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

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

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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

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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.

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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-

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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.

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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

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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.

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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).

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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.

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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, 'Tardj̲umān' (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.

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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).

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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

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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).

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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, 'Ṣiffin, Battle of', in Jane Dammen McAuliffe (ed), *Encyclopaedia of the Qur'ān* (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.

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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).

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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.

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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.

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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.

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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,

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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.

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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.

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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

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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).

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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).

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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

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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

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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

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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).

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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.

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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.

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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.

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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/>.

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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.

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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

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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>.

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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>.

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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... .

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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*'.

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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

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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.

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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>.

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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).

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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.

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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.

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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*

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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.

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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.

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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.'*

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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.

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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).

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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.

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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:

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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.

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> … *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.*'

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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

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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.*'

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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.

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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.

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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.

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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.

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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).

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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.

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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.

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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,

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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.

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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*').

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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.

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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.

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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.

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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.'*

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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

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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*

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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

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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.

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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).

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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.

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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.

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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-

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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.

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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.

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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.

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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.

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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.

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> 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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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