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.

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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

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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.

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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).

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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

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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).

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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).

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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.

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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

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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

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

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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.

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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

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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-

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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.

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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.

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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.

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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

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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,

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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.

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