by the MAT against Germany following suits by deportees pursuant to Article 304 VPT would run counter Article 233 VPT and interfere with the payments provided for under that provision. The Tribunal also flatly rejected Pirenne's argument, according to which Part VIII VPT only covered damages caused to the Belgian State, noting that its Annex I expressly mentioned 'damage caused to civilian victims', thereby excluding this interpretation. As for Pirenne's assertion that the Allies could not have deprived their nationals of their rights vis-à-vis the German State, the MAT essentially validated the arguments already put forward by Max Illch, which relied on the logic of diplomatic protection allowing states to act on behalf of their nationals. Noting that without the conclusion of a peace treaty, Allied nationals would probably have had no remedies at all against acts committed by the German State's *jure imperii*, it recalled that states frequently negotiated on behalf of their nationals following such acts. This power also meant making determinations on their nationals' private rights, including by renouncing these rights, as

210 ibid.

the Treaty of Versailles had expressly done in several of its provisions.[211] Moreover, in the case of the deportees' alleged work contracts:

> even in cases where a work contract actually existed, the transformation of the private debt of the German State vis-à-vis the deportees in a public law obligation vis-à-vis the Belgian State is all the more understandable as the contracts in question resulted in fact from acts of violence which, having been systematically inflicted upon a whole part of the civilian population, constitute the most severe violation of the law of nations.[212]

Having thus repeated its leitmotiv, the MAT endorsed the argument already used by Max Illch regarding the advantages of the Reparation Commission over the MATs for allied nationals, notably its composition and the fact that it could issue decisions based on equity alone.[213] The Tribunal's discussion of the deportees' main claim ended with a rejection of Pirenne's reading of the *Milaire* decision. For the MAT, it was simply wrong to assert that there was no difference between forced labour and free contractual labour in the context of German-occupied Belgium. Not only had *Milaire* expressly relied upon this distinction, as it constituted a basic principle of contractual law, but it had also been used by the Belgian war damages courts to refuse compensation to any worker who had voluntarily signed a contract with the occupier. Based on all these considerations, the Belgian-German MAT declined jurisdiction on the deportees' claim regarding unpaid salaries in favour of the Reparation Commission.[214]

The Tribunal's discussion of the deportees' three other claims was much shorter. Regarding disability compensation, it held that it had to decline jurisdiction on the same grounds as on unpaid salaries. As for the wear and tear of the deportees' clothes, the MAT declared that it was not the direct result of the deportation order but a factor that should have been integrated into the calculation of the 'just remuneration' of which the

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211 ibid, 682–83.

212 '*… dans les cas mêmes où un véritable contrat de travail s'est formé, la transformation de la dette privée de l'État allemand envers les déportés en une obligation de droit public envers l'État belge se comprend d'autant mieux que les contrats de travail dont il s'agit ont en fait leur origine et leur source dans des violences qui, systématiquement exercées sur toute une partie de la population civile, constituent la plus grave des violations du droit des gens*'. ibid, 683.

213 ibid.

214 ibid, 684.

deportees had been deprived according to para. 8 Annex I Chapter VIII VPT, falling therefore within the remit of the Reparation Commission.[215] It was only for the last of the deportees' claims, namely compensation for living expenses borne by their families, including lost parcels, that the Tribunal was able to come up with a partly positive answer. Although it declined jurisdiction on living expenses as such on the same ground as that mentioned in relation to worn and torn clothes, it held that the deportees were entitled to compensation for lost parcels based on the shipping contract concluded between their families acting in their name and the German State acting as a carrier. The decision ended with an invitation to the claimants to provide the Tribunal with additional information regarding their lost parcels.[216] From a legal perspective, the outcome of Pirenne's legal mobilisation had turned out almost exactly as predicted by Henri Rolin.

For Germany, the decisions in *Loriaux* and the nine other test cases were a huge relief. In a letter to the German Ministry of Foreign Affairs, Lenhard announced the news of the decisions as 'a great success of the German defence, … with major financial consequences'.[217] As could be expected, the claimants were disheartened. In a press release, Eugène-Paul Lévêque declared that the deportees and their supporters had felt 'bitterness' ('*amertume*') upon learning that Germany's violations of international law 'by resorting to the deportation and enslavement of peaceful civilians' had been met with impunity.[218] Nevertheless, concluding from these reactions that the decisions amounted to a total victory for the Reich would be excessive.

On the one hand, taking their case to the MAT had allowed the deportees to achieve a measure of success that they had been unable to attain on the national stage. The proceedings had had two major outcomes for them. The first of these outcomes was public recognition of their status as victims, patriots, and heroes – something which Belgian institutions and public opinion had always been somewhat reluctant to grant them.[219] The 'major international trial' at the Hôtel Matignon had offered the deportees

215 ibid, 684–85.
216 ibid, 686.
217 German original: '*[ein großer] Erfolg der deutschen Verteidigung … von erheblicher finanzieller Tragweite*'. Lenhard to German Ministry of Foreign Affairs (12 June 1924) BA (Lichterfelde), R 3001/7477.
218 French original: ('*en déportant des civils inoffensifs et en les réduisant à l'esclavage*'. 'Le procès des déportés' *Le Soir* (Brussels, 4 June 1924).
219 Claisse (n 39) 127.

the attention of the press, the compassion and admiration of the public, and the moral condemnation of the state that had deported them to forced labour. The FND had acknowledged the importance of this objective in its public discourse. At the end of the Paris hearing, Lévêque had thanked the reporters who had attended the event, noting that their work was an integral part of the Federation's strategy:

> Thanks to the press, we shall achieve one obvious success: the condemnation of Germany from a moral point of view.[220]

Seeing the German representatives confronted with the factual and legal dimensions of the Reich's wartime policies had also provided a more personal and emotional form of satisfaction to the deportees. According to Loriaux and a fellow FND delegate, the hearing had had a 'comforting' ('*réconfortant*') effect on them, as the painful account of their sufferings and their patriotism had been followed by 'the warmest and sincerest marks of admiration' from a very broad range of actors, including the Belgian Agent-General and the Association of French Combatants.[221]

The second major outcome of the deportees' suit against the Reich was the payment of compensations. Securing this payment proved almost as arduous as the legal proceedings before the MAT. Since examining each and every of the roughly 48 000 claimants' situations individually would have been too time-consuming, Pirenne had signalled to the Belgian Agent-General the deportees' willingness to negotiate a settlement with Germany. His precondition had been that the Belgian Government would make an advance payment of the sums agreed to under the settlement, which he had estimated at 75 million francs. Based on Belgium's limited payment capacity, Sartini van den Kerchove had brought that sum down to 40 million.[222] This allowed Pirenne to enter into negotiations with the German State Agent. Based on the estimation that 80 % of the deportees' parcels had been lost, he suggested awarding each deportee a lump sum of

220 '*Nous obtiendrons, grâce à la presse, un succès évident : la condamnation de l'Allemagne au point de vue moral*.' 'Les déportés contre le Reich' *Le Soir* (Brussels, 12 January 1924).

221 French original: '*les marques d'admiration les plus chaleureuses et les plus sincères*'. 'Le retour des délégués des déportés' *La Dernière Heure* (Brussels, 12 January 1924).

222 Pirenne to Prime Minister Theunis (3 December 1924) AGR, BE-A0510/I 530/5593.

1000 francs.[223] Lenhard wanted to bring this down to 200 francs, a sum that Pirenne found unacceptable.[224] In the meantime, Germany had found an unlikely ally in the Belgian Minister of Economic Affairs, Romain Moyersoen (1870–1971), who, deeming the deportees' claims 'fanciful' ('*fantaisistes*'), opposed the deal altogether and threatened to derail it.[225] However, after brandishing the threat of political action by the FND[226] and relying on the support of Paul Hymans, now back in government as Minister of Foreign Affairs,[227] Pirenne had eventually convinced the Belgian Government to agree to a lump sum of 500 francs per deportee.[228] This opened the way for a settlement with the German Government, signed by Pirenne, Lenhard, and Sartini van den Kerchove on 8 July 1925.[229] Securing the implementation of this agreement provoked new frictions with the Belgian Government, which had threatened not to homologate the settlement unless the deportees accepted payment in government securities.[230] In his own recollection, Pirenne had solved this problem by issuing a counterthreat during a meeting with the Belgian Minister of Finance, Albert-Édouard Janssen (1883–1966). Asserting that Article 304 (g) VPT[231] allowed the forced execution of MAT decisions in all signatory states, he had announced that he would have the French authorities seize as many locomotives of the Brussels-Paris express train as were needed to compensate the deportees.[232] This was, at best, a bluff, as Pirenne's claim was not backed up by actual state practice.[233]

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223 Memorandum to the German State Agent (undated, likely early 1925) AGR, BE-A0510/I 530/5596.

224 2nd memorandum to the German State Agent (undated, likely early 1925) AGR, BE-A0510/I 530/5596.

225 Pirenne to Hymans (20 January 1925) AGR, BE-A0510/I 530/5593.

226 Pirenne to Prime Minister's office (12 February 1925) AGR, BE-A0510/I 530/5593.

227 Pirenne to Hymans (n 225).

228 Sartini van den Kerckhove to Pirenne (30 March 1925) AGR, BE-A0510/I 530/5601.

229 Settlement between Germany and the deportees (8 July 1925) AGR, BE-A0510/I 530/5601.

230 Sartini van den Kerckhove to Pirenne (1 August 1925) AGR, BE-A0510/I 530/5593.

231 '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.'

232 Pirenne, *Mémoires…* (n 30) 112–13.

233 Walter Schätzel, 'Die Gemischten Schiedsgerichte der Friedensverträge' (1930) 18 Jahrbuch des öffentlichen Rechts der Gegenwart 378, 446.

Nevertheless, it proved effective: Janssen finally gave in with his legal adviser validating Pirenne's assertion. Shortly afterwards, the deportees' lawyer was able to distribute 48,707 cheques among his clients.[234] Although much less than the sum they had initially requested before the MAT, the 500 francs received by each were still more than the 150 francs lump sum awarded to many deportees by the Belgian Government.

On the other hand, beyond simply issuing a moral condemnation of Germany's wartime deportation policies, the Tribunal's decisions had also formally characterised them – twice – as severe violations of international law. By doing so, they backed up the statements to that effect already issued by both Allied and neutral states during the war and undermined any German efforts to present them as compatible with the Reich's obligations under international law. Admittedly, the effect of the Tribunal's dicta regarding the 'severe' illegality of the deportations was somewhat weakened by their laconicism. In 1926, under the influence of the German Ministry of Foreign Affairs and the former head of its Legal Department, Johannes Kriege,[235] the Reichstag Special Committee on World War I used the absence of any reasoning preceding the MAT's finding as a pretence to reject it as merely anecdotal and assert the legality of the wartime deportations.[236] In this regard, the judicial restraint shown by the MAT seems somewhat unfortunate, especially considering that the deportations' incompatibility with Article 52 Hague Regulations had been discussed extensively during the proceedings. Nevertheless, the Tribunal's repeated use of superlatives ('the most flagrant and atrocious', 'the most severe') had enriched the Tribunal's characterisation of the deportations with an additional layer, corroborating their special status within the realm of internationally wrongful acts. Echoing the language used by Pirenne and Hymans – but also, remarkably, by Illch –, it confirmed that they belonged to a category of acts that went beyond mere violations of the Hague Regulations but were radically incompatible with what Western states at that time deemed to be the customary obligations distinguishing 'civilised nations' from 'barbarous' or 'savage' ones. As Ethiopia had recently found out at its admission to the League of Nations in 1923, the most prominent

234 Pirenne, *Mémoires…* (n 30) 113.

235 Thiel (n 52) 312–13.

236 Resolution (2 July 1926) in Johannes Bell (ed), *Völkerrecht im Weltkrieg: Dritte Reihe im Werk des Untersuchungssausschusses* (vol 1, Deutsche Verlagsgesellschaft für Politik und Geschichte 1927) 193, 194.

of these obligations was renouncing slavery.[237] Accusing Germany of having broken that rule was a recurring theme among all those who had denounced the Belgian deportations. While stopping short of making an express statement to that effect, the German-Belgian MAT, by characterising the latter as the supreme violation of the law of nations, had nonetheless contributed to blurring the lines between the recent phenomenon of deporting nominally free civilians to forced labour and the 'barbarous' practice *par excellence* of wartime enslavement.

6. *Conclusion: Changes and Continuities*

On 7 November 1926, following a proposal by Jacques Pirenne, the International Congress of Deportees convened by the FND in Lessines adopted a motion mandating the FND to present to the League of Nations, via the Belgian Government, a request for the purpose of:

1) incorporating within the Law of Nations clear and precise provisions prohibiting wartime deportations of workers and all requisitions not authorized by the Hague Conventions;
2) protecting the freedom of labour in times of war by incorporating within the rules of Private International Law provisions to the effect that all work imposed by the occupier upon the population of the occupied country, whether benefitting the occupier or its nationals, shall result between the occupier and the forced labourers of the occupied state in a genuine work contract, with all legal consequences thereof, and for which only the victims of the imposition shall be able to raise a plea of nullity;
3) persuading the League of Nations to potentially mandate an International Tribunal to monitor the implementation of the international regulations to be adopted in these matters.[238]

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237 On this issue, see: Jean Allain, 'Slavery and the League of Nations: Ethiopia as a Civilised Nation' (2006) 8 Journal of the History of International Law 213.

238 '*1. d'incorporer aux règles du Droit des Gens des stipulations formelles et précises prescrivant les déportations ouvrières en temps de guerre, ainsi que toutes les réquisitions de la population non autorisées par les Conventions de La Haye de 1907; 2. de protéger la liberté du travail, en temps de guerre, en inscrivant dans les règles du Droit International Privé, une série de dispositions aux termes desquelles tout travail imposé, en violation des règles du Droit des Gens, à la population d'un pays envahi par le pouvoir occupant, soit au profit du dit pouvoir, soit au profit de ses ressortissants, fera naître entre l'État occupant et les travailleurs forcés de l'État occupé un véritable*

As pointed out by Arnaud Charon, this text shows that for Pirenne and the deportees, the decisions handed down by the German-Belgian MAT were, above all, revelatory of the 'shortcomings' of post-Versailles international law when it came to protecting civilians in occupied territories. The main result of these shortcomings, namely the impunity of those responsible for the deportations, was the legitimation of a discourse advocating for further violence against civilians, which was eventually implemented during the Second World War via even more gruesome deportations.[239]

Based on this consideration, one might be tempted to place the deportees' suit against the Reich within a narrative of 'restatement-and-renewal', where periodic restatements of post-Westphalian international law, with its imperial characteristics and its numerous injustices, are followed by periodic calls for renewal, with the aim of ridding international law of some of its residual shortcomings and injustices and adapt it to contemporary understandings of 'modernity', thus allowing it to 'progress'.[240] In that narrative, the proceedings before the MAT, the latter's decision, and the disappointment it triggered amongst the deportees would all have acted as a catalyst triggering a visionary call for renewal that would only have crystallised into positive law after the horrors of the Second World War. The deportees' call for 'clear and precise provisions' on the prohibition of wartime deportations and forced labour, as well as for an 'International Tribunal' monitoring their implementation, would fit especially neatly within such a narrative. Indeed, Germany's massive recourse to deportations during World War II, which largely built on its prior experience during World War I,[241] eventually resulted in treaty provisions expressly prohibiting this practice. In 1945, Article 6 of the Nuremberg Charter listed 'deportation to slave labour' (French: '*déportation pour des travaux forcés*') as a 'war crime' and 'enslavement' (French: '*réduction en esclavage*')

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contrat de travail, dont seules les victimes de la violence seront en droit d'invoquer la nullité; et qui sortira tous les effets juridiques prévus pour le contrat de travail; 3. d'obtenir de la Société des Nations qu'elle charge éventuellement un Tribunal International de veiller à l'exécution des règlements internationaux à intervenir en ces matières'. Motion adopted by the International Congress of Deportees (7 November 1926) AGR, BE-A0510/I 530/5594.

239 Charon, 'The Claims…' (n 27) 58–59.

240 Nathaniel Berman, 'In the Wake of Empire' (1999) 14 American University International Law Review 1521, 1523.

241 Ulrich Herbert, *Fremdarbeiter: Politik und Praxis des 'Ausländer-Einsatzes' in der Kriegsgefangenschaft des Dritten Reiches* (2nd edn, Dietz 1999) 32–40.

as a 'crime against humanity'.[242] Established pursuant to that instrument, the International Military Tribunal at Nuremberg in 1946 convicted Fritz Sauckel (1894–1946), Nazi Germany's 'General Plenipotentiary for Labour Deployment' ('*Generalbevollmächtigter für den Arbeitseinsatz*') on both accounts, sentencing him to death.[243] Since 2002, the *ad hoc* Nuremberg Tribunal has had a permanent successor in the International Criminal Court, established pursuant to the entry into force of its 1998 Statute. Article 7 (2) (c) of that instrument, which gives a definition of 'enslavement'[244] largely relying upon that provided by the 1926 Slavery Convention,[245] can be seen as further validating a characterisation already made by numerous observers of the Belgian deportations during World War I. Likewise, one cannot help but notice the similarities between the criterion laid out in Article 7 (1) Rome Statute, according to which crimes against humanity share the characteristic of having been 'committed as part of a widespread or systematic attack directed against any civilian population' and the German-Belgian MAT's finding in *Loriaux c État allemand* that the severity of the deportations resulted from them 'having been systematically inflicted upon a whole part of the civilian population'.[246]

However, it would be an oversimplification to describe the deportees' case before the German-Belgian MAT as a mere illustration of the limitations of the international legal order established by the post-World War I peace treaties. Examining the deportees' second request to the League of Nations, which advocated the international recognition of the *de facto* contractual nature of the relationship between an occupying power and the civilians subjected by it to forced labour, a more complex and am-

242 Agreement for the prosecution and punishment of the major war criminals of the European Axis: Charter of the International Military Tribunal (8 August 1945) 82 UNTS 284.

243 International Military Tribunal at Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal* (vol 1, International Military Tribunal 1947) 320–22, 366–67.

244 This definition reads as follows: 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

245 Art 1 (1) of that convention defines slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

246 *Loriaux c État allemand* (n 16) 683.

bivalent picture emerges. Granted, Pirenne's proposal to that effect was partially motivated by the will to give 'private' rights guaranteed by domestic labour laws and, more generally, 'human dignity', a measure of recognition on the international plane.[247] One might, therefore, once again conclude that post-World War II international law, via its recognition of human rights – including the freedom of labour and social and economic rights – and the establishment of international human rights bodies, has vindicated the 'visionary' proposals put forward by Pirenne and the deportees in the 1920s. Considering that today's international prohibition of forced labour is not subject to any geographic restrictions, one might even note that it is less selective than the prohibition that Pirenne, a fervent admirer of Leopold II's murderous colonial policies, seems to have envisaged only for the citizens of 'civilised nations'.[248]

That said, neither the substantive rights nor the procedural avenues granted to individuals under post-1945 international law have been able to overcome two fundamental issues already at play in the deportees' case. The first of these issues is the limited capacity of international courts and tribunals to resolve what Karen J Alter and Mikael Rask Madsen have characterised as 'mega-political' disputes, ie disputes '[involving] substantive issues that deeply divide societies such that one can predict that at least one important social group will be upset by the outcome of international adjudication'.[249] This notion includes 'inter-state driven mega-politics', ie disputes 'where both the respective publics and governments of the disputing states perceive strong stakes in the outcome',[250] with peace settlements after mass atrocities being a prime example of such disputes.[251] Although international courts sometimes manage to resolve such disputes or at least some of their underlying issues without generating too much backlash, they often choose not to engage with them at all.[252] In this regard, the German-Belgian MAT's judgment was no different from present-day international courts' decisions, sidestepping a case's mega-politics while

247 Memorandum by Pirenne for the International Congress of Deportees (undated typoscript, probably November 1926) AGR, BE-A0510/I 530/5594, 4–5.

248 Pirenne, *Mémoires…* (n 30) 25–28.

249 Karen J Alter and Mikael Rask Madsen, 'The International Adjudication of Mega-Politics' (2021) 84 Law and Contemporary Problems 1, 8.

250 ibid, 9–10.

251 ibid, 16.

252 Karen J Alter and Mikael Rask Madsen, 'Beyond Backlash: The Consequences of Adjudicating Mega-Politics' (2021) 84 Law and Contemporary Problems 219, 224.

still finding ways to uphold the law.[253] The second issue that has not fundamentally changed since 1945 is the deportees' main claim: their right to individual compensation for the harm Germany inflicted upon them. Granted, post-World War II reparations placed a comparatively much greater emphasis on the compensation for wartime mass atrocities than the Versailles Treaty, which had focussed – rather counterproductively – on economic damage.[254] Similarly, whereas the Belgian deportees were never able to capitalise on their limited success before their movement eventually petered out in the 1960s,[255] legal mobilisation by Central and Eastern European World War II forced labourers in the 1990s resulted in significant compensation payments by Germany.[256] There are also indications that international law is now evolving toward granting victims of such atrocities a right to individual compensation.[257]

Nevertheless, none of these developments has called into question the international law principle invoked by Max Illch against Jacques Pirenne's arguments: namely that states may very well make determinations regarding their nationals' rights, including by limiting or renouncing these rights on their behalf.[258] Based on the consideration that wars result in enormous amounts of damages, that these damages affect many different categories of private persons in many different ways, and that demands for full reparation from the author of the damage are either materially impossible or politically unsustainable, their aftermath implies a selection and prioritisation of claims not unlike those in insolvency procedures.[259] While legal mobilisation by individual private actors might contribute to this process, its overall architecture will ultimately have to be shaped by sovereign public actors.

253 ibid, 229.

254 Pierre d'Argent, *Les réparations de guerre en droit international public: La responsabilité internationale des États à l'épreuve de la guerre* (LGDJ/Bruylant 2002) 206–207, 825–29.

255 Charon, 'The Claims…' (n 27) 57.

256 On this issue, see: Roland Bank and Friederike Foltz, 'German Forced Labour Compensation Programme', in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2020).

257 d'Argent (n 254) 788–91.

258 ibid, 791.

259 Burkhard Hess, 'Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht' (2003) 40 Berichte der Deutschen Gesellschaft für Völkerrecht 107, 173–75.

Chapter 10: The Hungarian Optants Cases before the Romanian-Hungarian Mixed Arbitration Tribunal: International Lawyers, the League of Nations and the Judicialization of International Relations

Marilena Papadaki

1. *Introduction*

> *... if the Council can use its powers as mediator to obtain a solution on the fringe of the Law, an extra-legal solution, it cannot seek to impose a solution against the Law, an anti-legal solution. The real political interest of the question is not the immediate one, no matter how serious it may be: it is a more distanced/general political interest, but yet superior to all others, that of the definitive construction of permanent Peace … (that) can only be established on the basis of institutions and legality.*[1]

French internationalist George Scelle used these words to describe the role the Council of the League of Nations (LoN) was called upon to play within an international dispute regarding the jurisdiction of the Romanian-Hungarian Mixed Arbitral Tribunal (MAT) established under Article 239 of the Treaty of Trianon.[2]

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1 Georges Scelle, 'Le litige roumano-hongrois devant le Conseil de la Société des Nations' in *La Réforme Agraire Roumaine en Transylvanie devant la Justice Internationale et le Conseil de la Société des Nations* (Éditions Internationales 1928) 318 [citation translated from French].

2 Art 239 Treaty of Trianon: '(a) Within three months from the coming into force of the present Treaty, a Mixed Arbitral Tribunal shall be established between each of the Allied and Associated Powers on the one hand and Hungary on the other hand. Each such Tribunal shall consist of three members. Each of the Governments concerned shall appoint one of these members. The President shall be chosen by agreement between the two Governments concerned. In case of failure to reach agreement, the President of the Tribunal and two other persons, either of whom may in case of need take his place, shall be chosen by the Council of the League of Nations, or, until this is set up, by M. Gustav Ador if he is willing. These persons shall be nationals of Powers that have remained neutral during the war.' Treaty of Peace between the Allied and Associated Powers and Hungary

Although the protection of the private property and private rights of ex-enemies, even during wartime, was accepted in some cases by many international lawyers at the time, the 1919 Treaties empowered the Allied and Associated Powers to retain and liquidate the private property of ex-enemies.[3] The aim was to provide resources to compensate Allied nationals for damage caused to them by war measures, feed into the Reparations Fund and eliminate the competition of ex-enemy enterprises from the economic activity of the Allied Nations.[4]

The MATs were established in order to deal with various individual claims that arose from World War I. Most notably, nationals of the Allied and Associated states could bring claims before the MATs against the former Central Powers for compensation of damage or injury inflicted upon their property, rights or interests. By contrast, nationals of the defeated states could not challenge Allied liquidation measures before the MATs.[5] Nevertheless, as far as Austrian and Hungarian nationals were concerned, the liquidation system was not implemented for their property situated in the territories of the former Austro-Hungarian Monarchy annexed to certain successor states, notably Romania and Czechoslovakia. The Treaties of Saint-Germain (Arts 78 and 267) and Trianon (Arts 63 and 250), which had initially included provisions for the application of the liquidation system, exempted the property and rights of Austrian and Hungarian nationals by declaring that those which had been seized or sequestered before the entry into force of the Treaties would be restored in kind and that they

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(signed 4 June 1920, registered 24 August 1921) 6 LNTS 187. Some archival documents of this MAT are preserved at the French National Archives. See: Liberto Valls, Bernard Vuillet and Michèle Conchon, '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) : Répertoire numérique détaillé (AJ/2/1-AJ/22/171, AJ/22/NC/1-AJ/22/NC/46)' (Archives nationales 2019) at: <https://www.siv.archives-nationales.culture.gouv.fr/siv/rechercheconsultation/consultation/ir/pdfIR.action?irId=FRAN_IR_057371>.

3 Nicolas Politis, 'Lois et coutumes de la guerre sur terre. L'interprétation anglaise de l'article 23h du règlement de la Haye' (1911) 18 RGDIP 249–59; Nicolas Politis, 'Effets de la guerre sur les conventions internationales et sur les contrats privés' (1912) 25 Annuaire de l'Institut de droit international 611–50.

4 Scelle (n 1) 301.

5 For the jurisdiction, organization and legal nature of the Mixed Arbitral Tribunal, 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 Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 239–76.

would remain exempt, for the future, from any liquidation measure. Moreover, individuals opting for Hungarian and Austrian nationality, even though obliged to transfer their residency to the State in favour of which they opted, would still retain their real estate in the annexed territory.

The preferential treatment given to Austrian and Hungarian landowners was dictated by well-known motives. The Austrian delegation in the 1919 Paris Peace Conference had pointed out that, since Austrian subjects had most of their real estate and businesses in the annexed territories, their dispossession without compensation (since Austria would be unable to compensate them) would lead to the economic paralysis of the new state and probably to its collapse and subsequently impact the economic status of Central Europe.[6] In contrast to Article 267 Treaty of St Germain, Article 250 of the Treaty of Trianon also provided Hungarian nationals with the right to present any resulting claims to the MAT established by Article 239 of that same treaty.[7]

2. *Romanian-Hungarian MAT*

From the outset, the Romanian-Hungarian MAT had to deal with various cases under Article 250 of the Treaty of Trianon. As early as August 1922, it received claims from Hungarian optants, ie people living or owning land in the territories ceded after the war by Hungary to Romania and who had opted for Hungarian nationality. Their property, which was now on Romanian territory, was confiscated within the framework of the Romanian

6 Scelle (n 1) 302.

7 Art 250 Treaty of Trianon: '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. The property, rights and interests here referred to do not include property which is the subject of Article 191, Part IX (Financial Clauses). Nothing in this Article shall affect the provisions laid down in Part VIII (Reparation) Section I, Annex III as to property of Hungarian nationals in ships and boats.'

agrarian reform of the Liberal Government of Ionel Bratianu[8] and specifically the agrarian law of 30 July 1921 applicable to Transylvania, the Banat and the districts of the Crisana and the Maramures.[9] This law mainly targeted groups that for centuries had exercised power and held wealth and which, since 1919, had become minorities: Baltic barons of German origin, German aristocrats from Bohemia, great Magyar landlords from Transylvania etc, to the benefit of lowly peasants.[10] However, according to a Hungarian request to the LoN Council, the majority of individuals impacted by these measures in the region of Transylvania were people, , who owned small or medium properties, including widows and orphans. As these properties represented 83 % of the total Transylvanian territory, Hungary claimed there was no urgent need for a reform and redistribution of land in this region. Therefore, the Romanian Government was accused of intending to ruin and make disappear these populations under the pretext of agricultural reform. Moreover, although the Romanian Government had promised to compensate those affected by these agrarian measures, the collapse of the Romanian currency had considerably decreased the value of the compensation.[11] Nevertheless, even though the Hungarian arguments did actually present the true situation in which the agrarian reform had

8 The Editors of Encyclopaedia Britannica, 'Ionel Brătianu', in *Encyclopedia Britannica* (20 November 2021) at <https://www.britannica.com/biography/Ionel-Bratianu>.

9 The Romanian Law of Agrarian Reform applicable to Transylvania, the Banat and the districts of the Crisana and the Maramures was published on 30 July 1921. The prior and subsequent decrees of 12 September 1919, 12 January 1920, 12 July 1922 etc were applicable: 1.to the property in the territories that was formerly part of the Austro-Hungarian Monarchy and were transferred to the Kingdom of Roumania by the Treaty of Trianon; 2.to persons who had their rights of citizenship (*pertinenza*) in these territories, and who opted for Hungarian nationality either in accordance with arts 63 or 64 Treaty of Trianon; 3. to persons who remained *ipso facto* Hungarian nationals under the Treaty of Trianon. Hugh H L Bellot, 'Opinion as to the rights of Hungarian subjects with regard to their lands situated in territories transferred to Roumania', in *La Réforme Agraire Roumaine en Transylvanie devant la Justice Internationale et le Conseil de la Société des Nations* (Éditions Internationales 1928) 87–120).

10 Pierre Gerbet, Marie-Renée Mouton and Victor-Yves Ghébali, *Le rêve d'un ordre mondial : De la SDN à l'ONU* (Actes Sud 1996) 47–48. For the history of the region of Transylvania, see: Mariana Cernicova-Bucă, 'Hungarian-Romanian Relationships – The Hard Way Towards Mutual Trust: A Romanian View' (1999) 2 SEER: Journal for Labour and Social Affairs in Eastern Europe 135.

11 'Request by the Hungarian Government to the Council of the League in Accordance with Article 11 of the Covenant' (15 March 1923) 4 League of Nations Official Journal 732–33. See also 4 League of Nations Official Journal 887.

put hundreds of small or medium landowners (with some exaggeration in the percentages no doubt), it is difficult to imagine an agricultural reform imposed by law excluding certain areas of the State as it would be viewed as a discriminatory measure towards the rest of Romanian population.

Agrarian reform movements were widespread throughout Eastern Europe after WWI.[12] In Romania they were part of wider reform movements and had their roots in the increasing poverty of the peasantry, the democratization of countries where peasants dominated the population, the state modernization process via the transformation of the landed aristocracy into a class of agricultural entrepreneurs, the threat of Bolshevism, the defeat of Germany and Austria-Hungary, and various demands of war veterans. Agrarian reforms could be considered not only as the state's need to transform peasants into citizens whose loyalty to the new state would be unquestionable (Weberian approach), but also as instruments of territorial policies, which pursued the strengthening of national cohesion and unity of the new states that emerged in South-Eastern Europe during the 19th century.[13] In addition, expropriation and redistribution of land previously owned by defeated foreign nobles was the easiest target, since the interests of these former landowners were no longer represented in the national governments.

In Romania, land reform begun during the War continued under parliamentary regimes after the War. It was more radical in newly acquired Bessarabia, where land was hastily distributed to the peasantry out of fear of Bolshevism. In Transylvania, land which had been owned by Hungarian nobles was distributed primarily to Romanian peasants, although Hungarian peasants did also receive a portion of the redistributed land. Similarly, in Dobruja, Romanians rather than Bulgarians residing there, acquired most of the redistributed land. By 1930, distribution of land in Romania was heavily skewed towards small land holdings.[14]

In August of 1922, the Hungarian Government complained to the Conference of Ambassadors[15] about the liquidation of Hungarian nationals

12 See also Stanivuković and Djajić (ch 13).

13 Cornel Mica, 'Social Structure and Land Property in Romanian Villages (1919–1989): The Agrarian Question in Southeast Europe' (2014) 19 Martor 133.

14 Sarahelen Thompson, 'Agrarian Reform in Eastern Europe Following World War I: Motives and Outcomes' (1993) 75 American Journal of Agricultural Economics 840.

15 The Conference of Ambassadors of the Principal Allied and Associated Powers was an international governing body created in 1920 by the Allied Powers as a successor of the Supreme War Council in order to enforce peace treaties and to

and optants by the Romanian Government, under Article 63 or 64 of the Treaty of Trianon and Article 3 of the Treaty for the Protection of Minorities signed by Romania. However, the Conference considered that these claims fell within the competence of the LoN because they referred to the provisions of the above-mentioned Minorities Treaty.[16] As a result, in 1923, Hungary turned to the LoN Council and asked it, *inter alia*, to declare the international illegality of Romanian Agrarian Law and order the return of their property to Hungarian optants. As Romania and Hungary did not reach a bilateral agreement on this matter in 1923, after a series of negotiations various Hungarian optants filed individual claims before the Romanian-Hungarian MAT, seeking to declare that the measures taken against them were contrary to the provisions of Article 250 of the Trianon Treaty. They subsequently required Romania to return their property or provide them with decent compensation.[17] Two main issues that will be discussed related to this question, which provoked great controversy and divided international lawyers, academics and politicians of that period for more than a decade: First, the jurisdiction of Romanian-Hungarian MAT; Second, the role of the LoN Council following the withdrawal of the Romanian arbitrator from the MAT.

2.1. The Jurisdiction of Romanian-Hungarian MAT

The Hungarian optants cases before the Romanian-Hungarian MAT can be considered one of the most interesting and highly politicized legal disputes of the interwar period as embodying the discussions of both international lawyers and politicians about the power of the Treaties and the respective roles of international courts and the League. Apart from their state agents, both sides appointed high-profile legal figures as counsels. The Romanian Government was represented by: Alexandre Millerand, a

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mediate in case of international conflicts. It consisted of the ambassadors of Great Britain, Italy, and Japan accredited in Paris and the French Ministry of foreign affairs.

16 Marcel Sibert, 'Une phase nouvelle du différend roumano-hongrois : L'affaire des optants devant le Conseil de la Société des Nations (17–19 septembre 1927)' (1927) 34 RGDIP 561. For the text of the Treaty for the protection of minorities with Romania, see: Treaty between the Principal Allied and Associated Powers and Roumania (signed 9 December 1919, entered into force 4 September 1920) 5 LNTS 336.

17 Nicolas Politis, 'La Société des Nations et les Tribunaux arbitraux mixtes' (1927) 65 Revue Bleue 675–76.

French lawyer, statesman, former Prime Minister and President of France; Nicolas Politis, a well-known figure in the LoN, Greek diplomat, and former professor of international law in Paris; and Solomon Rosental, later a famous Romanian lawyer. The Hungarian optants were represented by: Jules Lakatos, jurist and Hungarian statesman; Gilbert Gidel, Joseph Barthélemy and Réné Brunet, renowned French academics of international law; and Aurel d'Egry, a Hungarian lawyer. The counsels of both sides were also supported by distinguish legal advisors of various nationalities such as Léon Duguit, Antoine Pillet, Charles Dupuis, Alfred Geouffre de La Pradelle, Jules Basdevant, Charles de Visscher, Karl Strupp, Frederick Pollock, Georges Scelle, Antonio Salandra, and many others.[18] The impressive number of international jurists that gave their opinion on the cases is explained by the many issues related to international law that arose. Whether a legal expert expressed his opinion within the framework of his academic activity or was asked to do so by the respective governments is not always clear. What is clear, however, is that the cases mobilized almost all the well-established academic international law networks of the day. The issues they tackled were very well known and widely discussed among legal experts and, sometimes, even beyond. One can assume that the main reason for that, was that the cases related indirectly to the

18 For the legal supporters of Romania's argumentation, see*: Réclamations des optants hongrois de Transylvanie contre la réforme agraire en Roumanie : Débats sur la compétence (15-23 décembre 1926) : Plaidoiries de MM. Millerand, Politis et Rosental, avocats de l'État roumain et observations de M. Popesco-Pion, agent du gouvernement roumain* (Bucarest 1927); See also: *La réforme agraire en Roumanie et les optants hongrois de Transylvanie devant la Société des Nations : Études rédigées par Alejandro Alvarez, Jean Appleton, Etienne Bartin, Jules Basdevant, H. Berthelemy, J.L. Brierly, René Cassin, Jules Diena, Léon Duguit, A. Pearce Higgins, Edouard His, Gaston Jèze, Louis Le Fur, J. Limburg, Charles Lyon-Caen, J.E.G. de Montmorency, Paul Pic, Maurice Picard, Nicolas Politis, André Prudhomme, Robert Redslob, Albéric Rolin, Walther Schucking, Marcel Sibert, Antoine Sottile, Karl Strupp, Donnedieu de Vabres, Charles de Visscher, Albert Wahl, Yves de La Brière, Henri Capitant, Arrigo Cavaglieri, Descamps, Prospero Fedozzi, Henri de La Fontaine, Scipione Gemma, Gaston Jeze, André Lenard, Barbosa de Magalhaes, Theodor Niemeyer, Antonio Salandra, Quintiliano Saldana, Gabriele Salvioli, Marcel Sibert, M. De Taube, Louis Trotabas et José de Yanguas* (2 vol, Imprimerie du Palais 1927–28). For the legal supporters of the Hungarian optants' case, see: *La Réforme Agraire Roumaine en Transylvanie devant la Justice Internationale et le Conseil de la Société des Nations : Quelques opinions* (Éditions Internationales 1928), with opinions by Alfred Geouffre de La Pradelle, Charles Dupuis, Hugh H. L. Bellot, E.L. Vaughan Williams et Frederick Pollock, Antoine Pillet, J.L. Kunz, R. Brunet, Josepth Barthélemy, George Scelle, E.M. Borchard, A. Hopkinson, Leslie Scott, John A. Simon and Ralph Sutton, James Vallotton, Georges Ripert.

subject of the revision of the Treaties, an issue of great interest for both international law experts and politicians in a period when Hungary was looking for a new role on the international stage, while the other Great Powers were trying to re-evaluate prewar policies in Central Europe. Most jurists engaged in the cases were French or French-oriented, which is easily explained given the French interests in Central Europe and the Balkans (Romania together with Czechoslovakia and the Kingdom of Serbs, Croats and Slovenes – later Yugoslavia – formed the Little Entente, a union of States in the Balkan area under the French zone of influence). The choice of some French jurists, such as Albert Geouffre de La Pradelle, not to support Romanian interests can possibly be explained by their wish at that time to establish the concept of international responsibility of the States for damage caused in their territory to foreigners ('*étrangers*'), as was expressed in the 1927 Lausanne session of the Institute of International Law. Other jurists, such as Scelle, legitimized the Romanian-Hungarian MAT to participate in the international law-making process, in order to enforce international law and impose it over political procedures for the settlement of international disputes. As for the counsels, many factors can possibly add to the international law expertise in order to be chosen to support one or the other side. Alexandre Millerand was the politician that had unsuccessfully tried to incorporate Hungary into the French zone of influence together with Little Entente in his famous letter, for which he was accused of holding out hope to Hungary that her borders might be re-negotiated by the LoN.[19] Nicolas Politis was a friend of the Romanian diplomat and later Prime Minister of Romania, Nicolae Titulesco; they had studied together in Paris and worked together within the LoN framework. During the dispute, legal argumentation was exhausted to the point that sometimes it resulted in completely contradictory conclusions, even though the legal experts cited the same sources. Jurists that were usually on the same wavelength found themselves in different 'camps'.[20] Examples of this include Nicolas Politis and Albert Geouffre de Lapradelle or French

19 Tamás Magyarics, 'Balancing in Central Europe: Great Britain and Hungary in the 1920s', Aliaksandr Piahanau (ed), *Great Power Policies Towards Central Europe 1914–1945* (International Relations Publishing 2019) 79; Jean-Phillipe Namont, 'La Petite Entente, un moyen d'intégration de l'Europe centrale?' (2009) 30 Bulletin de l'Institut Pierre Renouvin 45–56.

20 Albéric Rolin, 'Les réformes agraires en Roumanie et la compétence des Tribunaux Arbitraux Mixtes' (1927) 54 Revue de droit international et de législation comparée 438, 443.

academic Georges Scelle supporting for the first and only time a different opinion than his spiritual father, Léon Duguit.[21]

The Romanian State at first appeared in the proceedings of many suits brought before the MAT by Hungarian nationals under Article 250, only to challenge the Tribunal's jurisdiction later on. Romania's counsel raised the objection that the MAT lacked jurisdiction in agrarian matters and was not competent to try claims made by Hungarian nationals, regarding their property expropriated under the Transylvanian Law of Agrarian Reform. They mainly argued that Agrarian reform measures did not constitute liquidation measures within the meaning of Article 250. When Article 250 spoke of retention or liquidation measures, it only referred to 'bellicose dispositions for war purposes.' The interpretation of the term 'liquidation' would, from then on, be at the heart of the dispute.

Romania's legal team claimed that agrarian reform was a domestic matter of public utility related to an economic and social necessity in which no international body was entitled to interfere. They also emphasized the law's general character, as its application made no distinction of nationality and was administered impartially.[22] Politis insisted that international courts had the right to intervene only within the limits strictly assigned to them by the treaties. The exceptional nature of arbitral tribunals required the utmost caution in their action; it was not their responsibility to exceed, in the name of equity, the limits that the texts or the spirit of the treaty assigned to their jurisdiction.[23] An abusive interpretation would risk leading to a sentence tainted with abuse of power. As far as the Romanian-Hungarian MAT was concerned, Politis claimed that it was exceptional in three ways: exceptional in general, like any MAT; exceptional in a special way, because in respect of claims relating to the liquidation of the property of defeated countries it derogated from the common law of peace treaties; exceptional in an even more special way because it existed only in respect of a certain category of victorious countries, the successor States of Austria-

21 Fabrice Melleray, 'Léon Duguit et Georges Scelle' (2000) 21 Revue d'Histoire des Facultés de droit et de la science juridique 49. See also: Georges Scelle, 'L'arrêt du 10 janvier 1927 du TAM Roumano-Hongrois dans les affaires dites "agraires" et le droit international' (1927) RGDIP 433 and Léon Duguit, 'Le différend roumano-hongrois et le Conseil de la Société des Nations' (1927) 54 Revue de droit international et de législation comparée 469.

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

23 Léon Duguit, 'Le différend roumano-hongrois et le Conseil de la Société des Nations' (1927) 54 Revue de droit international et de législation comparée 480.

Hungary, and in respect of a single defeated country, Hungary.[24] Finally, counsel for Romania argued that on 26 May 1923, at a bilateral conference held in Brussels under the auspices of the League, Hungary had signed a declaration recognizing that, in instituting the agrarian law, Romania had remained loyal to the principles laid down in the Peace Treaty.[25]

Speaking for Hungary, Gidel and Brunet pointed out that national legislation could not override the stipulations included in a Treaty and a government's allegation that such legislation constituted an economic and social necessity was quite irrelevant. Many other jurists questioned the motives of the reform claiming that in the region of Transylvania large estates represented only 17 % of the properties and therefore the necessity of the reform in the regions of the enlarged Kingdom was questioned. They also accused the Transylvanian agrarian law of including an 'absenteeism' factor connected to automatic expropriations for all Hungarian citizens that were absent from the country (art 6) from December 1918 until the law entered into force, at a period when many Hungarian nationals were driven out of the territory because of the occupation of Romanian forces, a period when the borders had not been determined and many persons were uncertain of their nationality or were refused visas upon their return. The retrospectivity of the law was also criticized since no notice was given to the Hungarian landowners prior to the law coming into force. The law was therefore accused of being 'disguised liquidation' or in the best case '*liquidation de bonne foi*' or a law of elimination of the Hungarian element and an attempt towards 'Romanization'. Some believed that Romania was ceded the territories of the ex-Austrian and Hungarian Empire from the Paris Peace Conference on condition that it give up its sovereign right to apply a law of expropriation of an indefinite extent to all property of Hungarians to profit from the transfer of the ceded territories. The Romanian

24 According to Politis, the exceptional character of any international tribunal was a universally recognized principle and had been consistently applied in law cases. The Permanent Court of International Justice proclaimed this in its first judgment on the *Mavrommatis Palestine Concessions* in 1924. The Court took into consideration the fact 'that its jurisdiction is limited, that it is always based on the consent of the parties and cannot subsist outside the limits within which that consent has been given' and invoked 'the general rule that States are free to submit or not to submit their disputes to the Court' Jules Basdevant, Gaston Jèze and Nicolas Politis, 'Les Principes juridiques sur la compétence des juridictions internationales et, en particulier, des Tribunaux Arbitraux Mixtes organisés par les Traités de Paix de Versailles, de Saint-Germain, de Trianon' (1927) 1 Revue du droit public et de la science politique en France et à l'étranger 45–52.

25 Paul De Auer (n 22) xxvi.

State could apply such a law for purposes of public utility in view of the general principles of international law, only if accompanied by an adequate indemnity, which was not the case, as only 1 % of the market value of their land was offered as compensation to the Hungarian optants. Hence, the Romanian Law of Agrarian reform was of a confiscatory character and consequently a violation of the 'general principles of international law'.[26]

The Hungarian Government also based its argumentation on the equivalence of its case with the Permanent Court of International Justice's judgment on the merits in the *Certain German Interests in Polish Upper Silesia* case, which had recognized that specific private rights related to expropriation of German property were protected under Title III of the Geneva Convention of 15 April 1922 relating to Upper Silesia.[27] However, the Romanian side confronted this argument by stating that even if there were similarities, this was a case of interpretation of a special Convention between Germany and Poland and had no immediate connection with Article 250 of the Trianon Treaty. Even if the German citizens escaped liquidation, German property could perfectly well be expropriated as foreign property, by application of the general rule of expropriation.[28]

By a vote of two to one, handed down on 10 January 1927 in the case of *Emeric Kulin (senior) v Romanian State*, the Tribunal and its President, de Cedercrantz, declared itself competent. According to the Tribunal, the question as to whether the liquidations referred to could be executed in terms of the agrarian law did not fall within the question of jurisdiction. The liquidations mentioned by Article 250 of the Treaty of Trianon could be both war and post-war liquidations.[29] Furthermore, the MAT decided that the declaration of the Hungarian Government's delegate in Brussels

26 Hugh H L Bellot (n 9) 94–98.

27 *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits)* PCIJ Series A No 7; The German Government claimed that the application of Articles 2 and 5 of the Polish Law of July 14, 1920, constituted a measure of liquidation within the meaning of art 6 and the subsequent articles of the Convention of Geneva of 15 May 1922 in the sense that in so far as the said articles of the Geneva Convention authorized liquidation, that application must be accomplished by the consequences attached to it by the said Convention, in particular the entry into operation of Articles 92 and 297 of the Treaty of Versailles prescribed by the said Convention and that in so far as those articles did not authorize liquidation, that application was illegal. Hugh H L Bellot (n 9) 110–11.

28 Rolin (n 20) 456.

29 'Arrêt du Tribunal arbitral mixte roumano-hongrois, Affaire Emeric Kulin père c/ État roumain No R.H. 139' in *La Réforme Agraire Roumaine en Transylvanie*

was not a reason for the non-establishment of its competency. It then fixed a two-month term within which the Romanian State had to submit its defense on the merits.[30]

As a result, on 24 February 1927, Romania decided that its arbitrator, Antoniade, would no longer sit on cases concerning agrarian matters before the Romanian-Hungarian MAT. The Hungarian Government, making use of Article 239 of the Trianon Treaty, which provided the LoN Council with certain functions with reference to the MAT, asked the Council to complete the MAT by appointing two neutral arbitrators and enabling it to function despite the withdrawal of the Romanian arbitrator. Moreover, the Council was asked to bring the question of jurisdiction before the PCIJ.[31] The MAT's judgment sparked a new controversy among international jurists.

The Romanian side claimed that the competence of the MAT would subject Romania to a real regime of capitulations, in the sense that any measure of provision of common law could be questioned before the MAT under the pretext that it constituted a disguised liquidation and for an indefinite period, since the competence of the MAT was not limited in time.[32] In response, Scelle, supporting Hungary, believed that this was a rather childish fear because as he claimed: 'The MAT will die when it will no longer be possible to invoke before it the connection between the dispossession measures and the events of the war'.[33] International jurists supporting a total judicialization of international relations went as far as to claim that the MATs should not be considered as mere arbitral tribunals created by the parties involved in the disputes before them, but as international judicial institutions deriving their jurisdiction directly from the Peace Conference and the Peace Treaties. As such, they were halfway between arbitration and permanent international courts. According to these jurists, the Parties did not have the right to dispose of, restrict or repudiate the MATs' jurisdiction.[34] On 24 February 1927, during the second public section of the Council, the Romanian representative, Nicolae Titulescu,

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devant la Justice Internationale et le Conseil de la Société des Nations (Éditions internationales 1928) 233–43. See also: 7 Recueil TAM 138.

30 Paul De Auer (n 22) xxvi.

31 See above (n 2).

32 Many observers of the interwar period intent to prove a nexus between the MATs and Colonial-era Mixed Courts (notably those of Egypt). On the subject, see Theus (ch 1).

33 Scelle (n 1) 309–310.

34 ibid, 312.

commenting on the above idea of an all-powerful MAT, was particularly sarcastic:

> If liquidation is a violation of international law and if the Mixed Tribunal is competent for liquidation, international law has found its guardian: it is the Mixed Tribunal... Read Article 250! What the Hague Court, the highest institution in the world, the hope of the world cannot do without the consent of a State: sanction common international law, the Mixed Arbitral Tribunal can do... Read Article 250! Compulsory arbitration is no longer an ideal towards which humanity moves slowly. It already exists... Read Article 250![35]

2.2. The Role of the Council

Upon the Hungarian request to the Council to appoint two neutral substituting arbitrators, the question arose as to whether a Romanian-Hungarian MAT had the right to decide upon its own jurisdiction, whether was possible to appeal to another international authority against its decision or whether its decision was obligatory. Romania, insisting upon the invalidity of the decision, brought the dispute before the Council of the League of Nations under Article 11, paragraph 2 of the LoN Covenant.[36]

For the Romanian advocates, without a fixed procedure to determine abuse of power by the MAT, the Council's intervention 'replaced that of justice' but had to consider the various aspects of the issue before taking a decision. Did the Council have the right not to recognize the MAT's jurisdiction? Politis recognized that the refusal to allow the MAT to continue its work, as demanded by Romania, would constitute an annulment of the award by which it had recognized its jurisdiction and, consequently, aviolation of a major principle of order and legality, that of the authority of *res judicata*. Almost all jurists involved in the dispute had as a standpoint the rule of international law stating that international courts had the right to decide definitely upon their own competence (competence-compe-

35 League of Nations, Council, 44th session, 2nd meeting (public) (7 March 1927) 8 League of Nations Official Journal 350, 355.

36 Art 11 para 2 League Covenant: 'It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends'. Covenant of the League of Nations (adopted 28 June 1919) 225 CTS 195.

tence doctrine).[37] According to Politis, if the right to decide upon the competence of international courts was given to the Council, international justice, which the League advocated as a cornerstone of international relations, would no longer be above politics, as it should be, but would be rewarded and dominated by it. Nevertheless, according to him, the authority of *res judicata* imposed in modern societies as a means of ensuring order ceased to be imposed in cases where instead of ensuring order, it might compromise it.[38] To support his argument, he used a theory recently developed by the French publicist Gaston Jèze (1869–1953) in his *Principes généraux du droit administratif*.[39] The latter argued that, on the domestic level, the government had the obligation to refuse the execution of *res judicata* when such execution would result in a breach of social peace and public order. Transferring this theory to the international level, Politis claimed that decisions of international tribunals – especially where these tribunals were, such as the MATs, still in the process of formation and organization – could be refused if world public order, ie international social peace, was in danger.[40] Politis claimed that the authority of *res judicata* was only concerned with a regular and valid judgment. However, the award of

37 Concerning especially the MATs, the Peace Treaties contained the following provision: 'The High Contracting Parties agree to regard the decision of the MATs as final and conclusive and to render them binding upon their nationals.' See, eg, art 239 (g) Treaty of Trianon. Paul De Auer (n 22) xxvii.

38 According to Politis, the French Conseil d'État applied this idea in its judgment of 30 November 1923 in the *Couitéas* case, where the French Government had refused, for exceptional reasons, to assist in the execution of a judgment ordering the eviction of thousands of local inhabitants from the property of a European settler in the French protectorate of Tunisia. According to the Conseil d'État, the French Government had 'merely used the powers conferred to it for the maintenance of public order and security in a protectorate country', adding that 'The Government has the duty to assess the conditions of this execution and the right to refuse the assistance of armed force as long as it considers that there is a danger to order and security. Nicholas Politis (n 17) 678.

39 Gaston Jèze, *Principes généraux du droit administratif* (3rd edn, M Giard 1925) 279–80.

40 Politis' position supporting the use of LoN mechanisms in order to preserve international peace is explained by his 'political' engagement within the LoN. His legal theory is closely tied to Scelle's theory supporting a total juricialization of international relations, only Politis' political engagement make him support more 'realistic', moderate paths in order to achieve what he calls social peace at the international level. (For Politis' monistic theory of international law and personality see 'The European Tradition in International Law: Nicolas Politis', (2012) 23(1) European Journal of International Law (Contributions of Marilena Papadaki, Robert Kolb, Umut Özsu, Nicholas Tsagourias, Maria Gavouneli).

the MAT in the *Emeric Kulin* case could not have had that character since it was vitiated by an excess of power *(abus de pouvoir)*. And the decision of a Court judging outside its jurisdiction could only be considered invalid and void ('*nulle et non avenue*'). The objection based on the authority of *res judicata* was therefore inoperative. Having exceed its power, the judgment of the MAT was null and void and had no legal effect.[41]

Consequently, another objection was raised by both sides. To admit the alleged existence of an excess of power, it was not enough for it to be asserted by one of the parties; it was also necessary for it to be certified by a third authority whose decision could be legally imposed on the other party. However, this authority could not be the League Council because it only had political power, whereas the issue to be resolved was essentially legal. The only authority that could play such a role would, according to various jurists from both sides, be the PCIJ. Therefore, the Council would have a duty to consult it, on condition that the international organization had reached the same degree of perfection as the internal organization, where the separation of powers or functions prohibited political organs from interfering in judicial affairs. 'But in the international order, even after the creation of the PCIJ', claimed Politis, 'we are still far from such an organization'. According to him, without a fixed procedure to determine an excess of power, the Council had a dual duty: 'a duty of formality or procedure and a duty of substance or political opportunity'. The first was dictated by Article 239 of the Trianon Treaty, invoked by Hungary: it was to enable the MAT to function by appointing two substitute arbitrators. The second was dictated by Article 11 paragraph 2 of the Covenant, invoked by Romania: since its attention is drawn to a 'circumstance likely to affect international relations and which subsequently threatens to disturb peace or good understanding between nations, on which peace depends' it 'must take appropriate measures to effectively safeguard the peace of nations.[42]'

According to Politis, the Romanian-Hungarian conflict fell within the provisions of Article 11 of the Covenant. For the good understanding between the two countries concerned, it constituted more than a threat; it was a real danger that the Council had a duty to eliminate. The appointment of arbitrators would, according to Politis, only aggravate the conflict as the Romanian Government would not bow to a possible unfavorable ruling on the merits. In such a case, the Hungarian Government would

41 Basdevant, Jèze and Politis (n 24) 45–52.
42 Politis (n 17) 679.

not fail to invoke the final provision of Article 13 of the Covenant, according to which 'in the absence of enforcement of the sentence, the Council shall propose measures to ensure its effect'. The Council, Politis pointed out, would be unable to assist in an award that would contradict its 1923 decision supporting the Agreement of Brussels, for the full compatibility of Romanian land reform with the provisions of the Trianon Treaty. The resulting disturbance to peace would be infinitely greater. Hence, between the two duties, the Council had to choose the political duty, because it was the most compelling, pressing, and effective. 'To prefer the other', argued Politis, 'would not only be to sacrifice substance for form, but to abdicate its essential mission to safeguard peace. This would be the failure of the LoN, which, in the presence of an international dispute, must spare no effort in mediation and conciliation to restore good understanding between nations.'[43]

Nevertheless, Scelle and many other eminent jurists standing for the Hungarian side argued that the attitude of the Romanian Government when it appealed against the decision of the MAT to the League Council, ie to an international, but not a judicial organ, was contrary not only to the Treaty, but also to general principles of International Law. If it were admitted that the decision of an international Court could be revised by a political body or simply not carried out by one of the parties, this would mean the end of international adjudication.[44] International Justice had to be protected because as Scelle claimed: 'the real political interest of the question is the definitive construction of permanent Peace based on institutions and legality.'[45]

3. Conclusions

After Romania presented the cases before the LoN Council, the latter set up a three-member commission of inquiry, consisting of Austen Chamberlain, and the representatives of Japan and Chile, which in November 1927 declared the arbitral tribunal incompetent in agrarian matters.[46] More negotiations followed, but none succeeded in finding a commonly accepted solution. As Georges Scelle had predicted, on the eve of the Second World

43 ibid.
44 Paul De Auer (n 22) xxviii.
45 Scelle (n 1) 318.
46 9 League of Nations Official Journal (July 1928) 933.

War, as international tensions grew, the activity of the Romanian-Hungarian MAT became lethargic and was finally suspended.[47]

The study of the cases of Hungarian optants before the Romanian-Hungarian MAT is of historical interest insofar as it contains information on the exploitation of large properties in the territories ceded to Romania by Hungary after the First World War. It is indicative of the process of state building, that here took the form of agricultural modernization for the country's overall development. It is also interesting to follow the policies and strategies of a new State to become centralized and effective by controlling the peasantry in areas that previously had a very distinct solidarity and economic dependance, as well as many different legacies hosted in the past intense ethnic, religious and economic contacts and exchanges, following the dissolution of the great empires after the First World War.[48]

Moreover, studying these cases allows one to identify the interaction between international legal theory and governmental practice during the interwar period. It is all the more interesting because it takes place in the mid-twenties, ie during a period which might be said to be the high-water mark of international arbitration (let us not forget that in 1924, the Geneva Protocol appeared as the corollary of the efforts to impose compulsory arbitration for any dispute between states). In a period of rapprochement of former rivals, we see many international lawyers of the victorious countries advocate for Hungarian 'ex-enemy' individual rights, presenting the cases as necessary to prove the importance of juridical over political solutions, to stabilize an international legal order that would promote international peace.

The Hungarian optants cases before the Romanian-Hungarian MAT are also indicative of the fact that individuals from defeated countries did actively use, and sometimes place their trust in the new legal system of the MATs that had originally been created mainly to protect the victorious countries' individual rights.[49] The same can be said concerning the trust shown by a defeated country in both the new political and juridical instances, such as the LoN and the PCIJ, used as mechanisms to promote political agendas as well as both individual and state rights.

By studying the dispute through the specialized journals of international law, one can follow the networking of international lawyers in the new

47 Scelle (n 1) 309–310; Requejo Isidro and Hess (n 5) 275.

48 Stefan Dorondel, Stelu Şerbau, 'A Missing Link: The Agrarian Question in Southeast Europe' 19 Martor 7.

49 See also: Zollmann (ch 4).

academic space that emerged during the interwar period, as well as their role/functions, on one hand as promoters of a new international legal order based on social development and institutional renewal, and on the other hand as practitioners, arbitrators, international lawyers and – at the same time – political actors promoting concrete state interests and political agendas. In the Hungarian optants' cases, one can follow the multiple roles and levels international lawyers are often called to play. We see for example jurists such as Nicolas Politis, rapporteur of the 1924 Geneva protocol for the Pacific Settlement of International Disputes – which introduced the concept of compulsory legal arbitration -, as advocate of the Romanian State to support more realistic approaches that included moderate paths and the use of 'political' over 'legal' solutions. Scelle reproached Politis, Millerand and Rosental for their 'political' and not only academic engagement.

Finally, the Hungarian optants cases, which made use of all possible international political and juridical dispute settlement mechanisms of the interwar period, allows one to follow the interaction between these mechanisms, namely the MATs, the League and the PCIJ, as well as their common contribution to the codification, development, and evolution of both public and private international law.

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

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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 (Sub-section 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

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 Bleichrœder* (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

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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

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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]

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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 (unannulled) 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.

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]

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]

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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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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

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-

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

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-

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

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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-

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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]

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]

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

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 Séfériadès: 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

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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 Kułaga, '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-

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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

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.

Concluding Remarks*

*Prof. Dr. Dres. h.c. Burkard Hess***

I would like to conclude the conference by referring to its title: *The Mixed Arbitral Tribunals: an International Experiment in the Adjudication of Private Rights*. Was this conference a successful experiment? It was. Let me highlight the following four issues:

(1) *The innovative nature of the Mixed Arbitral Tribunals*: many speakers and discussion participants have stressed the legitimacy and enduring importance of the standing of the individual at the international level before the Mixed Arbitral Tribunals. This is certainly true. However, state agents were heavily involved in the proceedings conducted by private individuals.[1] We have to be aware that individual standing or representation by the national agents was mainly a political and not a legal issue – Michel Erpelding demonstrated these limitations yesterday quite convincingly.[2] And I would like to recall that most Mixed Arbitral Tribunals of the 1919 Peace Treaties were dissolved when the Young Plan was adopted in 1930: The state parties terminated the pending cases by espousing and waiving the claims of the individuals.[3]

(2) Without doubt, the Mixed Arbitral Tribunals stand in *the tradition of the so-called* '*colonial era mixed courts*' as we learned yesterday with regard to Turkey.[4] From this perspective, the debate about the former 'convention courts' in the negotiations of Lausanne Peace Treaty was quite compelling. However, the underlying idea of the Peace Treaties closely followed the

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1 Burkhard Hess and Marta Requejo Isidro, '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 Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 251 s.

2 See Erpelding (ch 9).

3 ibid, 252.

4 See Muslu (ch 2). See also Theus (ch 1).

paradigm of the colonial courts: It was about privileging private claimants vis-à-vis defendants coming from the defeated Central Powers. The Mixed Arbitral Tribunals implemented and enforced the privileges and rights of Allied nationals under the Peace Treaties by replacing the domestic jurisdictions of the Austrian, German and Turkish Courts.[5] In these states, their imposition was perceived as discrimination. In the defeated states, private rights affected by warfare were not compensated. Still, as we all know, the issue of legitimacy of courts which privilege a specific category of creditors/individuals is a significant issue in modern investment arbitration.[6]

(3) One overarching topic of this Conference was the reception of the Mixed Arbitral Tribunals' case-law in both private and public international law. Here, one should remember that the Permanent Court of International Justice in '*Certain German Interests in Upper Silesia*' *(No 6)* clearly stated that the Mixed Arbitral Tribunals were not international courts, but assimilated them to the domestic courts in Poland.[7] In this judgment, the Permanent Court of International Justice explicitly decided that a parallel claim before the Germano-Polish Mixed Arbitral Tribunals in Paris did not bar its jurisdiction. Pendency did not apply between the PCIJ and the Mixed Arbitral Tribunals. Therefore, the modern classification of the Mixed Arbitral Tribunals as 'international courts' does not correspond to their classification in the 1920's and 1930's and was certainly an impediment to the reception of their case-law after WWII.[8] However, as we learned this morning the function of the PCIJ as an appellate body for the Trianon Mixed Arbitral Tribunals has not been sufficiently discussed.

(4) If one looks at *the procedures of the Mixed Arbitral Tribunals*, their initial design was similar to 19th century civil procedural codes. This phenomenon has been described by the famous proceduralist *Calamandrei* who served as a judge at the Germano-Italian Mixed Arbitral Tribunals.[9] There were, of course, strong similarities between the different procedures.

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5 Burkhard Hess, *The Private-Public Law Divide in International Dispute Resolution*, (Collected Courses of the Hague Academy of International Law, vol 388, Brill 2018) 39 para 89.

6 Cf. Daniel Behn, Ole Kristian Fachault, and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration* (CUP 2022) 1.

7 *German Interests in Polish Upper Silesia (Germany v Poland)*, Permanent Court of International Justice, 25. May 1926 (ser. A) No. 7, 33.

8 For an early assessment cf. Charles Carabiber, *Les juridictions internationales de droit privé* (La Baconnière 1947) 163 ss.

9 Piero Calamandrei, 'Il tribunale Arbitrale Misto Italo-Germanico e il suo Regulamento Processuale' (1922) Rivista del Diritto Commerciale 293, 305-306.

Initially, the procedure of the Germano-French Mixed Arbitral Tribunal served as the basic model for others. However, there was one big difference which related to the practice and style of the British Mixed Arbitral Tribunals. As their judgments show, the Mixed Arbitral Tribunals were influenced by the cultural differences between civil and common law, between the Continent and the UK.[10] Cultural and language barriers were additional impediments for the defendants in these proceedings.[11] However, the unequal treatment of private rights in the Peace Treaties did not prevent the Mixed Arbitral Tribunals from developing a practice based on standards of procedural fairness. And these tribunals developed and used modern forms of mass claim settlement: by streamlining parallel cases, taking up 'pilot cases', developing accelerated proceedings and by achieving mass claim settlement.[12] In other aspects also, the Mixed Arbitral Tribunals were a successful experience in the settlement of private claims.

Let me conclude by affirming that this two-day conference has convincingly demonstrated the enduring legacy of the Mixed Arbitral Tribunals as a precursor of modern dispute settlement before domestic and international courts and within the interfaces of private and public international law. This conference has profited from the diversity of its presenters and participants: historians, legal historians and jurists from private and public international law. The conference took up different perspectives: it looked at the institutions, the jurisprudence, the political background and impediments and, last but not least at the persons involved. We all have learned much and I am greatly looking forward to the publication of the conference volume. My special gratitude goes to Michel Erpelding, the *spiritus rector* behind this project. We all owe him a lot. This conference has opened up an additional valuable historical and cultural perspectives on dispute resolution.

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10 Marta Requejo Isidro and I demonstrated this in our presentation on the Mixed Arbitral Tribunals in December 2017. See also Burkhard Hess and Marta Requejo Isidro (n 1) 239, 253-58.

11 This was different in the Trianon Mixed Arbitral Tribunals where French was used as the 'neutral' language of the proceedings.

12 Burkhard Hess (n 5) 49, para 91. The Mixed Arbitral Tribunals of the 1919-20 Peace Treaties handled more than 70 000 cases: Burkhard Hess and Marta Requejo Isidro (n 1) 239, 247. If one adds the cases handled by the MATs established with Turkey pursuant to the 1923 Lausanne Treaty, this figure might reach more than 90 000 cases (see the Introduction of this volume).

Epilogue: The Early and the Long End of the Mixed Arbitral Tribunals, 1920-1939

Michel Erpelding[*] *and Jakob Zollmann*[**]

More than a century after the conclusion of the post-World War I peace treaties that provided for the establishment of Mixed Arbitral Tribunals, many aspects of these institutions remain elusive. One such aspect is the material conditions of their establishment and operation, including the actual duration and ultimate termination of their activity. Based on the assertion that following the 1929 Young Plan and the 1930 Hague Agreement, the Allies and Germany had decided to dissolve their mutual MATs,[1] most prominent accounts assume that all MATs were discontinued sometime after this date.[2] The fact that the *Recueil des décisions des Tribunaux arbitraux mixtes*, the MATs' semi-official case law collection, ceased to be published after 1930 further reinforces this impression. However, a closer examination of archival and lesser-known published sources, covering both the MATs with Germany and those with the other former Central powers, reveal a much more complex picture. Whereas some MATs provided for by the peace treaties ultimately never saw the light of day, others continued to operate until 1939 or even beyond that date. Moreover, at the beginning of the 1930s, ie at the very moment often presented as marking the end of the MATs, several lawyers within the MAT system were actively trying to make them permanent, and almost succeeded in doing so.

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1 Agreement regarding the Complete and Final Settlement of the Question of Reparations (with Annexes) (signed 20 January 1930) 104 LNTS 243. It should be noted that this agreement did not include any provisions on the MATs.

2 See, in particular: Carl Friedrich Ophüls, 'Schiedsgerichte, Gemischte', in Hans-Jürgen Schlochauer (ed), *Wörterbuch des Völkerrechts* (vol 3, Walter De Gruyter 1962) 173, 176. Burkhard Hess and Marta Requejo Isidro, '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 Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 274.

Providing the reader with a more granular view on the demise of the MATs, this epilogue includes six sections. The first two sections describe how the main former Central Power, Germany, tried to avoid the establishment of MATs in the first place and to impose deadlines limiting the number of claims submitted to MATs that had already been established. The third section examines the efforts made by governments during the 1920s to phase out various MATs. The fourth section shows how government officials derailed the attempts made by some actors within the MAT-system in the 1930s to establish permanent MATs. The last two sections cover the liquidation of the last remaining MATs – arguing that the start of the Second World War in 1939 should be considered as the endpoint of the MATs' judicial activity – as well as the fate of the MATs' archival records after the war.

1. *Avoiding Mixed Arbitral Tribunals Altogether, 1920/21*

Two conflicting political goals stood at the baseline of the interpretation of the Paris peace treaties and their future purpose. On the one hand, Allied governments intended to come at least close to popular political demands that were inscribed in the wartime slogan '*Le Boche paiera tout!*' (which could be translated as 'the Hun shall pay everything!'). Accordingly, Germany and the other former Central Powers were to be held liable for as long as 'all' the damages the World War had caused were 'paid'. In Germany and among the other former Central Powers, on the other hand, the 'destructive minimal consensus' of 'the rejection of the peace treaty'[3] was translated into concrete politics by the call to modify or even destroy the 'status quo established in [Versailles]'.[4] Avoidance of the execution of individual provisions of the peace treaties was one of the means employed for this purpose by German, Austrian, Hungarian, or Bulgarian politicians and civil servants.

Germany, therefore, intended to avoid the establishment of MATs altogether and to thwart all the provisions referring to them, like Articles 297, 298, 304, and 305 Versailles Peace Treaty (VPT). Through its diplomats, Germany tried to convince governments with whom MATs were supposed

3 Eckart Conze, transl. in Alaric Searle, 'An Armistice without Peace? The "Failed" Versailles Settlement in Europe, 1919-23' (2021) 141 Historisches Jahrbuch 188, 221.

4 Eberhard Kolb, *The Weimar Republic* (2nd edn, PS Falla and RJ Park tr, Routledge 2004) 189.

to be established to find alternatives. They offered bilateral agreements on lump-sum reparation payments or negotiated the major claims diplomatically rather than solving them through arbitration. This diplomatic manoeuvring was met with some success. Only eleven Mixed Arbitral Tribunals were, in fact, established with Germany pursuant to the Treaty of Versailles, even though the latter had provided that MATs should have been established 'between each of the [27] Allied and Associated Powers on the one hand and Germany on the other hand' (Art 304(a) VPT). For example, in the case of a (future) Portuguese-German MAT, the parties had already agreed, according to Art 304(a) VPT, on their MAT president in 1921.[5] But then this envisaged MAT found an early end when the parties desisted from continuing the preparatory works. Instead, they agreed to arbitrate all Portuguese claims against Germany not by a MAT but through a different arbitration mechanism provided for by the Treaty of Versailles (§ 4 of the Annex to Art 298 VPT, 'neutrality damages'). Here, too, the Germans put – in vain, though – much pressure on the Portuguese to avoid these formal arbitration proceedings altogether.[6]

However, as became clear by 1921, when many of the MATs had in earnest begun their work, these attempts at avoiding the MATs could no longer be maintained. Rather than escaping their obligations under Article 304 VPT (or its equivalents in the other peace treaties), the former Central Powers' governments had to face the incoming mass claims for reparations by Allied nationals. They set up administrative branches in the Foreign and Justice Ministries to support their MAT staff in Paris, London, Geneva, or Rome. In particular, for the German government, this 'policy of fulfilment' ('*Erfüllungspolitik*') meant not only the (reluctant) payment of reparations according to payment schedules. German officials were ordered to work with the Treaty of Versailles and to execute its provisions with the least possible damage to Germany, thereby aiming to 'expose the impossible and unjust nature of the [Treaty] terms'. Within the political framework of a 'policy of fulfilment without [the German] will to fulfil ['*Erfüllungswillen*']', the defence of German (financial) interests before

5 Otto Göppert, 'Zur Geschichte der auf Grund des Versailler Vertrages eingesetzten Schiedsgerichte' (unpublished typoscript, Berlin, March 1931, on file with the authors) 1.

6 On the example of Portugal see Jakob Zollmann, *Naulila 1914. World War I in Angola and International Law: A Study in (Post-)Colonial Border Regimes and Interstate Arbitration* (Nomos 2016) 267 sq.

the MATs with the tools of international law was merely one aspect of this policy.[7]

2. *Setting Deadlines for Making MAT-Claims*

The Paris peace treaties did not stipulate when the MATs would have to terminate their work. The MATs' Rules of Procedure (RoP) that were drafted by the MATs' members and their national administrations, mostly over the years 1920 and 1921, however, attempted to set clear – and rather short – deadlines for all prospective claimants. Putting their sections on 'time for presentation of claims' (Rule 1 Anglo-German RoP, September 1920) or '*délais de présentation des requêtes*' (Art 3 Franco-German RoP, April 1920) prominently at the beginning, these Rules of Procedure left no doubt that the involved governments had no intention that the rights to claim compensation from former contractual partners or former 'enemy governments' should last forever. The general principle was that different classes of claims were being submitted to the MATs within six, 12, to 18 months 'of the publication of these rules' (claims under Art 297) or within 30 days of a decision of the clearing offices (Art 296 VPT).

These original deadlines for claims more or less coincided with the deadline set by Article 233 VPT that set up a Reparation Commission to determine the amount of damage and to announce the total amount to the Germans, by 1 May 1921.[8] Hence, these deadlines indicate an expectation that throughout 1921 to (latest) 1923, most claims should have been filed. And it would have then been the task of the MATs to speedily process these claims to finalise their work. The head of the German MAT administration pointed out 'the objective … to make the duration of the MATs' existence as short as possible'.[9] There was, however, always room left for exceptions. Rule 1(d) of the Anglo-German RoP stipulated: 'After the expiration of the times prescribed by this rule, no claim will be accepted without the special leave of the Tribunal'. Referring to principles of 'equity', a similar provision was included in Art 5 Franco-German RoP and the Tribunal used this competence 'repeatedly'. The Franco-German MAT

7 Kolb (n 4) 193; Wolfram Pyta, *Die Weimarer Republik* (Leske + Budrich 2004) 58.

8 On the Reparation Commission, see: Jean-Louis Halpérin, 'Reparation Commission (Versailles Treaty)' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2022).

9 German original: '*das Bestreben … die Existenz der Schiedsgerichte auf möglichst kurze Zeit zu beschränken*'. Göppert (n 5) 11.

also formally decided again and again to extend the deadlines mentioned in its 1920 Rules of Procedure to enable more individuals to file their claims.[10]

Furthermore, it seemed impossible to calculate in advance when the national Clearing Offices would have made their last decisions about (pre-war) debts – against which subsequently an appeal with the MAT would have been possible within 30 days. In fact, with regard to the time available to the clearing offices to settle different classes of debts, Article 296 VPT – again – set rather narrow deadlines, stipulating that such settlements be implemented 'within three months of the notification' required following 'the deposit of the ratification of the present Treaty by the Power'. Also, para 21 of the Annex to Article 296 VPT mentioned a timely execution of its provisions as an explicit goal: 'With a view to the rapid settlement of claims, due regard shall be paid in the appointment of all persons connected with the Clearing Offices or with the Mixed Arbitral Tribunal to their knowledge of the language of the other country concerned.' And yet, neither the MAT nor the clearing offices could possibly predetermine when the last potential claimants would file their last claims. With regard to the overall workload, the head of the German MAT administration for the Italian-German MAT in Berlin, Lorenz Krapp, conceded 'that the work [of the MAT branch in Berlin] is not easy, with 12- to 14-hour workdays, including on Sundays, being the rule'.[11] With a view to the future, he surmised in 1923: 'The Rome [MAT] is likely to last another 2 years; should I be granted reinforcements, I could hopefully reduce its lifespan to 1 ½ or 1 ¼ years'.[12] However, in 1925 the MAT-related workload had,

10 See the decision of the Franco-German MAT of 17 October 1921 to extend the deadline mentioned in Art 3 (c) of the Franco-German MAT Rules of Procedure (20 April 1920), in Karin Oellers-Frahm and Andreas Zimmermann, *Dispute Settlement in Public International Law: Texts and Materials*, vol II (2nd edn, Springer 2001) 1627; Göppert (n 5) 12.

11 German original: '*daß die Arbeit [der MAT-Dienststelle in Berlin] nicht leicht ist und der Zwölf- bis Vierzehnstundentag auch Sonntags der Normaltag ist'*. Dr. Krapp to Bavarian Ministry of Justice (14 March 1923) Hauptstaatsarchiv München, Bavarian Ministry of Justice, MJu 10952, Ausführung des Friedensvertrags Artikel 302 und 304. Gemischte Schiedsgerichtshöfe. Besetzung der Gemischten Schiedsgerichtshöfen. Dr. Lorenz Krapp.

12 German original: '*Der [MAT] Gerichtshof in Rom dürfte wohl noch 2 Jahre bestehen; wenn ich jetzt Verstärkung bekomme, hoffe ich, daß wir seine Lebensdauer auf 1 ½ oder 1 ¼ Jahre zurückschrauben können*' ibid.

from a German perspective, just reached its 'climax', when altogether 304 civil servants, 79 of them legally trained, were employed for this task.[13]

3. *Phasing Out the Mixed Arbitral Tribunals*

The political principle to avoid formal MAT awards, favouring instead diplomatic settlements about payments for war-related Allied claims, was upheld by former Central Powers' governments throughout the 1920s. Once such settlements were found for a majority of claims, the entire MAT including its secretariat could be dismantled. Already in April 1922, with the German-Soviet Treaty of Rapallo,[14] Germany had agreed with the Soviets that the latter, unlike the Allies under Article 116 VPT, would not claim 'from Germany restitution and reparation based on the principles of the present Treaty', thus avoiding a potential Soviet-German MAT. On the other hand, Germany would not demand compensation for German property in Russia expropriated after 1918 by the Bolshevik government.[15]

The first MATs that ceased their activities through the governments' agreement were the Siamese-German MAT and the Japanese-German MAT in 1926. In 1927, the Anglo-Bulgarian MAT was 'provisionally dissolved',[16] and the Yugoslav-German MAT and the Yugoslav-Austrian MAT followed suit in 1929 (however, the former would be revived following a case filed in 1931 by the prince of Thurn and Taxis against Yugoslavia; as we shall see later, it would even prove to be one of the most enduring MATs). In 1929, the Germans also tried to convince the French government to end the liquidation of German properties and to set a final deadline for claims to the Franco-German MAT. But the resulting liquidation agreement implemented only a number of changes that aimed at bringing the liquidation principles in line with the the Hague Agreement of 20 January 1930[17] ('Young Plan') and limiting the filing of ever new claims with the MAT

13 Göppert (n 5) 34.

14 See: Ilona Stoelken-Fitschen, 'Rapallo Treaty (1922)', in Rüdiger Wolfrum (ed), *Max Planck Encylopedia of Public International Law* (OUP 2009).

15 Pyta (n 7) 61.

16 Agreement between His Majesty's Government and Bulgaria relating the Provisional Dissolution of the Anglo-Bulgarian MAT, London (17 June 1927) Cmd. 2928; Treaty Series No. 21 (1927).

17 Agreement regarding the Complete and Final Settlement of the Question of Reparations (with Annexes) (signed 20 January 1930) 104 LNTS 243.

in view of 'allowing the Tribunal to cease its activity in the foreseeable future'.[18]

The Young Plan introduced a new payment schedule for German reparation annuities. The German diplomats and the German MAT personnel insisted that these negotiations about the 'final liquidation of the war' did include all other claims based on the Treaty of Versailles (including the liquidation of German property in Allied territories and thus the material base for the MAT proceedings). These claims were to be considered as replaced by the payments according to the Young Plan. In addition, Germany and Austria concluded several treaties with the neighbouring 'new States', agreeing that the remaining claims and counterclaims were to be settled or withdrawn from the MATs. By the late 1920s and early 1930s, governments throughout Europe and beyond had become tired of the cumbersome and costly MAT apparatus that, it seemed, contributed little to the welfare of Allied claimants. In its preamble, the Anglo-German agreement of 1932 to dissolve the Anglo-German MAT explicitly mentioned that the 'maintenance of that Tribunal would impose upon [the governments] … unnecessary expense'. However, the parties, similar to the earlier Anglo-Bulgarian agreement, stipulated that this dissolution was only 'provisional' and left them with the option to 'reconstitute the Tribunal' should 'any case arise' that should have been tried by this MAT.[19]

Allied governments that were faced with German claims for the compensation of liquidated property, on the other hand, appeared to have slowed down the MAT proceedings.[20] Poland and Germany, for example, signed a so-called 'liquidation agreement' on 29 October 1929 that provided for the discontinuation of further liquidation of German real estate in Poland by Polish authorities and Poland, in turn, obtained from Germany a waiver of the claims of German citizens for compensation due to an allegedly insufficient valuation of their liquidated assets or any other claims (Articles 92,4; 297b; 304; 305 VPT). However, the political opposition against such an agreement and the end of the Polish-German

18 German original: '*dass das Gericht innerhalb absehbarer Zeit seine Tätigkeit beenden könne*'. Göppert (n 5) 218; 220; 88 on the Franco-German 'Abkommen über die Einstellung der Liquidation deutschen Vermögens' (31 December 1929) RGBl. II, 562.

19 Agreement between His Majesty's Government and the German Government regarding the Dissolution of the Anglo-German MAT, London (26 July 1932) Cmd. 4160; Treaty Series No. 26 (1932).

20 Göppert (n 5) 195 alleging a '*Verschleppungstaktik*' by the Polish party in the Polish-German MAT.

MAT was adamant in both Poland and Germany. Seeing the agreement as too favourable towards Polish interests (Germany undertook to indemnify its own citizens), in the *Reichstag*, German members of parliament insulted the German Foreign Minister Curtius with the question: 'are you a Polish minister?' ('*Sind Sie denn polnischer Minister?*') and claimed the agreement would be an unconstitutional expropriation of Germans. Similarly, the Polish *Sejm* ratified the 'liquidation agreement' only after fierce debate in 1931.[21]

Such bilateral intergovernmental agreements, which indirectly reaffirmed the privileged position of states as primary subjects of international law, somewhat undermined what contemporaries saw as the 'most radical characteristic' of the MATs, namely the fact 'that not only States but also private individuals may appear before them as parties'.[22] This major limitation on the procedural rights the MATs had offered to individuals and companies was not lost on contemporary observers, sometimes leading them to question the legal position of private persons within the MAT system. For instance, in a letter written to Hersch Lauterpacht in 1935, one of the legal advisers of the British Foreign Office, WE Becket, referring to agreements concluded following the 1930 Young Plan, voiced his scepticism regarding the impact of the MATs on individual rights in the following terms:

> The Government who set up Mixed Arbitral Tribunals can, and in some instances have abolished them, changed their original jurisdiction, agreed that certain judgements delivered by them shall not be effective or shall be subject to appeal etc., etc. How is all this action by the Government, taken without the consent of the individual concerned, consistent with the view that the individual had legal rights in this respect?[23]

The diplomat and lawyer thus underlined that the individual, for all his/her war-related claims, remained at the mercy of his government and that, irrespective of any 'rights', the traditional notion of 'diplomatic protection' could be reinstated any time.

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21 Verhandlungen des Reichstages, 138. Sitzung (10 March 1930), vol 427, 1930, 4316; Polish Journal of Laws 1931, no 90, items 704; 705.

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

23 Cited in: Hersch Lauterpacht, *International Law: Collected Papers of Hersch Lauterpacht, Vol 5: Disputes, War and Neutrality, parts IX-XIV* (CUP 2004) 740.

By 1930, it seemed to those involved as if the MATs would 'soon disappear as institutions of the peace treaties, insofar as they [had] not already disappeared'.[24] Research literature as well has argued that 'by the beginning of the 1930s, the work of these tribunals had come to an end'.[25] The fact that the semi-official *Recueil des décisions des Tribunaux arbitraux mixtes* was discontinued after 1930 further reinforces the impression that the 'abrupt termination of most of the MATs by the Young Agreement in 1930'[26] meant that this experiment had ended by that date. However, a look at lesser-known publications and archival records reveals a more complex picture.

4. *Advocating and Resisting the Establishment of Permanent MATs*

Although the MATs remained controversial throughout their existence, there was at least one serious attempt during the interwar period to transform them into permanent institutions. Emanating from members of the Paris-based MATs and the microcosm of international legal practitioners associated with the MATs and the International Chamber of Commerce (ICC), also based in Paris, it foreshadowed some of the controversies sparked by present-day investor-state arbitration. The origins of this attempt can be said to go back to 1927, when Pierre Jaudon, the French Agent-General before the MATs, apparently acting in agreement with his German counterpart, Robert Marx, who would soon also become an influential member of the ICC,[27] submitted to his government a proposal advocating the creation of permanent international arbitral tribunals. These tribunals should have jurisdiction over transnational disputes between private persons and claims for damages by nationals of one of the state parties against another state party. Initially based on a series of bilateral

24 German original: '*als Institutionen der Friedensverträge demnächst verschwinden werden, soweit sie nicht schon verschwunden sind*'. Walter Schätzel, 'Die Gemischten Schiedsgerichte der Friedensverträge' (1930) Jahrbuch für Öffentliches Recht 378, 455.

25 Norbert Wühler, 'Mixed Arbitral Tribunals' in Rudolf Bernhardt (ed) *Encyclopedia of Public International Law*, vol. 1 (North Holland 1981) 142, 145.

26 Hess and Requejo Isidro (n 2) 274.

27 On Robert Marx, see: Jakob Zollmann, 'Un juge berlinois à Paris entre droit public international et arbitrage commercial: Robert Marx, les tribunaux arbitraux mixtes et la Chambre de commerce internationale', in Joly Hervé, Müller Philipp (eds), *Les espaces d'interaction des élites françaises et allemandes 1920-1950* (PUR 2021) 63–77.

treaties, these permanent MATs could subsequently result in the creation of a single multilateral institution, ideally also based in Paris. Eliciting no positive reply, Jaudon reiterated his proposal in 1928, this time with the support of the former Mexican President Francisco León de La Barra, who chaired several MATs, and again in 1929, with the backing of Thor Carlander, the Swedish delegate at the ICC,[28] who later tried to popularise this idea amongst a Scandinavian audience.[29] The French Minister of Foreign Affairs at the time, Aristide Briand, was clearly sceptical of the idea, which he deemed too costly and better suited to be discussed in the multilateral forum of the League of Nations.[30] Nevertheless, his administration was forced to consider it more seriously after the French Chamber of Deputies had voted in 1930 a resolution calling upon the executive to enter into negotiations with foreign governments in order to establish permanent MATs.[31]

This resolution, which had been presented by René Brunet, a right-leaning member of the socialist party who combined his activity as a professor of international law at the University of Caen with a flourishing practice as a business lawyer[32] and counsel before the MATs,[33] ultimately led the Quai d'Orsay to engage in a series of consultations. Over the objections

28 Jaudon to Briand (12 June 1930) French Diplomatic Archives (AMAE), 242QO/2462. Unfortunately, Jaudon's two first messages do not seem to have been preserved. For Jaudon's detailed 1929 proposal, see: 'Note de M. Jaudon, Agent général du gouvernement français auprès des Tribunaux arbitraux mixtes sur la permanence des juridictions arbitrales internationales de droit privé' (June 1929) AMAE, Y593.

29 Thor Carlander, 'Esquisse d'une juridiction internationale de droit privé' (1931) 2 Nordisk Tidsskrift for International Ret 49.

30 Briand to Jaudon (30 June 1930) AMAE, 242QO/2462.

31 The text of the resolution was as follows: '*Le Gouvernement est invité à entrer en pourparlers avec les gouvernements des puissances étrangères à l'effet de créer des tribunaux mixtes internationaux chargés de juger les litiges qui peuvent naître, soit entre États et particuliers, soit entre particuliers ressortissants des États ayant accepté cette juridiction*'. 'Adoption d'une proposition de résolution relative à la création de tribunaux mixtes internationaux' (30 June 1930) 89 Journal officiel de la République française : Débats parlementaires 2802.

32 Roger Pierre and Justinien Raymond, 'BRUNET René, Jean, Alfred, ou RENÉ-BRUNET' in *Le Maîtron : Dictionnaire biographique : Mouvement ouvrier, mouvement social* (uploaded on 3 November 2010, last modified on 7 November 2021 [https://maitron.fr/spip.php?article102879].

33 Brunet acted as counsel before the MATs as early as 1921: Franco-German MAT (4th section), *Société de Pont-à-Mousson c Hasenclever* (31 August 1921) 1 Recueil TAM 407, 409.

of the Ministry of Commerce,[34] the President of the ICC International Court of Arbitration,[35] its own legal adviser, Professor Jules Basdevant,[36] and the Ministry of Justice,[37] it yielded to Jaudon's arguments in favour of setting up an experimental Franco-Belgian MAT and informally authorised him to further explore the matter.[38] Together with his Belgian counterpart, Georges Sartini van den Kerckhove, also backed by his government, Jaudon set up a preparatory commission staffed by French and Belgian MAT members.[39]

This commission elaborated a draft convention for a permanent Franco-Belgian MAT[40] presented to both governments in late June 1931.[41] However, in early 1933, the Belgian Government rejected the proposal, voicing constitutional concerns. Jaudon, who in the meantime had secured from the French Parliament the creation of a '*Service de l'arbitrage international*' placed under his responsibility within the French Ministry of Foreign Affairs,[42] remained undeterred. He travelled to Brussels with Brunet and Sartini van den Kerckhove to have the Belgian Government reconsider its position and urging the French authorities to let him and his colleagues also engage into negotiations on permanent MATs with Luxembourg, the Netherlands, Sweden, Greece, and Egypt.[43]

However, although the activism of Jaudon and other MAT practitioners eventually persuaded the Belgian authorities to re-examine their stance

34 Flandin to Briand (26 July 1930) AMAE, 242QO/2462.
35 Clémentel to Briand (23 August 1930) AMAE, 242QO/2462.
36 Memorandum by Basdevant (22 December 1930) AMAE, 242QO/2462.
37 Bérard to Briand (9 June 1931) AMAE, 242QO/2462.
38 Memorandum by Charguéraud (27 June 1933) AMAE, 242QO/2462. Note by E. Meyers, honorary Director-general at the Belgian Ministry of Justice (December 1933) Belgian Diplomatic Archives (ADB), APC-I-4988.
39 In addition to Jaudot and Sartini van den Kerckhove, the commission included the Belgians Fauquel and Gevers, respectively arbitrator and state agent, as well as Lampérière and Chapuis, both state agents for France. Jaudot to Briand (18 March 1931) AMAE, 242QO/2461.
40 'Rapport présenté aux gouvernements français et belge par la commission préparatoire chargée de rechercher les conditions de l'élaboration d'une convention bilatérale instituant un tribunal franco-belge de droit privé' (undated) ANF, AJ/22/27.
41 'Note pour la Sous-direction d'Europe' (27 June 1933) AMAE, Y593.
42 ibid.
43 'Note sur l'état de la question des tribunaux arbitraux de droit privé' (12 February 1933) AMAE, Y593.

regarding the alleged unconstitutionality of permanent MATs,[44] they ultimately failed to maintain the necessary political support for their project within the Quai d'Orsay. Ironically, although Brunet's 1930 resolution had largely been associated with the Socialist Party, it was likely the advent of the left-wing Popular Front in 1936 that caused the demise of his call for permanent MATs. In a memorandum written three months after the advent of the new government, the Quai d'Orsay's legal adviser, Jules Basdevant, reiterated his reservations regarding the scheme. Doubting that international tribunals would be 'better composed, more enlightened, more impartial, [and capable of delivering speedier decisions] based on better and less onerous rules of procedure' than French or foreign domestic courts, he concluded that the creation of permanent MATs establishing a jurisdictional privilege for foreigners would be 'particularly ill-timed' ('*particulièrement inopportune … à l'heure actuelle*') for two reasons. On the one hand, such MATs were 'highly reminiscent' ('*ressemblent singulièrement*') of the Mixed Courts of Egypt, whose abolition France had just agreed to; on the other hand, they might prevent France from applying its new social legislation to foreigners and allow the latter to sue the government for damages resulting from plant occupations.[45] These considerations seem to have been persuasive, as the voluminous file on permanent MATs preserved at the Archives of the French Ministry of Foreign Affairs includes no subsequent discussion on this issue.

5. Liquidating the Last MATs

Even though the attempt to establish permanent MATs ultimately failed, several MATs established pursuant to the 1919-23 peace treaties remained operational well into the 1930s and, in some cases, even into the Second World War. While the lacunary state of publications and remaining archival records has prevented us from determining when exactly each individual MAT made its last judicial decisions, it seems safe to say that this was not a marginal phenomenon. The reasons behind the prolonged existence of several MATs varied. In the case of the Franco-German MAT, the number of unsettled claims was such that their quick liquidation

44 Claudel (French Ambassador to Belgium) to Laval (French Minister of Foreign Affairs) (4 April 1935) AMAE, Y593.

45 'Note sur les tribunaux internationaux de droit privé' (14 August 1936) AMAE, Y593. On the similarities between MATs and semi-colonial mixed courts, see Theus (ch 1).

proved impossible. Therefore, whereas all other MATs established between the major Allied Powers and Germany had been discontinued in 1932,[46] the Franco-German MAT took several more years to wind down. The lengthiness of this process had clearly not been anticipated. For example, in early 1931, the head of the MATs Commissariat established within the German Ministry of Foreign Affairs, Otto Göppert, had written in the subjunctive mode about the unlikely event that the Franco-German MAT should continue its work after October 1931. However, he himself listed that, of the 23 996 claims filed with this MAT, 21 093 claims had been 'liquidated' ('*erledigt*') – thus provoking the question of what would happen to the claimants of the remaining almost 3 000 claims and leaving open how both governments would decide about this question.[47] It was only in November 1936 that the Franco-German MAT could formally entrust its President with organising its administrative winding down after 30 April 1937, the date that had been set as a deadline to deal with all pending cases.[48]

The Franco-German MAT was not the only one whose existence extended beyond 1930 partly because of its caseload. For instance, the Greek-Turkish MAT, which handled almost 12 000 claims, operated until 1935. However, this was also due to its late establishment in 1926,[49] a feature that it shared with the other Istanbul-based MATs, as Turkey had been clearly reluctant to appoint members and provide premises for institutions that reminded it of the much-resented capitulatory mixed courts.[50] Conversely, the relative longevity of the Belgian-Turkish MAT, which held its last meetings in 1933, seems to have been due to problems with internal organisation. According to the Tribunal's Belgian secretary, it resulted

46 The MATs with Germany that had ended their activities by 1 June 1932 were: the Belgian-German MAT, the British-German MAT, the Japanese-German MAT, the Italian-German MAT, the German-Polish MAT, and the German-Siamese MAT. 'Übersicht über die Zusammensetzung und die noch unerledigten Aufgaben der Gemischten Schiedsgerichte nach dem Stande vom 1. Juni 1932' (1 June 1932) Political Archives of the German Ministry of Foreign Affairs (PAAA), RZ403-R53267.

47 Göppert (n 5) 90.

48 Franco-German MAT, 'Procès-verbal de la séance plénière du 26 novembre 1936' (26 November 1936) National Archives of France (ANF), AJ/22/NC35.

49 Niels Vilhelm Boeg, 'Le Tribunal arbitral mixte turco-grec' (1937) 8 Nordisk Tidsskrift for International Ret 3, 3-5.

50 William Henry Hill, 'The Anglo-Turkish Mixed Arbitral Tribunal' (1935) 47 Juridical Review 241, 243. On Turkey's attitude vis-à-vis the MATs, see also Muslu (ch 2).

from the unwillingness of its President, the Dutch law professor Carel Daniël Asser, to attend the Istanbul-based MAT's sessions for more than a few days at a time, thus illustrating one of the potential downsides of resorting to part-time non-professional judges.[51]

Finally, the longevity of many MATs established with the members of the Little Entente (Czechoslovakia, Romania, and Yugoslavia) was largely due to their jurisdiction over agrarian reform cases.[52] This was already true for the Austro-Romanian MAT, which seems to have operated at least until 1936,[53] and the German-Yugoslav MAT, which, after having been provisionally dissolved in 1929 and later revived following a new suit filed in 1931, was definitively disbanded in late July 1939, as both states had decided to settle the two remaining claims.[54] The MATs established between Hungary and the members of the Little Entente pursuant to the Treaty of Trianon proved even more enduring, at least from an administrative point of view. After Czechoslovakia, Romania, and Yugoslavia had applied various dilatory stratagems to avoid decisions in favour of Hungarian claimants,[55] the three MATs were still left with a rather voluminous docket at the outbreak of the Second World War. During the war, the Hungaro-Czechoslovakian and Hungaro-Yugoslav MATs continued to operate to a certain extent. Between 1939 and 1943, based on an earlier proposal by the Secretary-General of the MATs, Antony Zarb,[56] and in agreement with Hungary, the President of these two MATs, Henri Schreiber, issued summary decisions – but not a single award of damages – regarding the vast majority of pending cases from his home near Neuchâtel in Switzerland. However, owing to their summary form and their having been issued

51 Motte to Sartini van den Kerckhove (22 April 1932) National Archives of Belgium (AGR), I590/1071.

52 On this issue, see Papadaki (ch 10) and Stanivuković and Djajić (ch 13).

53 A document from the secretariat of that MAT preserved at the French National Archives mentions a 'judgment on the merits' ('*jugement rendu sur le fond*') issued on 30 April 1936. ANF, AJ/22/168.

54 It should be noted that this dissolution intervened without the two claimants, the German princely family of Thurn and Taxis and a Yugoslav national named Elias M. Lewy, having formally withdrawn their suits, thereby illustrating the limited standing of individuals before pre-Lausanne MATs. 'Protocole de clôture' (22 July 1939) ANF, AJ/22/169.

55 'Note traitant de diverses questions intéressant la liquidation pratique des affaires dévolues aux T.A.M. roumano-hongrois, hungaro-tchécoslovaque et hungaro-yougoslave' (undated, very likely written in spring 1939 by the Secretary-General of the remaining MATs, Antony Zarb) ANF, AJ/22/NC/33/2.

56 ibid.

after Germany's occupation of Czechoslovakia and Yugoslavia and without their participation, these decisions were hardly judicial in nature.[57] Although, technically speaking, both the Hungaro-Romanian and Hungaro-Yugoslav MATs survived the war (the Hungaro-Czechoslovakian MAT had been liquidated pursuant to an agreement concluded between Hungary and Germany in April 1942 and later joined by the Slovak puppet state),[58] they never reconvened to resume their activity as international judicial bodies. As noted by Antony Zarb, this would have been pointless in any case, as the factual basis for their decisions had largely disappeared.[59] Even more so than that of the League of Nations, the era of the MATs had definitively ended with the beginning of the Second World War in Europe.

6. *Discarding the MATs*

The story of the long end of the MATs would be incomplete without an account of their material legacy. After the *de facto* dissolution of the last remaining MATs during and immediately after the Second World War, the only thing that remained to do was to decide what to do with their archives. In 1932, when the dissolution of the Belgian-German MAT was imminent, Sartini van den Kerckhove insisted that the archives of that MAT remain in Paris pending the dissolution of the last MAT. According to the Belgian Agent-General, the international nature of these archives prevented their partition among the relevant state parties, leaving it instead to the MATs themselves to decide where to deposit them, 'obviously at the seat of an international organism, such as Geneva or the Hague'.[60]

However, this solution was not consistently applied. Whereas the archives of the Franco-German MAT were indeed handed over to the Peace Palace Library in the Hague, those of other MATs were either left in the care of individual MAT agents (whether in an official or a private

57 'Note concernant la situation actuelle des Tribunaux arbitraux mixtes' (14 December 1946) ANF, AJ/22/NC/33/2.

58 'Procès-verbal de la remise des dossiers et archives [du TAM hungaro-tchécoslovaque]' (6 August 1943) ANF, AJ/22/163.

59 ibid.

60 French original: '*évidemment [au] siège d'un organisme international, tel que Genève ou La Haye*'. Sartini Van den Kerckhove to the Belgian Minister of Finance (3 February 1932) AGR, I590/1082.

capacity),[61] or individual states. The latter was for instance the case of the Hungaro-Czechoslovak MAT's archives, which were divided between Germany, Hungary, and the Slovak Republic in 1943.[62] Undoubtedly reflecting his internationalist beliefs,[63] Antony Zarb nevertheless succeeded in having the archives of several MATs reach the Peace Palace Library, both before and after the Second World War. In July 1947, acting in agreement with MAT-President Schreiber,[64] he made sure to transfer the archives of the two last MATs to the Hague, where, as he noted, they 'would be stored amongst those of other judicial bodies already kept at the Peace Palace'.[65] In October 1947, FWT Furnée, who had been neutral secretary to the Belgian-Turkish, the Franco-German, and the Greek-German MATs, gladly confirmed that the eleven boxes containing the archives of the two last MATs, weighing 773 kg, had indeed arrived at the Peace Palace, 'where our other archives are already stored'.[66]

Unfortunately, the content of these archives, comprised of some 40 boxes, including those of the Franco-German MAT, is now forever lost. They were discarded between the late 1970s and early 1980s, at a time when the history of international law was barely considered a relevant part of the discipline, with only compilations of their decisions having been kept.[67] After sparking passionate controversies amongst states, fuelling the hopes of international legal practitioners, contributing to the rise of the individual as a subject of international law and inspiring the creators

61 Zarb to Schreiber (13 June 1939) ANF, AJ/22/169.

62 'Niederschrift betr. die Übergabe der Akten des gemischten ungarisch-tschechoslowakischen Schiedsgerichts' (6 August 1943) ANF, AJ/22/163.

63 After the war, Antony (or Antoine) Zarb would pursue his career as an international civil servant, eventually reaching the position of legal counsel for the World Health Organization, and actively promote international law by holding conferences and chairing Geneva's *Cercle des juristes internationaux*. See, eg: 'Le doyen Graven chez les juristes internationaux' *Le Rhône* (Geneva, 11 March 1960); 'Genève, capitale internationale' *Journal de Genève* (Geneva, 25 May 1961).

64 Zarb to the Dutch Ambassador to France (15 July 1947) ANF, AJ/22/NC/33/2.

65 French original: '*pour être rangées parmi celles d'autres juridictions déjà abritées au Palais de la Paix*'. Zarb to ter Meulen (archivist at the Peace Palace Library) (15 July 1947) ANF, AJ/22/NC/33/2.

66 French original : '*où se trouvent déjà nos autres archives*'. Furnée to Zarb (1 October 1947) ANF, AJ/22/NC/33/2.

67 Email exchange between Michel Erpelding and Peace Palace Library (August-September 2020), on file with the author.

of the European Court of Justice,[68] the Mixed Arbitral Tribunals of the 1919-23 Peace Treaties had been marked for oblivion. As the chapters in this volume show, forty years after the destruction of the MATs' archives, historians of the MATs are limited to other international, national and municipal archives, which keep, for instance, the MAT-related files from the Ministries of Justice or Foreign Affairs or personnel files. With the renewed interest in the history of international law and international tribunals, scholars will continue to search for additional sources that help to retrace and analyse the internal working processes of the MATs.

68 On this issue, see: Michel Erpelding, 'International Law and the European Court of Justice: The Politics of Avoiding History' (2020) 22 Journal of the History of International Law 446.

Appendix: Alphabetical List of the Mixed Arbitral Tribunals and their Members

Translated and edited by Michel Erpelding[*]

Based on the '*Répertoire alphabétique des Tribunaux Arbitraux Mixtes et de leurs Membres*' (unsigned and undated typoscript, possibly by Antony [or Antoine] Zarb, c. late 1930s), preserved at the French National Archives ('ANF'), ref. AJ/22/NC/33/2.

1. Anglo-Austrian MAT [1922–31][1]

[RoP: BGBl, 1922, 169/1 Recueil TAM 622; BGBl, 1930, 1236]

Address: 21 St James's Square, London; [2 Cavendish Square, London][2]

Presidents:	Dr Bernard Cornelis Johannes LODER (Netherlands) [Daniël Wigbold] baron van HEECKEREN [Netherlands, replaced Loder in 1923][3]
Austrian arbitrators:	[Dr] Paul HAMMERSCHLAG Dr Victor Baron de SCHEY Dr von BRAUNEIS [replaced Schey in 1923][4] Gustav WALKER
British arbitrator:	Heber [Leonidas] HART KC
Austrian agent:	Dr Felix WEISER
British agents:	HW LIVERSIDGE B HONOUR [replaced Liversidge in 1923][5] HH GAINE IAW MC GOWAN [replaced Gaine in 1926][6]
Austrian secretary:	N

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* Research Scientist, Faculty of Law, Economics, and Finance, University of Luxembourg; Principal Investigator, research project 'Forgotten Memories of Supranational Adjudication' (supported by the Luxembourg National Research Fund, C21/SC/15845902/FoMeSA). All additions are between box brackets.

1 The MAT formally ended its activities on 4 April 1931. 'Auflösung des Oesterreichisch-Britischen gemischten Schiedsgerichtshofes' *Neues Wiener Tagblatt* (Vienna, 2 September 1931) 4.

2 'A War-Time Claim' *Hartlepool Northern Daily Mail* (Hartlepool, 8 October 1928) 6.

3 3 Recueil TAM 215.

4 ibid.

5 ibid.

6 6 Recueil TAM 1.

British secretaries:	Claude MULLINS Everard DICKSON

2. *Anglo-Bulgarian MAT [1921–27]*[7]

[RoP: 1 Recueil TAM 639]

Address: 21 St James's Square, London

Presidents:	Dr Bernard Cornelis Johannes LODER (Netherlands) [Daniël Wigbold] baron van HEECKEREN (Netherlands) [replaced Loder in 1923)]
British arbitrator:	Heber [Leonidas] HART KC
Bulgarian arbitrators:	Alexander LUDSKANOFF (died) Th[eohar] PAPAZOFF (replaced Ludskanoff)
British agents:	HW LIVERSIDGE B HONOUR [replaced Liversidge in 1923] HH GAINE IAW MC GOWAN [replaced GAINE in 1926]
Bulgarian agent:	Stoyan PETROFF
British secretary:	Claude MULLINS
Bulgarian secretary:	N

3. *Anglo-German MAT [1920–32]*[8]

[RoP: RGBl, 1920, 1871/1 Recueil TAM 109; RGBl, 1925 II, 99, 854/5 Recueil TAM 616, 617; RGBl, 1930 II, 959]

Address: 21 St James's Square, London; [2 Cavendish Square, London][9]

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7 The MAT was provisionally dissolved as from 1 May 1927. Agreement between His Majesty's Government and Bulgaria Relating to the Provisional Dissolution of the Anglo-Bulgarian MAT (London, 17 June 1927) Cmd. 2928, Treaty Series No. 21 (1927). It never reconvened. British National Archives ('BNA'), FO 325.

8 The MAT was provisionally dissolved as from 7 February 1932. Agreement Between His Majesty's Government in the United Kingdom and the German Government Regarding the Dissolution of the Anglo-German Mixed Arbitral Tribunal With Exchange of Notes (London, 26 July 1932) Cmd. 4160, Treaty Series No. 126 (1932). It never reconvened. BNA, FO 326.

9 'Anglo-German Tribunal' *The Scotsman* (Edinburgh, 21 February 1929) 10.

Section I

Presidents:	Eugène BOREL (Switzerland, until November 1925) Dr Helge KLAESTAD (Norway, replaced Borel)
British arbitrator:	R[oland] EL VAUGHAN WILLIAMS[10]
German arbitrator:	Dr A[dolph] Nicolaus ZACHARIAS[11]

Section II

Presidents:	[Daniël Wigbold] baron van HEECKEREN (Netherlands) G[ooike] van SLOOTEN [AZN] (Netherlands, temporarily in July 1925)
British arbitrator:	Heber [Leonidas] HART KC
German arbitrators:	Dr Hermann JOHANNES Paul RODEGRA (temporarily, February-September 1925)

Section III

Presidents:	Algot JF BAGGE (Sweden, until September 1926) A[lfred] E[mil] F[redrik] SANDSTRÖM (Sweden, replaced Bagge)[12]
British arbitrator:	Gleeson E[dward] ROBINSON[13]
German arbitrator:	Dr Hermann DETMOLD (died on 24 November 1928)

Division A (1 April 1928-end of July 1929, replaced Sections I and II)

Presidents:	van HEECKEREN and KLAESTAD (alternately)
British arbitrator:	HART
German arbitrator:	JOHANNES and ZACHARIAS (alternately until 30 July 1928) ZACHARIAS (1 July 1928–15 May 1929) Dr R[obert] WENDRINER (after 15 May 1929)[14]

Division B (1 April 1928-end of July 1929, replaced Section III)

President:	SANDSTRÖM
British arbitrator:	ROBINSON

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10 'Former Recorder of Cardiff Dead' *Western Mail* (Cardiff, 26 January 1949) 3.
11 Political Archives of the German Ministry of Foreign Affairs ('PAAA'), P 8/490.
12 *Livre d'Or: Les Juridictions Mixtes d'Égypte, 1876–1926* (Journal des Tribunaux Mixtes 1926) XIV.
13 'London Traffic Chief' *Gloucester Journal* (Gloucester, 10 January 1931) 6.
14 PAAA, P 8/475.

German arbitrators:	ZACHARIAS (until June 1928) Dr Erich ALBRECHT (June-September 1928) Dr R[obert] WENDRINER (September 1928-May 1929) Dr [Arthur] KOHLER[15]

Single Section (after 1 August 1929)

President:	KLAESTAD
British arbitrator:	HART and ROBINSON (alternately)
German arbitrators:	Dr R[obert] WENDRINER (until 31 December 1930) Friedrich ROTH (after 31 December 1930)
British agents:	HH Gaine IAW MC GOWAN [replaced Gaine in 1926] HW LIVERSIDGE B HONOUR [replaced Liversidge in 1926] SIMONDS GAVIN
German agents:	Dr Erich ALBRECHT Dr Paul BARANDON [1920–27][16] [Dr Wilhelm] BEHL[17] Dr Hermann DETMOLD (appointed arbitrator) [Dr Victor Ferdinand Heinrich Leopold] HUECKING[18] Dr V[ictor] LEHMANN[19] [Dr Walter] LEWALD[20] Wilfrid LEWIS [?][21] Dr H[ugo] LÖHNING[22] [Prof Dr Carl Friedrich] OPHÜLS[23] ET RHYMER [?][24] [Hermann] RÜCKHEIM[25] FPM SCHILLER [?][26] Dr W[alter] von SIMSON[27]

15 PAAA, P 8/207.
16 'Barandon, Paul' in *Munzinger Online/Personen: Internationales Biographisches Archiv*, <https://www.munzinger.de/search/go/document.jsp?id=00000009796> (last retrieved on 1 February 2023).
17 PAAA, P 8/21.
18 PAAA, P 8/169.
19 PAAA, P 8/242.
20 PAAA, P 8/251.
21 No personal file at the PAAA.
22 PAAA, P 8/258.
23 PAAA, P 8/320.
24 No personal file at the PAAA.
25 PAAA, P 8/380.
26 No personal file at the PAAA.
27 PAAA, P 8/434.

	Dr R[obert] WENDRINER Dr G[ustav] WILKE[28]
British secretaries:	Everard DICKSON TAW GIFFARD Athol JOHNSON C ST JW NICHOLSON James PETRIE Harold John Hastings RUSSELL [died on 22 August 1926][29] Raglan SOMERSET Frederik SUHR CC WILSON
German secretaries:	Dr Erich ALBRECHT (appointed as state agent) [Dr Wilhelm] BEHL [Rudolf] HAGEN[30] Dr W[illiam] HESSE[31] [Prof Dr Carl Friedrich] OPHÜLS (appointed as state agent) [Friedrich] ROTH[32] Dr G[eorg] RUMPE[33]

4. Anglo-Hungarian MAT [1921–35][34]

[RoP: 1 Recueil TAM 655]

Address: 21 St James's Square, London; [2 Cavendish Square, London][35]

Presidents:	Dr Bernard Cornelis Johannes LODER (Netherlands) [Daniël Wigbold] baron van HEECKEREN (Netherlands, replaced Loder)
British arbitrator:	Heber [Leonidas] HART KC
Hungarian arbitrator:	Heber [Leonidas] HART KC

28 PAAA, P 8/484.
29 9 Recueil TAM 1–2.
30 PAAA, P 8/133.
31 PAAA, P 8/158.
32 PAAA, P 8/377.
33 PAAA, P 8/381.
34 ANF, AJ/22/27. The MAT was dissolved as from 3 January 1935. Agreement Between His Majesty's Government in the United Kingdom and the Hungarian Government for the Provisional Dissolution of the Anglo-Hungarian Mixed Arbitral Tribunal (London, 31 January 1935) Cmd. 4862, Treaty Series No. 10 (1935). It never reconvened. BNA, FO 327.

British agents:	HW LIVERSIDGE B HONOUR (replaced Liversidge) HH GAINE IAW MC GOWAN [replaced GAINE in 1926]
Hungarian agents:	W de RUTTKAY NYÁRI de PEKÁR
British secretary:	Claude MULLINS Everard DICKSON
Hungarian secretary:	N

5. Anglo-Turkish MAT [1926–32][36]

Address: [Çemberlitaş],[37] Istanbul

President:	Karl F[rederick] HAMMERICH (Denmark)[38]
British arbitrators:	HDK GRIMSTON [William Henry] HILL
Turkish arbitrators:	CEMİL Bey MEMDUH Bey
British agent:	[Robert Charles] OWEN-WELLS[39]
Turkish agents:	EMIN ALİ Bey [agent-general] KEMAL ATIF Bey NAZIM Bey VASFİ RAŞİT Bey MUSTAFA NAŞİD Bey KEMALEDDİN Bey MEHMED OSMAN Bey
British secretary:	HR DANE
Turkish secretary:	AHMED ZEKERYA
Neutral secretary:	Pierre GRANDCHAMP (Switzerland)

35 'Claim Against Hungarian Bank' *Yorkshire Post and Leeds Intelligencer* (Leeds, 13 October 1926) 2.

36 William Henry Hill, 'The Anglo-Turkish Mixed Arbitral Tribunal' (1935) 47 Juridical Review 241.

37 According to the Turkish Agent-general, their premises were located '*dans l'ancien bâtiment de l'instruction publique*'. Emin Ali Bey to Marcel Ogier (23 March 1927) ANF, AJ/22/NC/33/2.

38 5 Recueil TAM 1.

39 'No. 33898' *The London Gazette (Supplement)* (London, 30 December 1932) 11.

6. Belgian-Austrian MAT [1921–31][40]

[RoP: BGBl, 1921, 1599/1 Recueil TAM 171; 1 Recueil TAM 709; 1 Recueil TAM 957]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Paul MORIAUD (Switzerland, died on 8 September 1924) Robert GUEX (Switzerland, replaced Moriaud)
Austrian arbitrators:	[Dr] Wilhelm ROSENBERG (died [on 3 April 1923])[41] Karl ZWIEDINEK (replaced Rosenberg)
Belgian arbitrators:	[Baron] Albéric ROLIN Louis FAUQUEL [substitute]
Austrian agents:	Richard FÜRTH [Dr Rudolf] BLÜHDORN
Belgian agents:	Georges SARTINI van den KERCKHOVE (agent-general) Louis VAN CROMPHOUT Henri GEVERS Charles COLLARD VAN NUFFEL Roger JANSSENS de BISTHOVEN [resignation granted on 29 April 1929][42] [Walter] GANSHOF [van der MEERSCH] [replaced Janssens de Bisthoven in 1929][43]
Austrian secretary:	[E] BOUTSERIN (France)[44]
Belgian secretary:	Jean STEVENS

7. Belgian-Bulgarian MAT [1921–30][45]

[RoP: 1 Recueil TAM 231]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Paul MORIAUD (Switzerland, died on 8 September 1924) Robert GUEX (Switzerland, replaced Moriaud)
Belgian arbitrators:	[Baron] Albéric ROLIN Louis FAUQUEL [substitute]
Bulgarian arbitrator:	Th[eohar] PAPAZOFF

40 Belgian National Archives ('AGR'), I 590/1078; AGR, I 590/1080.
41 'Selbstmord Dr. Wilhelm Rosenbergs' *Neue Freie Presse* (Vienna, 3 April 1923).
42 9 Recueil TAM 4.
43 AGR, I 590/1075.
44 1 Recueil TAM 621.

Belgian agents:	Georges SARTINI van den KERCKHOVE (agent-general) Louis VAN CROMPHOUT Henri GEVERS Charles COLLARD VAN NUFFEL Roger JANSSENS de BISTHOVEN [Walter] GANSHOF [van der MEERSCH] (replaced Janssens de Bisthoven in 1929)
Bulgarian agent:	[Todor] P THEODOROFF[46]
Belgian secretary:	Jean STEVENS
Bulgarian secretary:	N

8. Belgian-German MAT [1920–32][47]

[RoP: RGBl, 1921, 108, 509/1 Recueil TAM 33; RGBl, 1922, 271; RGBl, 1924 II, 93; RGBl 1926 II, 427; RGBl II, 781]

Address: [146 avenue Malakoff, Paris]; 57 rue de Varenne [Hôtel Matignon], Paris

President:	Paul MORIAUD (Switzerland, died on 8 September 1924) Robert GUEX (Switzerland, replaced Moriaud)
Belgian arbitrators:	[Baron] Albéric ROLIN Louis FAUQUEL [substitute]
German arbitrator:	Richard HOENE
Belgian agents:	Georges SARTINI van den KERCKHOVE (agent-general) Louis VAN CROMPHOUT Henri GEVERS Charles COLLARD VAN NUFFEL Roger JANSSENS de BISTHOVEN [Walter] GANSHOF [van der MEERSCH] (replaced Janssens de Bisthoven in 1929)
German agents:	Dr Hermann JOHANNES Alfred LENHARD (died on 8 March 1929) [Dr Bruno] SCHUSTER[48] [Dr Helmuth] KUTZNER[49] [Dr Walther Adolph Bernhard] UPPENKAMP[50] [Dr Wilhelm] EULER[51]

45 AGR, I 590/1078; AGR, I 590/1077.
46 1 Recueil TAM 81.
47 AGR, I 590/1076.
48 PAAA, P 8/422.
49 PAAA, P 8/237.
50 PAAA, P 8/459.
51 PAAA, P 8/90.

	[Kurt] BUNGE[52] [Franz Ignatz] BOLTE [deceased in 1928][53] [Dr Walter] KLINGHARDT[54]
Belgian secretary:	Jean STEVENS
German secretaries:	SIMON [Dr Walther Adolph Bernhard] UPPENKAMP [Dr Bernhard] DANCKELMANN[55] [Günter] von MEENEN[56] [Dr Karl Ernst] MÜNCHMEYER[57]

9. *Belgian-Hungarian MAT [1922–33]*[58]

[RoP: 2 Recueil TAM 132]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Paul MORIAUD (Switzerland, died on 8 September 1924) Robert GUEX (Switzerland, replaced Moriaud)
Belgian arbitrators:	[Baron] Albéric ROLIN [resigned effective on 1 January 1933][59] Louis FAUQUEL [substitute until Rolin's resignation][60]
Hungarian arbitrator:	Béla de ZOLTÁN (died [on 30 October 1929])[61] J de BERCZELLY
Belgian agents:	Georges SARTINI van den KERCKHOVE (agent-general) Louis VAN CROMPHOUT Henri GEVERS Charles COLLARD VAN NUFFEL Roger JANSSENS de BISTHOVEN [Walter] GANSHOF [van der MEERSCH] (replaced Janssens de Bisthoven in 1929)
Hungarian agents:	Béla de KÖVESS
Belgian secretary:	Jean STEVENS
Hungarian secretary:	N

52 PAAA, P 8/54.
53 7 Recueil TAM 321.
54 PAAA, P 8/199.
55 PAAA, P 8/62.
56 PAAA, P 8/278.
57 PAAA, P 8/305, 305.
58 ANF, AJ/22/27; AGR, I 590/1077.
59 AGR, I 590/1072.
60 AGR, I 590/1073.
61 9 Recueil TAM 1.

10. Belgian-Turkish MAT [1926–33][62]

[RoP: 7 Recueil TAM 288, 298]

Address: [Çemberlitaş], Istanbul

President:	[Carel Daniël] ASSER (Netherlands)
Belgian arbitrators:	[Baron] Albéric ROLIN [resigned effective on 1 January 1933] Louis FAUQUEL [substitute until Rolin's resignation]
Turkish arbitrator:	MEMDUH Bey
Belgian agents:	Georges SARTINI van den KERCKHOVE (agent-general) Henri GEVERS Charles COLLARD VAN NUFFEL Roger JANSSENS de BISTHOVEN [Walter] GANSHOF [van der MEERSCH] (replaced Janssens de Bisthoven in 1929
Turkish agents:	EMIN ALİ Bey [agent-general] KEMAL ATIF Bey NAZIM Bey VASFİ RAŞİT Bey
Belgian secretary:	Jean STEVENS [A] MOTTE
Turkish secretaries:	HAKKI HÜSNÜ [Bey][63] MUZAFFER SABRİ Bey TEVFIK ZENDJER
Neutral secretary:	FURNÉE (Netherlands)

11. Czechoslovakian-German MAT [1921-?][64]

[RoP: RGBl, 1921, 1541/1 Recueil TAM 948; 3 Recueil TAM 474]

Address: rue de la Corraterie 22, Geneva

President:	Robert FAZY (Switzerland)
Czechoslovakian arbitrators:	Dr Cyril DUŠEK Dr Robert FLIEDER (replaced Dušek) Dr Otakar SOMMER (replaced Flieder)

62 AGR, I 590/1072, 1073, 1079.

63 Seda Örsten Esirgen, 'Lozan'ın Ardından Başlayan Bir Hukuki Mücadele: Karma Hakem Mahkemeleri' (2019) 7/2 Avrasya İncelemeleri Dergisi 309, 326.

German arbitrators:	Robert DÖRING Dr Franz SCHOLZ Dr Rudolf HEINZE [replaced Döring][65] Dr Viktor BRUNS
Czechoslovakian agents:	Carl Emil SPIRA Zdeněk FORMÁNEK (agent rédacteur) Jan SRB (agent rédacteur) Jan ŠIMÁK (agent rédacteur) Vladímir RUBEŠKA (agent rédacteur) Jan PAPANEK (agent rédacteur) Vladímir PALIČ (agent rédacteur) Vladímir KOREC (agent rédacteur)
German agents:	[Dr Curt] VIEHWEGER[66] [Dr Gerhard?] LEHNARD[67] WERSCHE [?][68] LUEGE (replaced Wersche) [?][69]
Neutral secretary:	Jacques LE FORT (Switzerland)

12. Czechoslovakian-Hungarian MAT [1922–39/42][70]

[RoP: 3 Recueil TAM 193; 5 Recueil TAM 620]

Address: [Eerste van den Boschstraat 13, The Hague];[71] rue de la Corraterie 22, Geneva

Presidents:	A[ntonius] A[lexis] H[endrikus] STRUYCKEN (Netherlands, died on 28 July 1923) Henri SCHREIBER (Switzerland, replaced Struycken)
Czechoslovakian arbitrators:	[Karel] KADLEC [died on 4 December 1928][72] HORA
Hungarian arbitrators:	[Károly] BALÁS de SIPEK [Károly] SZALADITS

64 Otto Göppert, 'Zur Geschichte der auf Grund des Vertrags von Versailles eingesetzten Gemischten Schiedsgerichte' (unpublished typoscript, March 1931) 211–15.
65 2 Recueil TAM 69.
66 PAAA, P 8/462.
67 PAAA, P 8/245.
68 No personal file at the PAAA.
69 No personal file at the PAAA.
70 ANF, AJ/22/27; 'Procès-verbal de la remise des dossiers et archives [du TAM hungaro-tchécoslovaque]' (6 August 1943) ANF, AJ/22/163.
71 3 Recueil TAM 193.
72 'Kadlec, Karel', in *Österreichisches Biographisches Lexikon 1815–1950* (vol 3, Verlag der Österreichischen Akademie der Wissenschaften 1965) 166.

Neutral arbitrators:[73]	[Daniël Wigbold] baron van HEECKEREN (Netherlands) Alejandro ÁLVAREZ (Chile)
Czechoslovakian agents:	Carl Emil SPIRA Antonín HOBZA Antonín KUKAL Zdeněk FORMÁNEK Jan SRB Jan ŠIMÁK (agent rédacteur) Vladímir RUBEŠKA (agent rédacteur) Jan PAPANEK (agent rédacteur) Vladímir PALIČ (agent rédacteur) Vladimir KOREC (agent rédacteur)
Hungarian agents:	[László] GAJZÁGÓ (agent-general) MÉSZÁROS L de MARK B[éla]de SZENT ISTVANY[74] Béla de KÖVESS P SEBESTYÉN
Agents of the Agrarian Fund:	Pierre JAUDON G[ustave] H[ippolyte][75] LAMPÉRIÈRE Jean CHAPUIS
Neutral secretaries:	A[rnold] JNM STRUYCKEN (Netherlands)[76] Antony ZARB (United Kingdom, replaced Struycken [in 1936])[77]

13. French-Austrian MAT [1921–24?][78]

[RoP: BGBl, 1921, 1599/1 Recueil TAM 242/JORF, 15 June 1921, 6818; 1 Recueil TAM 305; 2 Recueil TAM 154; BGBl, 1930, 1338]

Address: [146 avenue Malakoff, Paris];[79] 57 rue de Varenne [Hôtel Matignon], Paris [as of 21 March 1921][80]

President:	Francisco [León] de LA BARRA (Mexico)

73 Appointed by the PCIJ pursuant to the Paris Accords of 28 April 1930.
74 Notice on the League of Nations Search Engine (LONSEA): <http://www.lonsea.de/pub/person/12918> (last retrieved on 1 February 2023).
75 JORF, 14 January 1936, 562.
76 Michel Erpelding, 'Juristes internationalistes, juristes mixtes, Euro- Lawyers : l'apport de l'expérience semi-coloniale à l'émergence d'un droit supranational' (2022) 22 Clio@Themis, paras 9–16, <https://doi.org/10.4000/cliothemis.2023>.
77 ibid.
78 'Le tribunal franco-autrichien' *Le Temps* (Paris, 16 January 1924)
79 'Inauguration du tribunal arbitral franco-autrichien' *Le Temps* (Paris, 22 January 1921) 4.
80 JORF, 19 March 1921, 3497.

Austrian arbitrators:	[Dr] Paul HAMMERSCHLAG Karl ZWIEDINEK Victor de SCHEY KRATOCHWILL
French arbitrators:	Maurice GANDOLPHE Charles de VALLES Henri FORTIN
Austrian agents:	Richard FÜRTH [Dr Rudolf] BLÜHDORN
French agents:	Pierre JAUDON (agent-general) Charles ALPHAND BOUDET (replaced Alphand) Jean CHAPUIS Pierre CHAUDUN G[ustave] H[ippolyte] LAMPÉRIÈRE Ernest LÉMONON SICARD (replaced Boudet)
Neutral secretary:	[Francisco] AMUNATEGUI (Chile, secretary-general)[81]
Austrian secretaries:	VEIDL [E] BOUTSERIN (France)
French secretaries:	CAZEAU Armand GRÉGOIRE Louis BAYON-TARGE Paul FAUCHILLE Marcel OGIER

14. French-Bulgarian MAT [1920-?][82]

[RoP: JORF, 21 February 1921, 2370/1 Recueil TAM 121; JORF, 15 February 1922, 1958/ 1 Recueil TAM 835; 1 Recueil TAM 958; 2 Recueil TAM 492]

Address: [146 avenue Malakoff, Paris]; 57 rue de Varenne [Hôtel Matignon], Paris [as of 21 March 1921]

President:	Francisco León de LA BARRA (Mexico)
Bulgarian arbitrator:	Th[eohar] PAPAZOFF
French arbitrators:	Daniel SERRUYS Maurice GANDOLPHE Pierre CHAUDUN (replaced SERRUYS) Henri FORTIN

81 'Die österreichisch-französischen Schiedsgerichtsverhandlungen' *Neues Wiener Tagblatt* (Vienna, 16 June 1929) 10.

Bulgarian agents:	[Todor] P THEODOROFF PETROFF (acting) BOYADJIEFF (acting) KESSIAKO[FF] (acting) ALTINOFF (acting)
French agents:	Pierre JAUDON (agent-general) Charles ALPHAND BOUDET (replaced Alphand) Jean CHAPUIS Pierre CHAUDUN G[ustave] H[ippolyte] LAMPÉRIÈRE Ernest LÉMONON SICARD (replaced Boudet)
Neutral secretary:	[Francisco] AMUNATEGUI (Chile, secretary-general)
French secretaries:	CAZEAU Marcel OGIER Armand GRÉGOIRE Louis BAYON-TARGE Paul FAUCHILLE Charles SIREY
Bulgarian secretary:	N

15. French-German MAT [1920-37?][83]

[RoP: RGBl, 1921, 161, 509, 1262, 1369; RGBl, 1922 II, 777; RGBl, 1926 II, 423; RGBl 1928 II, 45]

Address: [146 avenue Malakoff, Paris]; 57 rue de Varenne [Hôtel Matignon], Paris [between 21 March 1921 and 1 November 1934][84]; 148 rue de Grenelle/24 rue Hamelin, Paris

Section I (Alsace-Lorraine)

President:	André Mercier (Switzerland)
French arbitrators:	[Louis] LE FUR Henri FORTIN
German arbitrator:	Dr August HERWEGEN

82 'Le tribunal arbitral franco-bulgare' *Le Temps* (Paris, 21 December 1920) 4.

83 Göppert (n 64) 43; French-German MAT, minutes of a plenary session (26 November 1936) ANF, AJ/22/NC/35 (noting that the MAT would have heard the remainder of its caseload by 30 April 1937).

84 Christian Albenque, 'Un hôtel particulier parisien', in Christian Albenque, David Bellamy, Monique Mosser, Alain-Charles Perrot, and Gérald Remy (eds), *L'Hôtel de Matignon: Du XVII^e siècle à nos jours* (La Documentation Française 2018) 50.

Neutral arbitrator:	LAS BÁRCENAS (Spain) [during the Ruhr crisis][85]
[Expert-arbitrator:	Marcel NOPPENEY (Luxembourg, during the Ruhr crisis)][86]

Section II (Art 296 VPT and Annex)

President:	Erik SJÖBORG (Sweden) [Conrad] de CEDERCRANTZ (Sweden, replaced Sjöborg [in 1924])[87]
French arbitrator:	Henri FORTIN
German arbitrators:	[Dieprand] von RICHTHOFEN[88] [Dr] MITTELSTAEDT (replaced von Richthofen)[89] Dr August HERWEGEN Dr Franz SCHOLZ
Neutral arbitrator:	Robert GUEX (Switzerland) [during the Ruhr crisis][90]

Section III (Arts 297, 298 VPT and Annex)[90]

President:	Carel Daniël ASSER (Netherlands)
French arbitrators:	Maurice GANDOLPHE Henri FORTIN
German arbitrators:	[Dr Felix] BONDI [or BOND?][91] Dr Rudolf HEINZE [Dieprand] von RICHTHOFEN [Dr] MITTELSTAEDT
Neutral arbitrator:	Didrik NYHOLM (Denmark) [during the Ruhr crisis][92]

Section IV (Contracts and other matters)

President:	Cristóbal BOTELLA (Spain)
French arbitrators:	Daniel SERRUYS Henri FORTIN [F] BRICOUT

85 Göppert (n 64) 54-55.
86 Order by President Mercier (11 May 1923) 3 Recueil TAM 473; Walter Schätzel, *Das deutsch-französische Gemischte Schiedsgericht, seine Geschichte, Rechtsprechung und Ergebnisse* (Georg Stilke 1930) 38-45.
87 United Nations Archives at Geneva ('UNAG'), R1288/19/39298/36235.
88 PAAA, P 8/367.
89 PAAA, P 8/290.
90 Göppert (n 64) 54-55.
91 PAAA, P 8/42.
92 Göppert (n 64) 54-55.

German arbitrators:	[Joseph Freiherr] von BIEGELEBEN[93] Dr Franz SCHOLZ [replaced von Biegeleben in 1921(?)][94]
Neutral arbitrator:	Dr [Joseph] LIMBURG (Netherlands) [during the Ruhr crisis][95]

Section A (replaced Sections I and III)

President:	Carel Daniël ASSER (Netherlands)
French arbitrator:	Maurice GANDOLPHE
German arbitrators:	Dr August HERWEGEN Dr Rudolf HEINZE Walther FROELICH

Section B (replaced Sections II and IV)

President:	Cristóbal BOTELLA (Spain)
French arbitrators:	Charles de VALLES Pierre CHAUDUN (replaced Charles de Valles) Henri FORTIN Maurice GANDOLPHE
German arbitrators:	Dr Franz SCHOLZ Richard HOENE [Ernst] RABEL Walther FROELICH

Single Section

President:	Carel Daniël ASSER (Netherlands)
French arbitrators:	Maurice GANDOLPHE Pierre CHAUDUN
German arbitrator:	Walther FROELICH
French agents:	Pierre JAUDON (agent-general) Charles ALPHAND BOUDET (replaced Alphand) Pierre CHAUDUN (appointed as arbitrator) Jean CHAPUIS G[ustave] H[ippolyte] LAMPÉRIÈRE Ernest LÉMONON RICHARD SICARD (replaced Boudet)

93 'Westerweller von Anthoni, Paul Freiherr von', in *Hessische Biografie* <https://www.lagis-hessen.de/pnd/117320234> (last updated on 29 June 2022).
94 1 Recueil TAM 81.
95 Göppert (n 64) 54-55.

German agents:	Dr Hermann JOHANNES (agent-general)
	[Dr Walter] von HAGENS (replaced Johannes as agent-general)[96]
	Dr Robert MARX (replaced von Hagens as agent-general)
	[Paul] BERG[97]
	Dr [Lucian] BERWIN[98]
	BOAS [?][99]
	BOCK von WULFINGEN [?][100]
	Dr [Alexander] BOCKENHEIMER[101]
	Dr [Josef] BOLTE[102]
	DAENHARDT[?][103]
	Dr Robert FRITZ
	Walther FROELICH (appointed as arbitrator)
	Dr [Eugen] GERNSHEIM[104]
	Dr [Hans] HA[M]MANN[105]
	[Jakob] HEINZMANN (replaced Daenhardt)[106]
	[Dr Victor Ferdinand Heinrich Leopold] HUECKING
	[Dr Ernst August Karl] KAULISCH[107]
	[Ernst?] [KEETMAN][108]
	[Erich] KLEEBERG[109]
	Dr [Walter] KLINGHARDT
	Dr [Arthur] KRENTZ[110]
	Alfred LENHARD (died on 8 March 1929)
	[Dr Hans] LORENZ[111]
	Dr Robert MARX (appointed agent-general)
	[Wilhelm] PUNGS[112]
	Dr [Paul] RIEDINGER[113]
	Dr [Wilhelm] RONNEBERG[114]

96 PAAA, P 8/135.
97 PAAA, P 8/27.
98 PAAA, P 8/31.
99 No personal file at the PAAA.
100 No personal file at the PAAA.
101 PAAA, P 8/37.
102 PAAA, P 8/40.
103 No personal file at the PAAA.
104 PAAA, P 8/116.
105 PAAA, P 8/138.
106 PAAA, P 8/151.
107 PAAA, P 8/186.
108 3 Recueil TAM 748. Author of *Die avoirs en numéraire (cash assets) im Vertrage von Versailles* (F Dummler 1928). The PAAA only holds the personal file of one Edith Keetman: PAAA, P 8/188, 189.
109 PAAA, P 8/197.
110 PAAA, P 8/222.
111 PAAA, P 8/261.
112 PAAA, P 8/351.
113 PAAA, P 8/368.
114 PAAA, P 8/375.

	[Dr Walter] ROTHHOLZ[115] Dr [Walter] SCHÄTZEL [1924-28][116] Dr [Walter August Maria] SCHIPPERS[117] Otto SCHOBER [Dr Peter] SYRING[118] [Dr] VOSS[119] Dr WEDELL Dr R[obert] WENDRINER Gustav WILKE
Secretaries-general:	Robert GUEX (Switzerland) CHAVANNES (Switzerland, replaced Guex) Roger SECRÉTAN (Switzerland, replaced Chavannes) Marcel OGIER (France, replaced Secrétan) Antony ZARB (United Kingdom, replaced Ogier)
Neutral secretaries:	COUCHEPIN (Switzerland) de MAGIAS (Spain) CHAVANNES (Switzerland, appointed secretary-general) Roger SECRÉTAN (ditto) Antony ZARB (ditto) de WECK (Switzerland) FURNÉE (Netherlands)
French legal secretaries:	Paul FAUCHILLE SIREY [Charles] FRANCK (acting)[120] ARCHAMBAULT d'ARDENNE DE TIZAG
French administrative secretaries:	Marcel OGIER (appointed secretary-general) ROQUES VUILLEMIN Jacques HICKEL
German legal secretaries:	WICKER [?][121] [Dr Walther Adolph Bernhard] UPPENKAMP SIMON [Dr Martin] LIEB[E]GOTT[122] [Dr Franz] ZIEGEL[123] [Walter August Maria] SCHIPPERS

115 PAAA, P 8/378.
116 PAAA, P 8/383; Daniel-Erasmus Khan, 'Schätzel, Walter' (2005) 22 Neue Deutsche Biographie 527, online at: <https://www.deutsche-biographie.de/sfz110715.html> (last retrieved on 1 February 2023).
117 PAAA, P 8/393.
118 PAAA, P 8/452.
119 PAAA, P 8/466.
120 'Informations diverses' *Le Temps* (Paris, 27 October 1920) 3.
121 No personal file at the PAAA.
122 PAAA, P 8/253.
123 PAAA, P 8/491.

German administrative secretaries:	[Wilhelm] MICHAELIS[124] BLANK [?][125] Walther FROELICH (appointed state agent) KOENITZER [?][126] WINCKEL [?][127]

16. French-Hungarian MAT [1922-?][128]

[RoP: JORF, 1 September 1922, 9050/2 Recueil TAM 814]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Francisco [León] de LA BARRA (Mexico)
French arbitrators:	Henri FORTIN Maurice GANDOLPHE
Hungarian arbitrator:	Béla de ZOLTÁN (died [on 30 October 1929][129]) Aladár SZÉKÁCS (replaced Zoltán)
French agents:	Pierre JAUDON (agent-general) Charles ALPHAND BOUDET (replaced Alphand) Jean CHAPUIS G[ustave] H[ippolyte] LAMPÉRIÈRE Ernest LÉMONON SICARD (replaced BOUDET)
Hungarian agents:	[György de] BARKÓCZY[130] Béla de KÖVESS
Neutral secretaries:	[Francis] AMUNATEGUI (Chile, secretary-general) J[ulio León?] de LA BARRA (Mexico)
French secretaries:	GRÉGOIRE CAZEAU Louis BAYON-TARGE
Hungarian secretary:	N

124 PAAA, P 8/286.
125 No personal file at the PAAA.
126 No personal file at the PAAA.
127 No personal file at the PAAA.
128 ANF, AJ/22/27; 'Inauguration du tribunal arbitral mixte franco-hongrois' *Le Temps* (Paris, 29 March 1922) 2.
129 9 Recueil TAM 1; http://mek.oszk.hu/00300/00355/html/index.html.
130 *Le Temps* (Paris, 29 March 1922) 2.

17. French-Turkish MAT [1925-38][131]

[RoP: JORF, 1 December 1925/5 Recueil TAM 984, 11493/5 Recueil TAM 984; JORF, 11 December 1925, 1103; JORF, 10 April 1927, 4011]

Address: [Çemberlitaş], Istanbul

President:	[Carel Daniël] Asser (Netherlands)
French arbitrators:	Daniel SERRUYS Maurice GANDOLPHE Pierre CHAUDUN
Turkish arbitrators:	MEHMED ALİ Bey HACI ADİL Bey AHMED ALİ RIZA Bey MEHMED OSMAN Bey
French agents:	Pierre JAUDON (agent-general) Charles ALPHAND Pierre CHAUDUN (appointed as arbitrator) G[ustave] H[ippolyte] LAMPÉRIÈRE Ernest LÉMONON Jean CHAPUIS
Turkish agents:	EMIN ALİ Bey [agent-general] KEMAL ATIF Bey NAZIM Bey VASFİ RAŞİT Bey BAYAN BERAT ZEKİ MUSTAFA NAŞİD Bey (died) NUREDDIN NAZMİ Bey [sub-agent] KEMALEDDİN Bey (appointed as arbitrator) SÜLEYMAN ALİ
Neutral secretary:	FURNÉE (Netherlands)
French secretaries:	CUINET RASCLE REMERAND
Turkish secretaries:	HAKKI HÜSNÜ MUZAFFER SABRİ Bey TEVFIK ZENDJER

131 Örsten Esirgen (n 63) 327.

18. Greek-Austrian MAT [1921-?]

[RoP: BGBl, 1921, 1161]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Francisco [León] de LA BARRA (Mexico)
Austrian arbitrator:	[Dr] Paul HAMMERSCHLAG
Greek arbitrators:	Jean YOUPIS
Austrian agents:	Richard FÜRTH [Dr Rudolf] BLÜHDORN
Greek agents:	COUMANTARAKIS (agent-general) PHARMACOPOULOS (replaced COUMANTARAKIS as agent-general) St SEFERIADES (replaced Pharmacopoulos as agent-general) H SPITHAKIS (replaced Seferiades as agent-general) Chr YOTIS LAMBIRIS TSIRIMOKOS GAZIS
Neutral secretaries:	[Francis] AMUNATEGUI (Chile) CAZEAUX (France) Armand GRÉGOIRE (France) Louis BAYON-TARGE (France) Marcel OGIER (France)
Austrian secretary:	[E] BOUTSERIN (France)
Greek secretary:	YOTIS

19. Greek-Bulgarian MAT

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Francisco León de LA BARRA (Mexico)
Bulgarian arbitrator:	Th[eohar] PAPAZOFF
Greek arbitrator:	Jean YOUPIS
Bulgarian agent:	[Todor] P THEODOROFF
Greek agents:	COUMANTARAKIS (agent-general) PHARMACOPOULOS (replaced COUMANTARAKIS as agent-general) St SEFERIADES (replaced Pharmacopoulos as agent-general) H SPITHAKIS (replaced Seferiades as agent-general) Chr YOTIS LAMBIRIS TSIRIMOKOS GAZIS
Neutral secretaries:	[Francis] AMUNATEGUI (Chile)

CAZEAUX (France)
Armand GRÉGOIRE (France)
Louis BAYON-TARGE (France)
Marcel OGIER (France)
J[ulio León?] de LA BARRA (Mexico)

20. Greek-German MAT [1920-?][132]

[RoP: RGBl, 1920, 1742/1 Recueil TAM 61; 2 Recueil TAM 63]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Carel Daniël Asser (Netherlands)
German arbitrators:	[Dieprand] von RICHTHOFEN Walther FROELICH Richard HOENE Greek arbitrator:Jean YOUPIS
German agents:	Dr Hermann JOHANNES [Wilhelm] PUNGS Dr Robert MARX [Dr Walter] von HAGENS
Greek agents:	COUMANTARAKIS (agent-general) PHARMACOPOULOS (replaced COUMANTARAKIS as agent-general) St SEFERIADES (replaced Pharmacopoulos as agent-general) H SPITHAKIS (replaced Seferiades as agent-general) Chr YOTIS LAMBIRIS TSIRIMOKOS GAZIS
Neutral secretary:	FURNÉE (Netherlands)
German secretaries:	SIMON WINCKEL [Dr Walther Adolph Bernhard] UPPENKAMP
Greek secretaries:	YOTIS HATZARAS

132 Göppert (n 64) 179-92.

21. Greek-Hungarian MAT [1922-?][133]

[RoP: 3 Recueil TAM 460]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Francisco [León] de La BARRA (Mexico) Greek arbitrator:Jean YOUPIS
Hungarian arbitrators:	Béla de ZOLTÁN (died [on 30 October 1929]) Aladár SZÉKÁCS (replaced Zoltán)
Greek agents:	COUMANTARAKIS (agent-general) PHARMACOPOULOS (replaced COUMANTARAKIS as agent-general) Chr YOTIS LAMBIRIS TSIRIMOKOS GAZIS
Hungarian agents:	Béla de KÖVESS
Neutral secretaries:	[Francis] AMUNATEGUI (Chile) CAZEAUX (France) Armand GRÉGOIRE (France) Louis BAYON-TARGE (France) Marcel OGIER (France) J[ulio León?] de LA BARRA (Mexico)

22. Greek-Turkish MAT [1926-36][134]

[RoP: 5 Recueil TAM 994]

Address: [Çemberlitaş], Istanbul

President:	[Henrik] de NORDENSKJÖLD (Sweden) [resigned on 1 December 1928] [Niels Vilhelm] BOEG (Denmark, replaced Nordenskjöld [on 1 May 1929])[135]
Greek arbitrator:	Hercule KYRIACOPOULOS
Turkish arbitrator:	MEHMED ALİ [BALCISOY] Bey AHMED RAŞİT Bey
Greek agents:	Dimitri KYPREAS

133 ANF, AJ/22/27.

134 Niels V Boeg, 'Le Tribunal arbitral mixte turco-grec' (1937) 8 Nordisk Tidsskrift for International Ret 3.

135 9 Recueil TAM 245.

	Jason STAVROPOULOS Basile BOUOPOULOS D TCHAOUSSIS
Turkish agents:	EMİN ALİ [DUROSOY] Bey [agent-general] KEMAL ATIF Bey NAZIM Bey VASFİ RAŞİT Bey BAYAN BERAT ZEKİ MUSTAFA NAŞİD Bey NUREDDİN NAZMİ Bey [sub-agent] MEHMED OSMAN Bey SÜLEYMAN ALI
Neutral secretary:	Roger SECRÉTAN (Switzerland) [resigned on 30 September 1926]
Greek secretary:	Constantin [G.] PAPADOPOULOS
Turkish secretary:	MUZAFFER SABRİ Bey [replaced in June 1934] [TEVFIK IBRAHİM]

23. Italian-Austrian MAT [1922-32][136]

[RoP: BGBl, 1922, 567/2 Recueil TAM 143]

Address: Via Venti Settembre 8, Rome

Presidents:	Giuseppe BERTA (Switzerland) Agostino SOLDATI (Switzerland)
Austrian arbitrators:	Emil JUNKAR Ernst KWIATKOWSKI Carl SCH[O]ENBERGER
Italian arbitrator:	Pietro ALBERICI
Austrian agents:	[Wilhelm von] THAA [Dr Rudolf] BLÜHDORN (replaced Thaa)
Italian agents:	Eugenio MERCURIO Giancarlo [or Carlo?] MESSA
Austrian secretary:	[Anton] HOFFMANN
Italian secretaries:	Luigi BARONE Ovidio CIANCARINI Enrico LECCADITO Federico PATRONI

136 'Österreichisch-italienisches gemischtes Schiedsgericht' *Innsbrucker Nachrichten* (Innsbruck, 27 January 1932) 11.

24. Italian-Bulgarian MAT [1922-30?][137]

[RoP: 2 Recueil TAM 835]

Address: Via Venti Settembre 8, Rome

Presidents:	Dr Giuseppe BERTA (Switzerland) Dr Agostino SOLDATI (Switzerland)
Bulgarian arbitrator:	Velislava RADULOWA
Italian arbitrator:	Donato FAGGELLA
Bulgarian agent:	Nicolas BALABANOW
Italian agents:	Francesco LO BIANCO Carlo [or Giancarlo?] MESSA Eugenio MERCURIO
Austrian secretary:	Antoine [Anton?] HOFFMANN
Italian secretaries:	Luigi BARONE Ovidio CIANCARINI Enrico LECCADITO Federico PATRONI

25. Italian-German MAT [1921-30][138]

[RoP: RGBl, 1922, 157/1 Recueil TAM 796; RGBl, 1924 II, 95; RGBl, 1928 II, 501]

Address: Via Venti Settembre 8, Rome

Presidents:	Dr Giuseppe BERTA (Switzerland, until 31 December 1922) Dr Agostino SOLDATI (Switzerland, after 26 February 1924)
German arbitrators:	Dr Ernst RABEL Dr Franz SCHOLZ
Italian arbitrator:	Dr Pietro ALBERICI Donato FAGGELLA
German agents:	[Dr] Ludwig HEINKE[139] Robert FRITZ
Italian agents:	Francesco LO BIANCO Eugenio MERCURIO
German secretary:	[Robert] FRITZ
Italian secretaries:	Luigi BARONE

137 Swiss Federal Archives ('CH-BAR'), E2001C#1000/1532#1409*.
138 Göppert (n 64) 154-68.
139 1 Recueil TAM 721.

Ovidio CIANCARINI
Enrico LECCADITO
Federico PATRONI

26. Italian-Hungarian MAT [1924-?][140]

[RoP: 4 Recueil TAM 121]

Address: Via Venti Settembre 8, Rome

Presidents:	Agostino SOLDATI (Switzerland)
Hungarian arbitrator:	Béla de ZOLTÁN
Italian arbitrator:	Donato PAGGELLA
Hungarian agent:	Alexandre de JÓKAY
Italian agents:	Francesco LO BIANCO Giancarlo MESSA
Hungarian secretary:	N
Italian secretaries:	Giovanni DALLARI Ovidio CIANCARINI

27. Italian-Turkish MAT [1926–30][141]

Address: [Çemberlitaş], Istanbul

President:	Karl F[rederick] HAMMERICH (Denmark)
Italian arbitrators:	A VUCCINO E PISA
Turkish arbitrators:	CEMİL Bey MEMDUH Bey
Italian agents:	Giovanni GIUNI R MONTAGNA
Turkish agents:	EMIN ALİ Bey [Agent-general] KEMAL ATIF Bey NAZIM Bey VASFİ RAŞİT Bey MUSTAFA NAŞİD Bey MEHMED OSMAN Bey
Neutral secretary:	Pierre GRANDCHAMP (Switzerland)
Italian secretary:	Guido ROSSI
Turkish secretary:	AHMED ZEKERYA

140 ANF, AJ/22/27.
141 Örsten Esirgen (n 63) 328.

28. Japanese-Austrian MAT [1921-?]

[RoP: BGBl, 1921, 1775; 1 Recueil TAM 821]

Address: 21 St James's Square, London

Presidents:	BOLER [or rather Eugène BOREL?]
Austrian arbitrators:	Dr Wilhelm ROSENBERG (died [on 3 April 1923])
Japanese arbitrator:	Ken'ichi KAYAMA
Austrian agent:	Dr Felix WEISER
Japanese agent:	…
Austrian secretary:	N
Japanese secretary	…

29. Japanese-German MAT [1920–25][142]

[RoP: RGBl, 1921, 96; 1 Recueil TAM 124]

Address: 21 St James's Square, London

Presidents:	Eugène BOREL (Switzerland)
German arbitrator:	A Nicolaus ZACHARIAS
Japanese arbitrators:	Kisaburo SUGA Kota OMORI
German agent:	Dr Paul BARANDON
Japanese agent:	…
German secretary:	[Dr] W[illiam] HESSE
Japanese secretary:	Tsurumine KITO

142 Göppert (n 64) 149–53.

30. Polish-German MAT [1921–32][143]

[RoP: RGBl, 1921, 1557/1 Recueil TAM 687; RGBl, 1923 II, 44, 262/3 Recueil TAM 203; RGBl, 1924 II, 65, 234]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Paul MORIAUD (Switzerland, died on 8 September 1924) Robert GUEX [Switzerland, 1 December 1924–1 January 1927][144] Paul LACHENAL (Switzerland, after 15 April 1927)
German arbitrators:	Franz SCHOLZ (until the end of 1927) Dr Rudolf HEINZE (as a substitute) Dr Viktor BRUNS (1927–31)
Polish arbitrator:	[Jan] NAMITKIEWICZ
German agents:	Dr Hermann JOHANNES Alfred LENHARD (died on 8 March 1929) [Erich KAUFMANN (replaced Lenhard) (?)][145] [Dr Paul] THIE[M]E[146] [Dr Walther Adolph Bernhard] UPPENKAMP [Bruno] SCHUSTER [Dr Helmuth] KUTZNER [Dr Wilhelm] EULER Dr Robert MARX
Polish agents:	Tadeusz SOBOLEWSKI Kasimierz SACHOCKI Tadeusz ŁEBIŃSKI (replaced Sachocki [on 15 December 1929])[147]
German secretaries:	[Dr Walther Adolph Bernhard] UPPENKAMP [Dr Bernhard] DANCKELMANN [Günter] von MEENEN [Dr Karl Ernst] MÜNCHMEYER
Polish secretaries:	Stefan DEMBIŃSKI Tadeusz ŁEBIŃSKI (replaced DEMBINSKI) J MARLEWSKI Zygmunt KRZYSZTOFORSKI (replaced Marlewski [on 1 September 1929])[148]

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143 Göppert (n 64) 193–210; Magdalena Bainczyk and Jakob Zollmann, 'Polish-German Mixed Arbitral Tribunal', in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (OUP 2022).
144 6 Recueil TAM 529.
145 Bainczyk and Zollmann (n 143).
146 PAAA, P 8/454.
147 9 Recueil TAM 245.
148 ibid.

Portuguese-German MAT [never convened][149]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Cristóbal BOTELLA (Spain, never took up his functions) Aloïs de MEURON (Switzerland)
German arbitrator:	N
Portuguese arbitrator:	N
Neutral arbitrators:	Robert FAZY (Switzerland) Robert GUEX (Switzerland)
German agents:	Dr Robert MARX FRANZ
Portuguese agents:	BARBOSA de MAGALHAES COSTA DIAS
Neutral secretary:	d'ARDENNE DE TIZAC (French, never took up his functions)

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31. Romanian-Austrian MAT [1924–1936][150]

[RoP: BGBl, 1924, 259; BGBl, 1926, 1325]

Address: 57 rue de Varenne [Hôtel Matignon], Paris [until 1 November 1934]; [142 rue de Grenelle, Paris][151]

President:	Erik SJÖBORG (Sweden) Paul MORIAUD (Switzerland, replaced Sjöborg, died on 8 September 1924) Charles BARDE (Switzerland, replaced Moriaud, sole arbitrator under Arts 249–50 SGPT)
Austrian arbitrators:	Dr Otto JUCH [Dr] Paul HAMMERSCHLAG
Romanian arbitrators:	Constantin ANTONIADE Lazar MUNTEANU (replaced Antoniade)
Austrian agents:	Richard FÜRTH [Dr Rudolf] BLÜHDORN KRATOCHWILL
Rumanian agents:	Jean POPESCO-PION CA ROBESCO

149 Göppert (n 64) 221.

150 'Une séance solennelle aux tribunaux arbitraux mixtes' *Le Temps* (Paris, 17 July 1936); CH-BAR, E2001C#1000/1533#5016*.

Neutral secretary:	J[acques] HICKEL (France)[152]
Austrian secretary:	[E] BOUTSERIN (France)
Rumanian secretaries:	POPESCO ROJNITZA VISOIANU

32. Romanian-German MAT [1922–32?][153]

[RoP: RGBl, 1922 II, 87/1 Recueil TAM 939; RGBl, 1924 II, 132, 419]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Erik SJÖBORG (Sweden, until 18 December 1922) Robert FAZY (Switzerland, after 1 April 1924)
German arbitrators:	Dr August HERWEGEN Dr Robert MARX Walther FROELICH (after April 1924) Franz SCHOLZ
Romanian arbitrators:	Constantin M SIPSOM Constantin ANTONIADE (after 1 August 1922) Lazar MUNTEANU (after January 1928)
German agents:	Dr Hermann JOHANNES Dr Robert MARX Dr Frantz Ignatz BOLTE (died) ROTHHOLZ
Romanian agents:	CAPITANEANO Jean POPESCO-PION C ROBESCO
German secretaries:	[Dr Walther Adolph Bernhard] UPPENKAMP KONITZER WINKEL
Romanian secretaries:	POPESCO ROJNITZA VISOIANU
Neutral secretary:	Jacques LE FORT (Switzerland)

151 ibid.

152 'Oesterreichisch-rumänisches gemischtes Schiedsgericht' *Neues Wiener Tagblatt* (Vienna, 8 November 1928) 14.

153 Göppert (n 64) 169–73; 'Übersicht über die Zusammensetzung und die noch unerledigten Aufgaben der Gemischten Schiedsgerichte nach dem Stande vom 1. Juni 1932' (1 June 1932) PAAA, RZ 403/R 53267.

33. Romanian-Hungarian MAT [1922–39/46][154]

[RoP: 2 Recueil TAM 826; 5 Recueil TAM 244]

Address: 57 rue de Varenne [Hôtel Matignon], Paris

President:	Erik SJÖBORG (Sweden) [Conrad] de CEDERCRANTZ (Sweden, replaced Sjöborg) Cristóbal BOTELLA (Spain, replaced Cedercrantz)
Hungarian arbitrators:	Aladár SZEKÁCS [Károly] BALÁS de SIPEK
Romanian arbitrators:	Constantin SIPSON Constantin ANTONIADE Lazar MUNTEANU (replaced Antoniade)
Neutral arbitrators:[155]	Francisco [León] de LA BARRA (Mexico) Michael HANSSON (Sweden)
Hungarian agents:	[László] GAJZÁGÓ MESZAROS L de MARK B[ela de] SZENT ISTVANY Béla de KÖVESS
Romanian agents:	CAPITANEANO POPESCO-PION ROBESCO VISOIANU
Agents of the Agrarian Fund:	Pierre JAUDON G[ustave] H[ippolyte] Lampérière Jean CHAPUIS
Hungarian secretary:	B[ela de] SZENT ISTVANY
Romanian secretaries:	ROJNITZKA VISOIANU (appointed as agent)
Neutral secretary-general:	Antony ZARB (United Kingdom)

154 ANF, AJ/22/27; 'Note concernant la situation actuelle des Tribunaux arbitraux mixtes' (14 December 1946) ANF, AJ/22/NC/33/2.

155 Appointed by the PCIJ pursuant to the Paris accords of 28 April 1930.

34. Romanian-Turkish MAT [1926–29][156]

[RoP: 5 Recueil TAM 994]

Address: [Çemberlitaş], Istanbul

President:	de NORDENSKJÖLD (Sweden)
Romanian arbitrator:	Georges C IONESCU
Turkish arbitrators:	MEHMED ALİ Bey AHMED REŞİD Bey
Romanian agent:	BAGDAD
Turkish agents:	EMIN ALİ Bey [Agent-general] KEMAL ATIF Bey NAZIM Bey VASFİ RAŞİT Bey NUREDDIN NAZMİ Bey MUSTAFA NAŞİD Bey
Romanian secretary:	Lycurg MANU
Turkish secretary:	MUZAFFER SABRI Bey

35. Siamese-German MAT [1920–26][157]

[RoP: RGBl 1921, 345/1 Recueil TAM 182]

Address: [146 avenue Malakoff, Paris]; 57 rue de Varenne [Hôtel Matignon], Paris[158]

President:	André MERCIER (Switzerland)
German arbitrators:	[Dieprand] von RICHTHOFEN
Siamese arbitrators:	Ch[arles] L'EVESQUE R[ené] PRADÈRE-NIQUET (replaced L'Evesque)[159]
German agents:	[Dr Paul] RIEDINGER Dr Hermann JOHANNES
Siamese agent:	Ch[arles] L'EVESQUE
German secretary:	SIMON
Siamese secretary:	[N] CH[U]EN [or CHUNE] CHARUVASTRA[160]

156 Örsten Esirgen (n 63) 328.
157 Suppressed pursuant to the Agreement of 12 February 1926. Göppert (n 64) 220.
158 'Tribunal arbitral mixte allemand-siamois' *Le Temps* (Paris, 29 December 1920) 1.
159 ibid.
160 Authored *La Formation du mariage et la puissance maritale en droit siamois* (M Giard 1922).

36. Yugoslavian-Austrian MAT [1921–38][161]

[RoP: BGBl, 1921, 2075]

Address: rue de la Corraterie 22, Geneva

Presidents:	Paul LOGOZ (Switzerland) G[ooike] van SLOOTEN [AZN] (Netherlands, replaced Logoz) Henri SCHREIBER (Switzerland)
Austrian arbitrator:	Karl ZWIEDINEK
Yugoslavian arbitrator:	D[ragoljub] ARANDJELOVITCH
Austrian agents:	Friedrich HLAVAC PROSSINAG [Dr Rudolf] BLÜHDORN (replaced Thaa)
Yugoslavian agents:	Douchan SOUBOTITCH Louis BAKOTIC
Neutral secretary:	Jacques LE FORT (Switzerland)

37. Yugoslavian-Bulgarian MAT

Address: [Peace Palace, The Hague];[162] rue de la Corraterie 22, Geneva

Presidents:	Paul LOGOZ (Switzerland) [Gooike van] SLOOTEN [AZN] (Netherlands, replaced Logoz, [died on 14 December 1932])[163] Henri SCHREIBER (Switzerland)
Bulgarian arbitrator:	Th[eohar] PAPAZOFF St KIRIAKOV
Yugoslavian arbitrator:	D[ragoljub] ARANDJELOVITCH
Bulgarian agent:	[Todor] P THEODOROFF
Yugoslavian agent:	Douchan SOUBOTITCH
Neutral secretary:	Jacques LE FORT (Switzerland)

161 Austrian State Archives ('AT-OeStA'), AdR AAng ÖVB 1Rep GenfSG.

162 4 Recueil TAM 465; 'À la Cour permanente de justice internationale' *Le Temps* (Paris, 13 June 1926).

163 'G. van Slooten Azn' (1932) 14 Revue internationale de la Croix-Rouge 1076.

38. Yugoslavian-German MAT [1921–39][164]

[RoP: RGBl 1921, 693, 1660/1 Recueil TAM 61]

Address: [19 bd Georges-Favon, Geneva];[165] rue de la Corraterie 22, Genevae

Presidents:	Paul LOGOZ (Switzerland) G[ooike] van SLOOTEN (replaced Logoz) Henri SCHREIBER (Switzerland)
German arbitrators:	Robert DÖRING Dr Rudolf HEINZE (replaced Döring) Walther FROELICH Franz SCHOLZ
Yugoslavian arbitrator:	D[ragoljub] ARANDJELOVITCH
German agents:	[Dr Curt] VIEHWEGER Dr Robert MARX Robert FRITZ [Dr Wilhelm] EULER WERSCH[I] [?][166]
Yugoslavian agents:	Douchan SOUBOTITCH Louis BAKOTIC
Neutral secretaries:	Jacques LE FORT (Switzerland) A[rnold] JNM STRUYCKEN (Netherlands) Antony ZARB (United Kingdom, replaced Struycken [in 1936])

164 Göppert (n 64); 'Protocole de clôture' (22 July 1939) ANF, AJ/22/169.

165 1 Recueil TAM 266.

166 'Übersicht über die Zusammensetzung und die noch unerledigten Aufgaben der Gemischten Schiedsgerichte nach dem Stande vom 1. Juni 1932' (1 June 1932) PAAA, RZ 403/R 53267.

39. Yugoslav-Hungarian MAT [1924–39/46][167]

[RoP: 4 Recueil TAM 547]

Address: [Bazarstraat 36, The Hague];[168] rue de la Corraterie 22, Geneva

Presidents:	[Gooike van] SLOOTEN [AZN] (Netherlands) [died on 14 December 1932] Henri SCHREIBER (Switzerland)
Hungarian arbitrator:	Béla de ZOLTÁN (died [on 30 October 1929]) V TOMCSÁNYI [Károly] BALÁS de SIPEK
Yugoslavian arbitrator:	D[ragoljub] ARANDJELOVITCH
Neutral arbitrators:	Joost Adriaan VAN HAMEL (Netherlands) Karl F[rederick] HAMMERICH (Denmark)
Hungarian agents:	[László] GAJZÁGÓ (agent-general) MESZAROS L de MARK MESZAROS Béla de KÖVESS P SEBESTYEN
Yugoslavian agents:	Louis BAKOTIC Douchan SOUBOTITCH STOUKOVITCH
Agrarian Fund agents:	Pierre JAUDON G[ustave] H[ippolyte] LAMPÉRIÈRE Jean CHAPUIS
Neutral secretaries:	A[rnold] JNM STRUYCKEN (Netherlands) Antony ZARB (United Kingdom, replaced STRUYCKEN [in 1936])

167 ANF, AJ/22/27; 'Note concernant la situation actuelle des Tribunaux arbitraux mixtes' (14 December 1946) ANF, AJ/22/NC/33/2.

168 4 Recueil TAM 465.