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

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

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For Dieter Gosewinkel on his 65th birthday

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 Caglioti (n 12) 211.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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44 Erich Kaufmann (n 33) 97.

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

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

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

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

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

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

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

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

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

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

50 Caglioti (n 12) 308.

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

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

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

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

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

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

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

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

54 Teyssaire and de Solère (n 30) 20.

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

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

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

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

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

56 Keynes (n 52) 68.

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

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

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

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

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

60 Dülffer (n 35) 123.

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

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

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

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

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

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

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

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

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

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

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

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

68 Caglioti (n 12) 210.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

84 Claud Mullins (n 58) 96.

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

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

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

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

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

87 Adolf Heilberg (n 80) 3; 4.

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

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

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

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

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

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

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

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

92 Triepel (n 89) 6.

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

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

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

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

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

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

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

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

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

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

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

97 Hermann Isay (n 47) 221.

98 Marta Requejo Isidro and Burkhard Hess, 'International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922' in Michel Erpelding, Burkard Hess and Helene Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 239–276, 244; Carabiber (n 82) 41.

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

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

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

102 Caglioti (n 12) 301.

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

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

103 Keynes (n 52) 68.

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

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

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

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

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

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

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

108 See Dumberry (n 90) 375.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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134 Rabel (n 112) 6.

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

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

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

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

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

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

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

138 Strupp (n 93) 670.

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

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

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

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

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

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

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

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

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

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

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

145 Blühdorn (n 7) 210.

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

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

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

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

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

148 Henry Emile Barrault, 'Note–*Charbonnage Frédéric Henri SA c Germany*' (1923) 50 Journal du droit international 609–611, 610.

149 See Dumberry (n 90) 373; Trendtel (n 89) 31–35; 37; Gidel and Barrault (n 82) 330.

150 Requejo Isidro and Hess (n 98) 268, referring to Schätzel (n 91) 425 sq; see Rabel (n 112) 77 quoting the *Lothringer Volkszeitung*, no 236 (13 October 1922), and referring to the association *Incarcerés et Internés politiques* in Metz that 'painstakingly' informed the French members of the MAT.

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straw to which in their final desperation they can cling and from which they hope at least reparation for the injuries to their private property.'[151]

5. Conclusion

The Mixed Arbitral Tribunals are to be understood as part of a *ius post bellum*. Not only were these tribunals part of the Paris peace treaties (Article 304 Treaty of Versailles), but in their own case law they established rules that massively affected the lives of tens of thousands living in post-war societies. And as this chapter has shown, questions of nationality and property were paramount for those who tried to address the MATs throughout the 1920s.

Post-war developments matter for both the victorious and vanquished nations. As the history of the drafting process of the Treaty of Versailles also shows, 'the aftermath of war is crucial to the justice of the war itself', for contemporaries – politicians, scholars, journalists – invoke post-war developments to justify or condemn the war just won or lost.[152] This became particularly evident in 1918/9 when the evocation of a 'just' peace that was worth the war, was based on the Allied side's claim that this war had been fought to re-establish and lastingly defend the 'reign of law' (Woodrow Wilson). Ending the war was therefore far more than the demobilization of troops, the return of prisoners of war, and establishing a lump-sum to be paid by the vanquished. Guided by a strong belief in the advantages of an internationalist legalism for the community of nations, to the framers of the Paris peace treaties this 'reign of law' had to be built into the treaties' provisions in order to be implemented for a future without war. As historian Markus Payk has shown, 'all demands and interests [after the war] could only be expressed through a language of legality, by referring to precedents in international law and by invoking justice as the main objective of the Allied nations.'[153]

The central role of arbitration in the reparation regime of *private* damages was thus not incidental. For decades prior to the war, high hopes connected to this instrument of law and its alleged practicability to solve

151 de Auer (n 117) xxix.

152 Gary J Bass, 'Ius post bellum' (2004) 32(4) Philosophy & Public Affairs 384, 384, quoting 'Peace at Any Price' *The New Republic* (24 May 1919) 101.

153 Marcus M Payk, '"What We Seek Is the Reign of Law": The Legalism of the Paris Peace Settlement after the Great War' (2018) 29 European Journal of International Law 809, 818.

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interstate and private disputes for good.[154] After having learnt about the practice of the MATs, including the undeniable difficulties to deliver awards on questions of nationality and property, the chairman of the *Grotius Society* in a meeting in London in 1927 declared: 'The substitution of arbitration for force was vital for the peace of the world.'[155] The framers of the treaties hoped that international law and its practical implementation by the MATs and other bodies created by the peace treaties would be instrumental to secure justice for states as well as for the individual. It is not surprising that Allied scholars assessed the work of the MATs in a generally positive light. Henry Barrault lauded the advent of the MATs as '*un grand événement de l'histoire du droit international*'.[156] And the French *agent général* for the MATs, Pierre Jaudon, did not hide his overall satisfaction with the results of the MATs, when he summarized the tribunals' achievements and their '*sagesse*'.[157]

However, what the victors saw as a demand of justice in the face of an urgent need for economic reconstruction, was for the German side an immoral exploitation of Germany's weakness by triumphant states. Such 'imperialist' abuse of the rhetoric of international law and justice, for example, entitled the Allies to continue with liquidation of German property all over the world even in times of peace and prevented the former belligerents from returning to the pre-war principle of equality and reciprocity of property rights across national borders in order to allow for the Allied reconstruction at the expense of the German economy. To the great disappointment of Germany, the Allied claims for 'justice' and law after the war included the future and the past and, as they learnt from the Allies in May 1919, 'reparation for wrongs inflicted [in the past] is of the essence of justice.'[158] Related to the downfall of the Weimar Republic, whose democratic politicians bore the stigma of fulfilment ('*Erfüllungspolitik*') of the conditions set by 'Versailles', 'reparations have acquired a stigma of vindictiveness'.[159] The Treaty of Versailles was, also

154 Jakob Zollmann, 'Théorie et pratique de l'arbitrage international avant la Première Guerre mondiale', in Rémi Fabre, Thierry Bonzon, Jean-Michel Guieu, Elisa Marcobelli and Michel Rapoport (eds), *Les défenseurs de la paix, 1899–1917* (PUR 2018) 111–126.

155 Quotation in: de Auer (n 117) xxix.

156 Henry E Barrault, 'La jurisprudence du Tribunal Arbitral Mixte' (1922) Journal du Droit International 298, 311.

157 Pierre Jaudon, 'Avant-Propos' in Teyssaire and de Solère (n 30) 8.

158 Quotation in Hull (n 70) 10.

159 Bass (n 152) 410; see on 'Erfüllungspolitik': Peter Krüger, *Die Außenpolitik der Republik von Weimar* (Wissenschaftliche Buchgesellschaft 1985) 132.

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by later historians, regularly depicted 'as disaster of the first rank.'[160] Yet modern research contends that the Treaty of Versailles was 'better than its reputation.'[161] More specifically, the MATs are by now also seen in a 'positive perspective', given the central role they gave to the individual in international law, their 'efficient and fair' handling of 'mass claims', and the adaptation and modernization of the rules of procedure for the use of international arbitration.[162]

The above-quoted contemporary criticism of MAT awards speaks a clear language of a different interpretation and reading of the Paris peace treaty system. Contempt and anger at the principles created at Versailles and their one-sided application by the non-German arbitrators dominated the German and Austrian debate on the MATs. As Fritz Morstein Marx, a young scholar in Albrecht Mendelssohn Bartholdy's liberal Hamburg *Institut für Auswärtige Politik* (Institute for Foreign Policy) and future expert of public administration, put it harshly in a review: 'The wartime legislation and the case law of the Mixed Tribunals … were … to a large extent created as means to an end. This end was not that of perfecting the law, but rather the *sacro egoismo* and the necessities of war. They should be judged accordingly. From the point of view of legal science, they constitute material of rather dubious value.' ('*Die Kriegsgesetzgebung und die Rechtsprechung der Gemischten Schiedsgerichte … sind … in hohem Maße Zweckschöpfungen, nicht im Sinne der Vervollkommnung des Rechts, sondern im Sinne des sacro egoismo und der Kriegsnot. Sie wollen so gewürdigt werden. Damit sind sie vom Standpunkt der Rechtswissenschaft ein Material von recht zweifelhaftem Wert*').[163] When modern research confirms that in 'the era of the two world wars both nationality law and property law increasingly became an object and instrument of state intervention in society',[164] contemporary German and Austrian scholars castigated the MATs for not being able to frustrate this instrumentalisation of municipal law with the

160 Gerald D Feldman, *The Great Disorder: Politics, Economics and Society in the German Inflation, 1924–1924* (OUP 1997) 148.

161 Marcus M Payk, 'Die Urschrift. Zur Originalurkunde des Versailler Vertrages von 1919' (2019) 16(2) Zeithistorische Forschungen/*Studies in Contemporary History* 342, 352.

162 Requejo Isidro and Hess (n 98) 276.

163 Fritz Morstein Marx, 'Review of: Ernst Marburg, Staatsangehörigkeit und feindlicher Charakter' (1928) 52 Archiv des öffentlichen Rechts 151–152; see Margit Seckelmann, 'Mit Feuereifer für die öffentliche Verwaltung: Fritz Morstein Marx – Die frühen Jahre (1900–1933)' (2013) 66 Die öffentliche Verwaltung 401, 406.

164 Dieter Gosewinkel and Stefan Meyer (n 45) 588.

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tools of international law. This inability came at the expense of the former ruling nations who had been turned into 'minorities' and who should have been protected from the ongoing liquidations of their property. On the other hand, by handing out thousands of awards enabling individuals to claim and receive damages from (foreign) governments, the MATs' work anchored and strengthened the position of the individual in (public) international law to a hitherto unprecedented degree. This achievement in itself, as part of the development in the history of international law, was, as contemporaries have already argued in retrospect, at the same time 'brilliant and comforting'.[165]

165 Carabiber (n 82) 42: '*l'éclatante et réconfortante confirmation*'.

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Chapter 5: The Mixed Arbitral Tribunals and the Nationality of Legal Persons: The Uncertain First Steps of an Evolving Concept

Emanuel Castellarin[*]

Nationality was an important procedural issue before the Mixed Arbitral Tribunals (MATs) set up by the post-World War I peace treaties. The jurisdiction *ratione personae* of each MAT and the admissibility of claims were defined by the nationality of claimants, who had to be nationals of the Allied Power party to the relevant peace treaty. In addition, some claims, such as those relating to contracts concluded before the entry into force of the treaties, could only be brought against nationals of the defeated power party to the relevant peace treaty.[1]

Therefore, nationality was crucial, regarding both individuals and legal persons.[2] Among the relevant issues, some were not specific to legal persons. In fact, the moment at which the nationality requirement had to be met was mainly discussed concerning individuals.[3] This chapter analyses the content and the implications of MATs' case law on issues specifically related to the nationality of legal persons.

Section 1 explains the historical legal context. The nationality of legal corporations had already been debated for decades as an issue of corporate law or private international law, and occasionally in the framework of diplomatic protection. MATs were the first international tribunals that

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1 Art 304(b) Treaty of Versailles, and analogous provisions of other peace treaties.

2 Awards also used the expression 'juridical persons', the more general expression 'moral beings' and more specific terms (company, corporation, partnership, etc).

3 For legal persons, the date at which nationality was assessed was generally the date of entry into force of the applicable peace treaty: French–German MAT, *Mercier et Cie c Etat allemand* (27 October 1923) 3 Recueil TAM 686, referring to *d'Escuvilley*, of the same date, which set the same rule for individuals (3 Recueil TAM 689); Franco–Austrian MAT, *Léon Goldwasser c Böhmische Industriebank et Etat autrichien* (28 December 1923) 3 Recueil TAM 951; Anglo–German MAT, *in re Gebrüder Adt AG v Scottish Co-op Wholesale Society, Limited* (4 and 30 November 1927) 7 Recueil TAM 473. Unless otherwise stated, case law references are those of the *Recueil des Décisions des Tribunaux Arbitraux Mixtes* (Recueil TAM).

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settled disputes on a large scale in this field. Section 2 shows that MATs contributed, albeit in a limited way, to the conceptual clarification of the concept of corporate nationality. In particular, they contributed to establishing the idea that legal persons have a nationality. Section 3 analyses the criteria followed for the determination of corporate nationality. Without a clear common methodology, MATs alternatively chose three different criteria: the place of the *siège social*, the place of incorporation, and the theory of control, ie the nationality of the persons in control of the corporation. Section 4 addresses the admissibility of claims by shareholders. This issue is not an aspect of corporate nationality *stricto sensu*, but it shows that MATs had diverging approaches regarding whether or not to pierce the corporate veil for procedural purposes. Section 5 concludes by taking stock of the legacy of MATs' case law on the nationality of legal persons. In spite of some original features, its contribution to the development of international law was limited, especially due to a lack of consistency.

1. *MATs' Case Law on the Nationality of Legal Persons in its Historical Context*

Issues of nationality of legal corporations are at the confluence of public international law and domestic law. In principle, the (lack of) corporate nationality is an issue of domestic law. However, legal persons are also usually said to have a nationality under public international law. In this legal order, nationality is intended as 'the result of a functional attribution of the person to a State, which is necessary for applying certain rules of international law, rather than a personal bond giving rise to a formal status'.[4] Before MATs, the main applicable sources were theoretically the peace treaties and the relevant norms of domestic law (including private international law). However, the interplay between these two sources was not clear, and some issues were not explicitly covered by either of them.

In the interwar period, issues related to the nationality of legal persons were still mainly debated by private law scholars with a conflict of laws background,[5] and it was even doubted that rules of public international

4 Oliver Dörr, 'Nationality', in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2019), para 24.

5 Eg, Karl Neumeyer, 'Die Staatsangehörigkeit juristischer Personen und das Gemischte deutsch-französische Schiedsgericht' (1923) 12(3) Zeitschrift für Völkerrecht 201.

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law existed in this field.[6] Case law and scholarship had dealt with these issues at the domestic and comparative level at least since the 19th century.[7] In international practice, the nationality of legal persons was often referred to in order to determine the applicability of treaties or to identify the State entitled to exercise diplomatic protection through inter-State arbitration or mixed claims commissions. However, the scholarship was far from unanimous on the very existence of nationality of legal persons as a concept of public international law. For some authors, such as Hilton Young, the only legally relevant concept was the personal law of the legal person (*lex societatis*), ie the law governing the private status of corporations: their formation, representation, dissolution, liability for debts of their predecessors, etc. Thus, according to this view, the concept of nationality of legal corporations only implied political consequences.[8] Other authors, such as Travers, were in favour of the concept of nationality of legal persons, and controversies continued after World War I.[9] In fact, the nationality of legal persons is not known to all domestic legal systems even nowadays.[10] Irre-

6 Henry Wheaton and Arthur B Keith, *Elements* of *International Law*, (6th edn, Stevens 1929), part 2, 321, quoted by Maurice Travers, 'La nationalité des sociétés commerciales' (1930) 33 Recueil des cours de l'Académie de droit international 1, 7–8.

7 Eg, Henri Fromageot, *De la double nationalité des individus et des sociétés* (Rousseau 1892); Maurice Leven, *De la nationalité des sociétés et ses effets juridiques* (Rousseau 1900); Pierre Arminjon, *Nationalité des personnes morales* (Pedone 1902); Ernst Isay, *Die Staatsangehörigkeit der juristischen Personen* (Mohr 1907); Edward Hilton Young, 'The Nationality of a Juristic Person' (1908) 22(1) Harvard Law Review 1; Paul Ruegger, *Die Staatsangehörigkeit der juristischen Personen: die völkerrechtlichen Grundlagen* (Füssli 1918); Alexandre Martin-Achard, *La nationalité des societés anonymes* (Füssli 1918); André Pepy, *La nationalité des sociétés* (Sirey 1920); John Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35(6) Yale Law Journal 655.

8 Hilton Young (n 7), 2.

9 Travers (n 6), 11–26.

10 *Report of the International Law Commission on the work of its fiftieth session* (doc. A/53/10, *Yearbook of the ILC*, 1998, II, para 461). This observation led the International Law Commission, when it dealt with nationality in relation to the succession of States, to consider the idea of examining 'similar concepts on the basis of which the existence of a link analogous to that of nationality was usually established' (ibid). The 1999 Draft Articles on Nationality of Natural Persons in relation to the Succession of States do not apply to legal persons (*Yearbook of the ILC*, 1999, vol. II, Part II, Commentaries, para 1). In a comparative perspective, see Matthias Pannier, 'Nationality of Corporations under Domestic Law: A Comparative Perspective', in Federico Ortino and others (eds), *Investment Treaty Law: Current Issues II* (British Institute of International and Comparative Law 2007), 1.

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spective of the existence and nature of corporate nationality, the criteria to determine it (or to determine the *lex societatis*) were even more controversial. Until World War I, domestic legislation, courts and scholarship had adopted different tests. The place of incorporation was preferred in the United States and, to some extent, in England. Different forms of domicile (intended as the centre of administrative business, as the main place of business, or as the seat fixed once and for all by the constitutive documents), were predominant in continental Europe, while a part of French doctrine proposed the nationality of the majority of shareholders.[11]

These debates implicitly influenced MATs' awards. However, MATs did not address the issue of nationality of legal persons from the point of view of a given domestic legal order. Thus, they developed their own approaches, which were not clearly based on public international law. While the applicable peace treaty was an obvious starting point, international custom played a very limited role, in the sense that MATs did not look for practice and *opinio juris*. MATs' case law can be seen as a laboratory of general principles of law, which had just been recognised as a source of international law in Article 38(1)(c) of the 1920 Statute of the Permanent Court of International Justice. However, the comparative dimension of MATs' awards was rarely explicit. It is more correct to state that they had a transnational dimension, reflecting the quest for some kind of natural law supposedly applicable across legal orders, irrespective of positive comparative law. Interestingly, interwar scholarship mainly analysed MATs' case law on the nationality of legal persons, not in isolation, but alongside domestic case law on similar issues, to argue in favour of a harmonised approach from the point of view of conflict of laws.

An overall analysis of MATs' case law is made difficult by the fact that several awards are elliptic and contingent on case-specific facts so that they can be interpreted in different ways. Although MATs referred to their own and other MATs' precedents, their case law was often inconsistent, even on essential issues and within the case law of each MAT. Inconsistencies can be partially explained by the specificity of the measures at the origin of disputes, ie extraordinary war measures.[12] However, it must also be noted that MATs often had different approaches to similarly drafted provisions.

11 For an overview, Hilton Young (n 7); Travers (n 6), 49–100.

12 Marta Requejo Isidro and Burkhard Hess, 'International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922', in Michel Erpelding, Burkard Hess and Hélène Ruiz Fabri (eds), *Peace Through Law: The Versailles Peace Treaty and Dispute Settlement After World War I* (Nomos 2019) 239, 268.

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Moreover, to some extent, different linguistic versions hinder a fully harmonious interpretation of awards.[13] Nonetheless, MATs did contribute to the consolidation of the conceptual framework of the nationality of legal persons, which was still fragile at that time.

2. *The Contribution of MATs' Case Law to the Conceptual Clarification of the Nationality of Legal Persons*

Overall, MATs' case law contributed to establishing the very concept of nationality of legal persons at the international level and to the clarification of its essential features, at a time when only a few international cases had already done so. With some exceptions,[14] most awards unambiguously accepted that legal persons may have a nationality. Strengthening pre-World War I practice, MATs' case law predominantly shows that the granting of political rights is neither a condition for, nor a necessary consequence of, the existence of nationality. Hence, the nationality of legal persons can be conceived differently from that of individuals. MATs clarified that corporate nationality requires domestic legal personality (2.1) and addressed the underexplored issue of change of corporate nationality as a consequence of State succession (2.2).

2.1. Domestic Legal Personality as a Necessary Condition for Nationality

Some MATs' awards are based on the assumption that domestic legal personality is a necessary (although not sufficient) condition for nationality under international law. This was clearly explained by the Belgo-German MAT in the case *Caisse d'assurances des Glaceries c Etat allemand*. The Caisse d'assurances des Glaceries acknowledged that it did not have legal personality under Belgian law, but claimed to have legal personality (and thus *locus standi*) based on natural law as an organism capable of acting and exercising rights. The Tribunal rejected this view. It judged that moral beings are not purely sociological and organic entities: a recognition under

13 Eg, the term 'partnership' was used for different forms of *sociétés de personnes*, irrespective of their status under domestic law; 'main place of business' was mainly used as the translation of '*siège social*', but was occasionally distinguished from 'seat'; 'branch' was mainly used as the translation of '*succursale*', but occasionally also as the translation of '*filiale*', etc.

14 See below, Section 3.3.2.

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positive domestic law is needed for them to legally come into existence. Thus, a corporation can only exist as such, with its rights and obligations, because a domestic legal system has recognized it.[15] Absent such recognition, a corporation can have no rights or obligations in any legal system. The MAT concluded that the Caisse d'assurances des Glaceries could not be considered a national of an Allied or Associated power under the terms of the Treaty of Versailles.

This idea is confirmed *a contrario* by two cases of the French-German MAT. In *Mercier et Cie c Etat allemand*, a claim was brought by a French individual regarding the situation of a joint-name partnership (*société en nom collectif*) registered under German law, active in France and placed in liquidation in 1917 in Germany. Partners were Alsace-Lorrainers that had been reinstated in the French nationality since 11 November 1918. The Tribunal held that 'a joint-name partnership made up of partners having all the same nationality cannot have a nationality different from theirs'. The Tribunal added that '(w)hile according to the jurisprudence of the M.A.T. the location of principal place of business is not sufficient to determine the nationality of capital-stock companies, it cannot a fortiori confer to a company of persons, such as joint-partnership, a nationality differing from that of the partners'.[16] In this case, all partners were French at the date of the entry into force of the Treaty of Versailles. As a result, all parties to the dispute were French nationals, so the Tribunal had no jurisdiction. These statements must be read in the light of the case law of the French-German MAT on the 'theory of control', which is equally based on piercing the corporate veil. However, this line of reasoning can be primarily explained by the lack of legal personality of joint-name partnerships.

This outcome was confirmed in *Wernlé et Cie c Etat allemand*, regarding a *société en commandite* established in Germany, whose partners were Austrian (for the majority of the shares) and French. As explicitly recalled in this case, *sociétés en commandite* had no legal personality under German law (unlike under French law).[17] The conclusion that partnerships have no nationality is coherent with the idea, shared at least implicitly by all MATs, that domestic legal personality is a necessary condition for nationality. The drafting of the award in *Mercier* indeed suggests that partnerships have no

15 Belgo–German MAT, *Caisse d'assurances des Glaceries c Etat allemand* (13 March 1923) 3 Recueil TAM 261, 265.

16 *Mercier* (n 3).

17 French–German MAT, *Wernlé et Cie c Etat allemand* (25 June 1927) 7 Recueil TAM 608, 612.

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proper and separate nationality but do have a nationality, which is the same as that of partners if all partners have the same nationality. In fact, the Tribunal's approach is pragmatic and case-specific: as the partnership was placed in liquidation, the Tribunal first analysed the nationality of partners. It turned to the issue of the nationality of the partnership only to confirm that no German nationals were involved in the dispute.[18] It can be safely inferred from these cases that, for MATs, the nationality of legal persons was not established by the international legal order, but that the international legal order simply drew legal consequences from the existence of a legal person under domestic law.

On this basis, MATs' case law also contributed to the distinction of branches and subsidiaries. In the case of *Alice Sedgewick Baroness Ludlow v Disconto-Gesellschaft*, the Anglo-German MAT found that branches of a corporation have no nationality. The main house of the Disconto-Gesellschaft in Berlin and its London branch were found to be one and the same legal person. Thus, the British claimant could bring claims under the procedure provided for in Article 296 of the Treaty of Versailles regarding pre-war contracts concluded by the London branch, as the debtor was of German nationality.[19] The distinction between branches and subsidiaries was presented in an even clearer way in *Blanchet et Gosselin et al. c la Société Badische Anilin et Soda Fabrik, la succursale de cette société sise à Neuville-sur-Saône, la Compagnie Parisienne de Couleurs d'Aniline et la Société Farbwerke vorm. Meister Lucius et Bruning*, a case equally based on claims under Article 296 of the Treaty of Versailles for damages for non-performance of pre-war contracts. The Belgo-German MAT distinguished the French branch and the French subsidiary of a German corporation. In spite of its independent accounting, the branch was legally 'an integral part of the principal place of business' of the German corporation, which was the only debtor of contractual obligations. On the contrary, the subsidiary (incorporated in France and with its *siège social* in Paris) was a separate legal entity, although the capital was held by the German parent company and the two companies constituted a single economic unit. The subsidiary's contracts were not binding on the parent company. Thus, claims regarding the subsidiary were dismissed.[20]

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18 *Mercier* (n 3), 689.

19 Anglo–German MAT, *Alice Sedgewick Baroness Ludlow v Disconto-Gesellschaft* (27 March and 5 April 1922) 1 Recueil TAM 869.

20 Belgo–German MAT, *Blanchet et Gosselin et al c la Société Badische Anilin et Soda Fabrik, la succursale de cette société sise à Neuville-sur-Saône, la Compagnie Parisienne*

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2.2. Corporate Nationality and State Succession

MATs also contributed, although with some ambiguity, to the issue of the nationality of legal persons in case of State succession. In *Léon Goldwasser c Böhmische Industriebank et Etat autrichien*, the defendant bank was considered as a Czechoslovakian national, although it had been created before the war as an Austrian corporation.[21] This solution is based on Article 263 of the Treaty of Saint-Germain, which referred to situations in which, as a general rule, individuals and juridical persons previously nationals of the former Austrian Empire, acquired *ipso facto* the nationality of an Allied or Associated Power by virtue of the Treaty. However, some peace treaties also required the recognition of the new nationality by the successor State as a condition for the change of nationality. Most notably, Article 75 of the Treaty of Saint Germain, regarding nationals of the former Austrian Empire in territories acquired by Italy, stated that '[j]uridical persons established in the territories transferred to Italy shall be considered Italian if they are recognised as such either by the Italian administrative authorities or by an Italian judicial decision'. Similarly, under Article 74(3) of the Treaty of Versailles, '[j]uridical persons will also have the status of Alsace-Lorrainers as shall have been recognized as possessing this quality, whether by the French administrative authorities or by a judicial decision'.[22]

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de Couleurs d'Aniline et la Société Farbwerke vorm. Meister Lucius et Bruning (30 July 1921) 1 Recueil TAM 328.

21 Goldwasser (n 3).

22 Legal persons were not covered by the mechanism of reinstatement in French nationality set by the annex to section V of part III of the Treaty of Versailles, regarding Alsace-Lorraine. This mechanism gave rise to significant controversies. While para. 1 of the Annex provided for reinstatement in French nationality as from 11 November 1918, para. 4 provided that '[t]he French Government shall determine the procedure by which reinstatement in French nationality as of right shall be effected, and the conditions under which decisions shall be given upon claims to such nationality'. According to the French government, Alsace-Lorrainers eligible for reinstatement in French nationality had a 'virtual French nationality'. Although contested by the German government and by several German scholars (eg, Heinrich Triepel, *Virtuelle Staatsangehörigkeit: ein Beitrag zur Kritik der Rechtsprechung des französisch-deutschen gemischten Schiedsgerichtshofs* (Vahlen, 1921, also published in French)), this thesis was accepted by the French–German MAT (eg, *Chamant v Germany* (23 June and 25 August 1921) 1 Recueil TAM 361), which allowed the filing of more than 20 000 claims by Alsace-Lorrainers under art 296 Treaty of Versailles (Requejo Isidro and Hess (n 12), 269). In turn, by virtue of the case law of the French–German MAT on the criterion of control (see

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In the case of the *Böhmische Industriebank*, the MAT reached its conclusion on the basis of two facts: the seat of the corporation was in Prague at the time of the entry into force of the treaty and the corporation had been recognised by Czechoslovakia as one of its nationals. The respective weight of each factor is not explained by the MAT. On the one hand, according to Rühland, this award showed that the recognition by the successor State of a legal person as a national was required based on general practice, even when the applicable treaty did not include any specific provisions to that effect.[23] In support of this thesis, it can be observed by analogy that the automatic acquisition of the nationality of the successor State, although often practised until World War I, had been replaced by more complex systems also regarding individuals.[24] On the other hand, the award may also imply that legal persons do not automatically lose their nationality in case of State succession. Although the Böhmische Industriebank only owed its legal existence to the law of the Austrian Empire, the fact that this State ceased to exercise its sovereignty in the territory where the corporation had its seat did entail the loss of Austrian nationality, but not the loss of all nationalities, or *a fortiori* the legal disappearance of the corporation. While statelessness of individuals was a widespread phenomenon in the interwar period, there seems to be no evidence of statelessness of legal persons. Arguably, this concept was even more problematic than the concept of nationality of legal persons.[25] However, given the lack of any details in this respect in the reasoning of the MAT, it would be speculative to argue that this solution could have been applied in all cases of State succession. The fact that the Austrian Empire was dissolved may have played a role, but the reasoning could have been different for other kinds of State succession.

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below, Section 3.3.2), this allowed a broad interpretation of the jurisdiction of the MAT for claims regarding legal persons controlled by Alsace-Lorrainers.

23 Curt Rühland, 'Le problème des personnes morales en droit international privé' (1933) 45 Recueil des cours de l'Académie de droit international 387, 440.

24 For an overview of issues of nationality of individuals in the wake of post-World War I peace treaties, Rudolf Graupner, 'Nationality and State Succession' (1946) 32 Transactions of the Grotius Society 87.

25 The 1930 Protocol relating to a Certain Case of Statelessness, like the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, was only applicable to individuals, and does not even mention its inapplicability to other legal persons.

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3. The Uncertain Criteria of Nationality: Siège Social, Incorporation or Control?

Once the general idea that legal persons have a nationality had been admitted, MATs faced the need to determine the nationality of a given legal person. Case law was not consistent in this respect: different approaches and criteria were used. Overall, there was no uniform method to navigate a potentially complex set of norms and approaches of domestic, comparative and international law (3.1). Some MATs resorted to the criteria of *siège social* and place of incorporation, now well-established under general international law (3.2). The most original criterion, mainly applied by the French-German MAT, was control, ie the nationality of controlling shareholders. However, this criterion turned out to be controversial and, ultimately, not very influential in the history of international law (3.3).

3.1. Methodological Ambiguity

The choice of the legal system of reference to determine the nationality of a legal person is an issue of theoretical interest. It implies two overlapping questions: whether an entity is a legal person in a given legal system, and to which domestic legal system the legal person must be attached in terms of nationality. From a conflict of laws perspective, two options are theoretically available to answer both of these questions: a reasoning *lege fori*, ie following the rules of the legal system of the Tribunal, or a reasoning *lege causae*, ie following the rules of the relevant legal system. In principle, conflicts of competence, ie diverging outcomes following the application of the rules of several relevant legal systems, cannot be excluded.

One might expect that the question of whether an entity is a legal person in a given legal system must be answered *lege causae* by reference to the legal order pertaining to the alleged nationality. The basic legal qualification in this respect would depend on claims by the parties to the dispute, without any objective criteria set by MATs. The procedural framework of MATs encouraged this approach: depending on applicable provisions of the peace treaties, parties to each dispute necessarily had to show that a given entity was a national of one of the two States that had established the tribunal. Theoretically, the same method could be followed for the determination of the domestic legal system to which the legal person is attached in terms of nationality: nationality would be the corollary of the existence of the legal person in the domestic legal order of a given State. The most general statement in this direction was made

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the Anglo-Bulgarian MAT, according to which '(a) Company is assumed by the Treaty of Neuilly-sur-Seine to be the national of the Power to the laws of which it owe(d) its existence'.[26] In a similar vein, the US-Germany Claims Commission held, although only on the basis of US domestic law, that:

> [i]t is a settled general rule in America that regardless of the place of residence or citizenship of the incorporators or shareholders, the sovereignty by which a corporation was created, or under whose laws it was organized, determines its national character.[27]

This approach is compatible with the current state of public international law. As underlined by the International Court of Justice ('ICJ')in the *Barcelona Traction* case, regarding the determination of the nationality of a legal person, 'international law has had to recognize the corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction'.[28]

However, this approach was not systematically followed by MATs. Although incidental references to the law of the relevant domestic systems can be found in several awards, MATs choose between competing claims by the parties on the basis of their interpretation of the peace treaties and of comparative law. One of the difficulties of the situation faced by the MATs was due to the adoption by almost all belligerents of measures by which they unilaterally considered some corporations as enemy companies, even if the State of the alleged nationality did not recognise those corporations as its nationals. Moreover, the application of objective rules neutrally applicable to companies of any nationality implied the recognition of some equivalence between legal orders, which could have been difficult to reconcile with some provisions of the peace treaties, whose asymmetrical drafting specifically referred either to nationals of Allied Powers or to nationals of defeated countries.

MATs did not set a clear methodology and most awards remained ambiguous on the respective role of domestic law, comparative law, natural law and public international law. In this context, it is difficult to draw any conclusion on the general self-perception of MATs as full-fledged interna-

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26 Anglo–Bulgarian MAT, *James Dawson and son v Balkanische Handels und Industrie AG* (18 October 1923) 3 Recueil TAM 534.

27 US–Germany Claims Commission, *Agency of Canadian Car and Foundry Company v Germany* (30 October 1939) 7 RIAA 460, 466.

28 ICJ, *Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports 1970, 3, para 38.

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tional courts or joint tribunals of two States. The award in *James Dawson and son v Balkanische Handels und Industrie A.G.* is a good example of a pragmatic approach. Although explicit on the need to rely on domestic law to determine whether a legal person may be a national of a State, the Anglo-Bulgarian MAT combined domestic, comparative and natural law to interpret the Treaty of Neuilly. It started from the observation that Article 176 of the Treaty implied the existence of corporate nationality, and continued:

> It being therefore clear that a company may be a Bulgarian national, the question arises as to the test to be applied for the purpose of determining whether any particular company is to be considered a Bulgarian national within the meaning of the Treaty. According to English law the nationality of a corporate body is determined by reference to the law under which it is constituted; and it has not been suggested that the law of Bulgaria is different in this respect. Moreover, in the view of the Tribunal, the balance of convenience as well as of the weight of juridical opinion is in favour of the adoption of this criterion. Having regard to these considerations, as well as to the ordinary use of language, the Tribunal thinks that, if no indication of the intention of the High Contracting Parties could be found in the Treaty itself, it would be natural and reasonable to assume that they had intended that this test should be adopted in applying the provisions of the Treaty.[29]

In spite of nominal reliance on it, the Tribunal did not apply Bulgarian domestic law. Instead, the reasoning was based on the Treaty, as interpreted in the light of the law of the two States which had established the Tribunal (but not of other parties to the Treaty) and of 'juridical opinion'. In this case, this approach led to the conclusion that the place of incorporation was the relevant criterion of nationality. The defendant company was considered Bulgarian, although its directors and the majority of its shareholders were non-Bulgarians of different nationalities.[30] Overall, MATs did not focus on the international legal effects of domestic legal personality, but rather on the determination of the criteria of nationality.

29 *Dawson* (n 26), 535.
30 ibid, 537.

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3.2. *Siège social* and Incorporation

Several MATs chose two main criteria to determine the nationality of legal persons: the *siège social* and/or the place of incorporation. The *siège social* was explicitly considered as the relevant criterion by the Belgo-German MAT. In *Compagnie Internationale des Wagons-Lits* and *La Suédoise*, the Tribunal held that nationality, '*aux yeux de la jurisprudence traditionnelle de tous les pays, résulte du lieu où est établi le siège social, du moment que cet établissement n'est pas purement nominal*'.[31] Thus, the Tribunal considered that other criteria were not decisive: in *Compagnie Internationale des Wagons-Lits*, the presence of a technical and commercial direction and an administrative seat in Paris; in *La Suédoise*, the fact that all shareholders and directors were French and that the administrative seat of the corporation was in France. In both cases, the claimants were considered Belgian. However, the Tribunal's position raises doubts. Firstly, it seems to imply that, when the *siège social* is purely nominal, other criteria must be preferred, perhaps a global assessment of the dominant links with a State. Secondly, the outcome seems to be based on comparative law, even if at that time domestic legal systems were far from identifying a single nationality test for legal persons, and *a fortiori* from converging on the choice of the *siège social*. Such convergence could only be observed assuming that both the *siège social* and the place of incorporation were in the same State.[32] This seems to explain why *La Suédoise* was later quoted as an example of a close correlation between *siège social* and the place of incorporation as criteria of corporate nationality.[33] Nonetheless, the criterion of the *siège social* had been traditionally followed in both Belgian and French law, which were the two relevant legal systems in this case.

Converging rules of the relevant domestic legal systems, or converging views expressed by their governments, seem the main factor to explain several awards, even when they apparently reflect inconsistencies in the case law of a single MAT. In *Chamberlain & Hookham v Solar Zahlerwerke GmbH*, regarding a claim for debts under Article 296 of the Treaty of Versailles, the Anglo-German MAT chose the place of incorporation as the relevant criterion for corporate nationality. This conclusion was reached on the basis of convergent declarations made by Great Britain and Ger-

31 Belgo–German MAT, *Compagnie Internationale des Wagons-Lits* and *La Suédoise Grammont c Roller* (24 June 1922) 3 Recueil TAM 570, 573.

32 See above, Section 3.1.

33 International Law Commission, *Fourth Report on Diplomatic Protection, by Mr John Dugard, Special Rapporteur*, doc A/CN.4/530, 2003, para 33, note 95.

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many.[34] Thus, a company with limited liability incorporated in Germany according to German law was considered German, even though its whole capital was owned by British nationals (including the claimant, a company incorporated under English law). However, the place of residence was also relevant under Article 296 of the Treaty of Versailles, regarding debts 'due by a national of one of the Contracting Powers, residing within its territory, to a national of an Opposing Power, residing within its territory'. The case *in re Gebrüder Adt AG v Scottish Co-op Wholesale Society, Limited* concerned a company with its seat in Lorraine, incorporated under German law before the war, placed into liquidation by French authorities and transferred to Germany in 1919, before the entry into force of the Treaty of Versailles. The British and the German governments expressed diverging views on the place of residence of the company: for the former, it was at the place where it had its seat; for the latter, it coincided with the centre of the company's economic activities. The Anglo-German MAT did not consider it necessary to decide on this issue, as both places were in Germany. The Tribunal added that the German nationality of the corporation appeared 'in the special circumstances of the present case to be confirmed by Article 54 of the Treaty, according to which companies in Alsace and Lorraine acquired French nationality only if they had been recognised as possessing such quality either by the French Administrative Authorities or by a judicial decision',[35] which was not the case.

In spite of uncertainties on positive criteria for the determination of nationality, MATs' awards mainly avoided requiring an effective or genuine link with the relevant State: the timid reference to the 'not purely nominal' *siège social* in the case law of the Belgo-German MAT seems isolated. As they only chose between competing criteria for the determination of nationality, without setting a more general methodology, MATs also refrained from addressing the potential multiple nationalities of legal persons. Consequently, they did not test the predominant nationality, which they did for individuals.[36] On these issues, case law is in accordance with post-World War II public international law. Unlike for the nationality of

34 Anglo–German MAT, *Chamberlain & Hookham v Solar Zahlerwerke GmbH* (6 February 1922) 1 Recueil TAM 722, 725.

35 *in re Gebrüder* (n 3), 478–79.

36 Anglo–German MAT, *Hein* (26 April and 10 May 1922) 1 Annual Digest of Public International Law cases, case no 148, 216; French–German MAT, *Blumenthal* (24 April 1923) 3 Recueil TAM 616; *de Montfort* (10 July 1926) 3 Annual Digest of Public International Law Cases, case no 206, 279.

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individuals,[37] the ICJ did not request any genuine link as a condition for the nationality of legal persons to produce effects at the international level[38] and did not suggest that legal persons may have multiple nationalities. Nonetheless, absent a coherent approach, MATs had little influence on subsequent developments on the role of the *siège social* and the place and incorporation as criteria of the nationality of legal persons. Their case law is not crucial in the 1927 *Report on the nationality of commercial corporations and their diplomatic protection*, in which a committee of experts of the League of Nations proposed to determine the nationality of a commercial company by the law of the State under whose law it was formed and by the establishment of the actual seat of the company in the territory of the State in which the company was formed.[39] Similarly, when the ICJ had to clarify the customary rules in this field in *Barcelona Traction*, it held that '[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office'.[40] Whereas in *Barcelona Traction* these two criteria were cumulative, MATs' awards applied them alternatively, even if they were generally cumulatively met in the facts of each case.

3.3. The Theory of Control

A different criterion to determine corporate nationality was the nationality of the persons who effectively controlled the corporation. The control test was introduced in some provisions of the peace treaties following its

37 In *Nottebohm*, the ICJ required a genuine connection with the State to establish nationality as a condition of admissibility of diplomatic protection claims (*Nottebohm Case* (*second phase*), Judgment of 6 April 1955, ICJ Reports 1955, 4, 22–23). Although mentioned in oral pleadings, the case law of MATs was not quoted in the judgment.

38 ICJ, *Barcelona Traction* (n 28), para 70. In the oral pleadings of the case, it was argued that in *Agency of Canadian Car and Foundry Company v Germany*, the USA-Germany Claims Commission took the effectiveness of the link to the United States to conclude that the company was a US company (*Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (New Application: 1962)*, Verbatim record 1964/2, Plaidoirie de M. Sauser-Hall, 577). However, the Court did not include any reference to the case law of the MATs in the judgments in this case.

39 League of Nations Committee of Experts for the Progressive Codification of International Law, *Nationality of commercial corporations and their diplomatic protection* (League of Nations, 1927, V, 12).

40 See ICJ, *Barcelona Traction* (n 28), para 70.

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widespread application under domestic law during World War I (3.3.1). The test was mainly applied, with some inconsistencies, by the French-German MAT (3.3.2). It was often criticised by other MATs and scholars, at least as a criterion of corporate nationality, so that it was progressively abandoned in domestic and international practice (3.3.3).

3.3.1. Control of Companies in Domestic Law and Peace Treaties

The control test emerged during the First World War in most belligerent countries. Although with some nuances[41] and with the notable exception of the USA,[42] ordinary rules to determine the nationality of legal persons were abandoned; the nationality of corporations, or at least their enemy character for the purposes of war measures, was determined on the basis of the nationality of the controlling directors or shareholders. Some provisions of the peace treaties were inspired by wartime domestic practice. Article 297(b) of the Treaty of Versailles assimilated 'companies controlled by Germany' with 'German nationals' for the purposes of retention and liquidation of property.[43] In the Treaty of Versailles, this assimilation was also set in Article 74(1) regarding Alsace-Lorraine.[44] Under Article 297(a),

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41 In France, a corporation '*doit être assimilée aux sujets de nationalité ennemie dès que notoirement sa direction ou ses capitaux sont en totalité on en majeure partie entre les mains de sujets ennemis*' (Circulaire du Garde des sceaux (France) relative à la loi du 22 janvier 1916 (19 February 1916), quoted by Vaughan Williams and Matthew Chrussachi, 'The Nationality of Corporations' (1933) 49 Law Quarterly Review, 334, 337–38). Germany adopted a similar approach. In England, the enemy character in time of war was determined not by nationality but by voluntary residence among the enemy, so that even a British national could be considered as an enemy (ibid, 338–39). The authors also observe that the control test, which resulted from alarm from German economic penetration into Allied countries, 'was really the converse of the pre-War problem of companies incorporated abroad when it was held that they should have been incorporated at home, which had led to the formulation of the *siège social effectif* theory' (ibid, 337).

42 The United States adopted the criterion of incorporation also in special legislation to determine the enemy character of corporations (Williams and Chrussachi (n 41) 339–40).

43 The provision reads as follows: 'The Allied and Associated Powers reserve the right to retain and liquidate all property, rights or interests belonging on the date of the coming into force of the present Treaty to German nationals or companies controlled by them'.

44 The provision reads as follows: 'The French Government reserves the right to retain and liquidate all the property, rights and interests which German nationals

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> [t]he exceptional war measures and measures of transfer ... taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, *including companies and associations in which they are interested*, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners (emphasis added).

Under Article 297(e),

> The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, *including any company or association in which they are interested*, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer (emphasis added).

Similar provisions were contained in other peace treaties.[45] Interpreted literally, each of these provisions sees moral beings from a different perspective. Article 297(b) explicitly refers to 'control', which can be intended to be independent of the nationality and the *lex societatis*. This provision only refers to 'companies', which suggests that only moral beings with legal personality are covered. Articles 297(a) and (e) have in common the reference to 'interest', seemingly irrespectively of control (and *a fortiori* of nationality and *lex societatis*), and cover both companies and associations, ie all moral beings, irrespective of legal personality. In Article 297(e), it is clear that companies and associations are presented as a category of 'property, rights or interests'. Coherently, the Italo-German MAT decided that the right to make direct claims under Article 297(e) does not belong to the corporations or associations themselves, but only to individuals.[46] The different word order of Article 297(a) makes it also possible to consider that companies and associations are presented as a category of 'nationals of Allied or Associated Powers', but the text is ambiguous. The other linguistic versions of the Treaty replicate this ambiguity.[47]

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or societies controlled by Germany possessed in the territories referred to in Article 51 on November 11, 1918, subject to the conditions laid down in the last paragraph of Article 53 above'.

45 Art 249(a), (b) and (e) Treaty of Saint-Germain; art 232 (a), (b) and (e) Treaty of Trianon; art 177 (a), (b) and (e) Treaty of Neuilly.

46 Italo-German MAT, *Fratelli Giulini v Germany* (29 April 1924) 4 Recueil TAM 506.

47 The lack of a comma in the German version of art 297(a) suggests that companies and associations are a category of 'nationals of Allied or Associated Pow-

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3.3.2. The Theory of Control in the Case Law of the French-German MAT

The French-German MAT quickly started to use control as the relevant criterion to determine the nationality of corporations. Partnerships were not subject to the control test, as they had no legal personality.[48] In the leading case *Société du Chemin de fer de Damas-Hamah c la Compagnie du Chemin de fer de Bagdad*, both the plaintiff and the defendant companies had their seat and principal place of business in the Ottoman Empire, where they had been incorporated. The Tribunal found these facts to be 'mere formal circumstances without any real importance'. The relevant criterion was control, defined as 'effective preponderance apart from all considerations of absolute majority'. As the companies were controlled respectively by French and German nationals, they were considered respectively French and German. Accordingly, the Tribunal considered that it had jurisdiction to hear claims on a pre-War contract between the two companies, under Article 304(2) of the Treaty.[49]

This reasoning was unambiguously based on the assumption that corporations had a nationality. The Tribunal did not rely on considerations of conflicts of law or comparative law, even if it could have been argued that, at that time, the control test was widely used under domestic law. The outcome was presented as the result of the combination of literal, contextual and teleological interpretation of treaty provisions:

> With regard to the determination of the nationality of Joint-stock Companies, the Treaty of Versailles (art. 74, par. 1 and 297, litt. b) has formally consecrated the system of the predominance of the interests represented, called the 'control' system.
> While the provisions made in this respect cannot be considered as special or exceptional and as applying only to the hypothetic cases mentioned in regard thereto, it should be admitted that the same theory is to be applied whenever a claim made by a Company is the consequence of its determined nationality.

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ers': '*betreffend die Güter, Rechte und Interessen von Staatsangehörigen der alliierten oder assoziierten Mächte einschließlich der Gesellschaften und Vereine, an denen diese Staatangehörigen beteiligt waren*'. The relevant part of art 297(e) reads as follows: '*Gütern, Rechten und Interessen, einschließlich der Gesellschaften oder Vereinigungen, an denen sie beteiligt sind*'. However, only the French and English texts of the Treaty of Versailles are authentic (art 440(3)).

48 See above, Section 2.1.

49 French–German MAT, *Société du Chemin de fer de Damas-Hamah c la Compagnie du Chemin de fer de Bagdad* (31 August 1921) 1 Recueil TAM 401.

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> Besides, it is quite conformable to the spirit of the Treaty to take a greater account of the real economic circumstances than of the merely outward circumstances, and therefore to determine the nationality of the Companies according to the importance of the interests therein represented rather than to the apparent label of said interests such as, in the present instance, the name of the firm and the place of business.[50]

This case was quoted in *Elmores Metall AG c Grunberg*, where a corporation had its principal place of business in Germany, but with English managers and a majority of English shareholders.[51] The theory of control was confirmed in *Société des Salines du Haras c Deutsche Bank*, regarding a 'company having its principal business in Alsace-Lorraine but who, having regard not only to the distribution of capital stock but to the composition of its Board of Directors, was undeniably controlled by French interest'.[52] The French-Bulgarian MAT also applied the control test, on the basis of the predominant interests in a corporation's capital. In *Régie générale des chemins de fer et travaux publics et Chemin de fer jonction Salonique-Constantinople c Etat Bulgare*, it refused an exception for incompetence based on the allegation that the applicant companies were not French, as they had been organized according to Ottoman law. For the Tribunal, the nationality of companies was to be determined, in view of liquidation under the Treaty of Neuilly, not by the law under which companies were constituted or by their principal place of business, but by the interests controlling them. Given the prevalence of French funds, the claimant companies were considered French.[53]

The controlling persons could be not only individuals, but also other corporations. In *Société Anonyme "La Providence" à Rehon c Roheisenverband GmbH*, the French-German MAT considered the branch of a company whose *siège social* was in Belgium as Belgian, as the mother company had financial and administrative control over it.[54] This case shows that, when

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50 ibid, 402.

51 French–German MAT, *Elmores Metall AG c Grunberg* (13 May 1924) 5 Recueil TAM 777.

52 French–German MAT, *Salines du Haras c Deutsche Bank* (24 July 1926) 6 Recueil TAM 859.

53 French–Bulgarian MAT, *Régie générale des chemins de fer et travaux publics et Chemin de fer jonction Salonique-Constantinople c Etat Bulgare* (12 November 1923) 3 Recueil TAM 954, 954–55.

54 Interestingly, the French version of the award used both the term '*filiale*' and the term '*succursale*' to describe the company seated in France: French–German MAT,

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applied to complex corporate structures, the control test could potentially entail a difficult search for ultimate individual interests behind several corporate veils. For the sake of consistency, it must be supposed that in this case, the individuals controlling the mother company were also Belgian. Already in *Société du Chemin de fer*, the Tribunal made clear that control could exist even absent an absolute majority of shares and of posts of director.[55] This was further clarified in *De Neuflize c Etat allemand et Deutsche Bank*: 'what must be considered is not only the nationality of the persons owning the majority of the shares but also all the administrative, financial and other elements which are liable to ensure the control of a company to the nationals of a certain Power'.[56] In this case, there was neither a majority of French shareholders nor a French majority in the management and administration, which led to an absence of French nationality.

However, blatant inconsistencies can be found in the case law of the French-German MAT, which cannot be explained by the facts of each case or by the drafting of Treaty provisions. In *Charbonnages Frédéric-Henri c Etat allemand*, the Tribunal was confronted with a claim by a joint-stock company (*société anonyme*) composed mostly of French shareholders but having its principal place of business in Germany and constituted under German law. The Tribunal had to determine whether the company had an enemy character for the purposes of Article 297(a) and (e) of the Treaty of Versailles, regarding damage or injury inflicted by German exceptional war measures. It considered that the relevant criterion was the national law of the majority of shareholders, and not the principal place of business.[57] As such, this position is possible to reconcile with the reasoning of *Société du Chemin de fer*, rendered only a month earlier. Whilst it is true that control and the majority of shareholders are not perfectly equivalent, there was no doubt that French shareholders controlled the company. After all, the reference to the majority of shareholders in *Charbonnages Frédéric-Henri* resulted from the parties' arguments, presented in pleadings before the award in *Société du Chemin de fer*. Moreover, specific requirements for the determination of the enemy character of corporations regarding exceptional war measures under Article 297(a) and (e) of the Treaty of Versailles

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Société Anonyme "La Providence" à Rehon c Roheisenverband GmbH (13 June 1924) 5 Recueil TAM 780, 780–81.

55 ibid.

56 French–German MAT, *De Neuflize c Etat allemand et Deutsche Bank* (2–5 June 1928) 8 Recueil TAM 158.

57 French–German MAT, *Charbonnages Frédéric-Henri c Etat allemand* (30 September 1921) 1 Recueil TAM 422.

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did not necessarily call into question the criteria for the determination of nationality in general, which could be used for other provisions of the Treaty.

Nevertheless, in a rare example of detailed theoretical development, the Tribunal explicitly rejected the very concept of nationality of corporations, on grounds that seem at odds not only with the case law of other MATs, but also with other cases of the French-German MAT:

> *'les sociétés anonymes n'ont pas de nationalité proprement dite, puisqu'une telle nationalité, d'une part, confère des droits (tels que le droit de vote, le droit d'être nommé à des fonctions publiques, la protection contre l'extradition. etc.) et, d'autre part, impose des obligations (telles que le service militaire) qui ne peuvent s'appliquer qu'aux personnes physiques'.*[58]

This position was not rare in contemporary scholarship, but it is not totally persuasive. While it is undisputed that nationality has different legal effects for individuals and for legal persons, this fact does not necessarily imply that corporations cannot have a nationality. Moreover, most of the rights and obligations mentioned in the *dictum* were and are not consubstantial to nationals, but reserved to some categories of nationals. The Tribunal justified its position by the distinction between the *lex societatis* and nationality. Regarding the determination of the *lex societatis*, the Tribunal expressed its preference for the criterion of the *siège social*, but suggested that it could only operate in conjunction with the place of incorporation:

> *les sociétés anonymes, nées d'un contrat entre des personnes physiques (les fondateurs), doivent leur existence comme personnes morales à une fiction légale;*
> *... les lois, en créant cette fiction, ont établi des règles pour la formation des sociétés, les pouvoirs de leurs organes, la répartition de leurs bénéfices, leur dissolution, etc., règles de droit privé visant les relations des sociétés avec leurs actionnaires, avec leurs administrateurs et avec les tiers;*
> *... la loi régissant cette matière est la loi de l'Etat où la société a été formée, où elle a son siège social et où elle a été enregistrée;*

58 Excerpts quoted in French were not translated *in extenso* in the summary, which was published in French, English, and Italian. Unofficial translation: '*sociétés anonymes* do not have a nationality as such, since such a nationality, on the one hand, confers rights (such as the right to vote, the right to be appointed to public office, protection against extradition, etc) and, on the other hand, imposes obligations (such as military service) which can only be applied to natural persons'.

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> *... il en résulte qu'une société anonyme est, au point de vue du droit privé, soumise aux dispositions de tel code ou de telle loi spéciale en vigueur dans le pays où elle a son siège social sans qu'elle ait obtenu la nationalité de ce pays.*[59]

The Tribunal did not contest that, under the *lex societatis*, corporations had a legal personality. However, regarding the issue of nationality, merely intended as a condition for the jurisdiction of the tribunal and the admissibility of claims, the Tribunal only focused on shareholders:

> *en dehors de la personnalité juridique, représentée par la société même, il faut considérer les actionnaires, c'est-à-dire les personnes qui, en possédant les actions, participent aux bénéfices et après la dissolution de la société au solde de la liquidation, tandis que réunis en assemblée générale, ils exercent le pouvoir suprême et contrôlent la gestion du conseil d'administration;*
> *... ces actionnaires étant des personnes physiques, peuvent avoir une nationalité;*
> *... la nationalité de la majorité des actionnaires détermine le caractère de l'entreprise qui forme l'objet de la société anonyme;*
> *... au regard de ces faits la question est de savoir si, aux termes de l'article 297, e du Traité de paix de Versailles, la recevabilité de la demande doit être jugée d'après la loi du siège de la société ou bien d'après la loi nationale de la majorité des actionnaires.*[60]

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59 *Charbonnages Frédéric-Henri* (n 57) 427–28. Unofficial translation: 'public limited companies, born of a contract between natural persons (the founders), owe their existence as legal persons to a legal fiction;
... the laws, in creating this fiction, have established rules for the formation of companies, the powers of their organs, the distribution of their profits, their dissolution, etc, rules of private law relating to the relations of companies with their shareholders, with their directors and with third parties;
... the law governing this matter is the law of the State where the company was formed, where it has its registered office and where it has been registered;
... it follows that a *société anonyme* is, from the point of view of private law, subject to the provisions of such and such a code or special law in force in the country where it has its registered office without having obtained the nationality of that country'.

60 ibid. Unofficial translation: 'apart from the legal personality, represented by the company itself, we must consider the shareholders, ie the persons who, by owning the shares, participate in the profits and, after the dissolution of the company, in the balance of the liquidation, when meeting in a general assembly exercise the supreme power and control the management of the board of directors;
... these shareholders being natural persons, may have a nationality;

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This excerpt is particularly significant because the Tribunal could have analyzed the admissibility of claims under Article 297(a) and (e) of the Treaty as a specific issue, separate from that of nationality. This reasoning was reproduced *in extenso* in *Jordaan et Cie c. Etat allemand*, a case that shows that the aim of this approach was not to systematically broaden the jurisdiction of the Tribunal. The case concerned a *société en commandite* having its principal place of business in France. The Tribunal recalled that, under French law, the company had its own legal personality.[61] However, as the capital was held mainly by Dutch nationals, the Tribunal had no jurisdiction. Interestingly, this case referred to the majority of capital, a criterion which is much more economically relevant for capital companies than the majority of shareholders.

Contemporary scholars assessed this approach in diverging ways. While Travers criticised the distinction between public and private law concepts as arbitrary,[62] Lipstein praised the distinction between nationality and *lex societatis*: in his view, other approaches wrongly conflated these two concepts.[63] Be that as it may, the distinction between these two concepts only accounts for part of the case law of the French-German MAT. *Société du Chemin de fer* and *Charbonnages Frédéric-Henri* reflect two different ways of piercing the corporate veil. They differ on the theoretically crucial issue of the existence of nationality of corporations and on the test applicable to the jurisdiction of the Tribunal and the admissibility of claims (control or the majority of shareholder, or of capital). Although they are different, both approaches are centred on shareholders rather than the corporation and imply a limitation of international legal effects of the legal personality of corporations. The 'spirit of the Treaty' mentioned in *Société du Chemin*

... the nationality of the majority of the shareholders determines the character of the business which forms the object of the *société anonyme*;
... in the light of these facts the question is whether, under the terms of Article 297(e) e of the Versailles Peace Treaty, the admissibility of the claim must be judged according to the law of the company's seat or according to the national law of the majority of the shareholders'.

61 French–German MAT, *Jordaan et Cie c Etat allemand* (30 November 1923) 3 Recueil TAM 889, 892.

62 Travers (n 6) 21.

63 Kurt Lipstein, 'Conflict of Laws before International Tribunals (A Study in the Relation between International Law and Conflict of Laws)' (1941) 27 Transactions of the Grotius Society 142, 162. In general terms, the distinction is also approved by Ernst Marburg, *Staatsangehörigkeit und feindlicher Charakter juristischer Personen unter besonderer Berücksichtigung der Rechtsprechung der Gemischten Schiedsgerichte* (Vahlen 1927) 12.

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de fer is the will to ensure effective reparation to the affected individuals. This will corresponded to the rationale of the adoption of the control test under domestic law during the war, according to which '*derrière la fiction du droit privé se dissimule la personnalité ennemie elle-même vivante et agissante*'.[64] It is, therefore, logical that, in *Charbonnages Frédéric-Henri*, the French-German MAT found that:

> [m]easures taken against Joint-stock Companies having their principal place of business in Germany and whose shareholders are mostly alien subjects are not to be excepted from the exceptional war measures taken by Germany against alien property.

After all, this statement, which was coherent with German law at the time of the adoption of these measures, shows that the application of the theory of control at the international level was the direct continuation of war measures at the domestic level.

3.3.3. The Rejection of Control as a General Criterion of Corporate Nationality

The piercing of the corporate veil for the purposes of public international law was met with almost unanimous criticism. Several other MATs rejected the control test. In *Chamberlain and Hookham Limited v Solar Zahlerwerke*, the Anglo-German MAT acknowledged that:

> the opinion formerly generally adopted and which attributed to a juridical person the nationality of the State under whose laws it is created and in whose territory it has its seat, has been much shaken during the war and that good reasons may be urged for taking into consideration, at any rate during war time, what might be called the human substance of a juridical person, considering as such either the corporators or those who control the company's affairs.

However, the Tribunal dismissed the control test, invoked by the defendant on the basis of an explicit reference to *Société du Chemin de fer*.[65] So did, implicitly, the Belgo-German MAT in *La Suédoise*, where the defendants had argued that all shareholders were French.[66] The Italo-German

64 Circulaire du Garde des sceaux (France) relative à la loi du 22 janvier 1916 (19 February 1916) quoted by Williams and Chrussachi (n 41) 338.

65 Anglo–German MAT, *Chamberlain & Hookham v Solar Zahlerwerke GmbH* (6 February 1922) 1 Recueil TAM 722, 724.

66 *La Suédoise* (n 31) 572.

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MAT also clarified that its interpretation of Article 297(e) of the Treaty of Versailles in *Fratelli Giulini* was not based on the control test.[67] The rejection of the control test was particularly explicit in *Dawson*, where the Anglo-Bulgarian MAT held that the Treaty of Neuilly:

> nowhere recognises that the interest in the capital of a company of individual nationals of Powers other than that Power in accordance with the laws of which the company is constituted, or the control by such nationals of the affairs of a company, affords any test as to the nationality of the company itself.[68]

The position of these MATs can be explained by the assumption that the control test was only relevant to apply Article 297(b) of the Treaty of Versailles (and equivalent provisions in other peace treaties), which explicitly referred to it regarding the seizure and liquidation of property. For all other issues, it was intended that corporate nationality must be determined in accordance with pre-war criteria.

The difficulty to reconcile the reasoning of all awards is manifest in *Van Peteghem c. Staackmann, Horschitz et Tielecke*, where the Belgo-German MAT adopted an original position. In this case, a partnership (*société en nom collectif*) whose principal place of business was in Belgium was considered as German concerning the application of Article 299 of the Treaty of Versailles.[69] Two of the three partners had been recognized as Germans. At first sight, this outcome can be explained by the lack of legal personality of the partnership, which allows a consistent interpretation of the case law of the Belgo-German MAT and the French-German MAT.[70] However, the Tribunal's decision is based on a more complex combination of international law and domestic law, which seems inconsistent with the approaches later followed in *Caisse d'assurances des Glaceries*. The Tribunal started distinguishing the issue of nationality and the issue of the determination of the enemy character of legal persons:

> *pour l'application de la section V du Traité, on doit laisser de côté les théories traditionnelles sur la nationalité des sociétés et se demander simple-*

67 Italo–German MAT, *Fratelli Giulini v Germany* (29 April 1924) 4 Recueil TAM 506, 509.

68 *Dawson* (n 26) 537.

69 Belgo–German MAT, *Van Peteghem c Staackmann, Horschitz et Tielecke* (29 July 1922) 2 Recueil TAM 374.

70 See above, Section 2.1.

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> *ment si les personnes parties à un contrat doivent être "considérées comme ennemies" au sens du Traité'.*[71]

This position is not incompatible with the reasoning followed in *Compagnie Internationale des Wagons-Lits* and *La Suédoise*, which could in no way be considered enemy corporations. To determine the nationality of the partnership, the Tribunal applied the control test, but only after having determined that the partnership was an enemy person vis-à-vis the claimant, whose situation was not assessed on the basis of its nationality, but on the basis of its residence:

> *d'après le paragraphe 1 de l'annexe A la section V, elles [les personnes parties à un contrat] sont considérées comme ennemies dès le jour où le commerce a été interdit par la loi à laquelle ne fût-ce qu'une des parties était soumise;*
> *... en 1'espèce, le requérant ayant résidé en Angleterre pendant la guerre, il était soumis aux proclamations anglaises des 9 septembre 1914 et 16 février 1915, qui interdisaient aux personnes résidant en Angleterre de faire le commerce avec des personnes résidant en pays ennemi ou en pays occupé;*
> *... à son égard la Socité Staackmann, Horschitz et Cie était par conséquent une société ennemie;*
> *... comme société ennemie, elle doit être qualifiée de société allemande, vu la nationalité de la majorité des associés qui la composent.*[72]

However, the Tribunal followed a slightly different approach in *Peeters van Haute et Duyver c Trommer et Gruber*. A partnership having its registered office and principal place of business in Belgium had been considered

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71 *Van Peteghem* (n 69) 777. Unofficial translation: 'for the application of Section V of the Treaty, one must set aside traditional theories of corporate nationality and simply ask whether persons who are parties to a contract are to be "considered enemies" within the meaning of the Treaty'.

72 ibid, 777–78. Unofficial translation: 'according to paragraph 1 of Annex A, Section V, they [the parties to a contract] are considered to be enemies from the day on which trade was prohibited by the law to which even one of the parties was subject;
... in the present case, as the applicant was resident in England during the war, he was subject to the English proclamations of 9 September 1914 and 16 February 1915, which prohibited persons resident in England from trading with persons resident in enemy or occupied countries;
... in its respect the company Staackmann, Horschitz et Cie was consequently an enemy company;
... as an enemy company, it must be qualified as a German company, in view of the nationality of the majority of its members'.

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as Belgian according to Belgian law in force at the date of the litigious contract in June 1914, notwithstanding the German nationality of one of the partners. Later on, the partnership was placed under sequestration in Belgium according to a Belgian law of 10 November 1918. For the Tribunal, under Article 297(b) of the Treaty of Versailles, the company must be considered as German in every respect connected with its liquidation.[73] The main line of reasoning consists in applying the Belgian legislation at the relevant time. The choice of the Belgian legal order to determine the enemy character of the corporation makes sense, as the decision to liquidate the company was adopted under Belgian law, which was, therefore, applied not as *lex societatis*, but as *lex causae* of the relevant operation, ie liquidation. Interestingly, the Tribunal did not exclude that, in some cases, domestic law may not be applicable because of its 'arbitrary' character:

> *on ne saurait objecter que ce refus de reconnaître le caractère belge de la défenderesse constitue, de la part de la Belgique, un acte arbitraire qui ne lie pas une juridiction telle que le T.A.M., Tribunal international constitué conjointement par les deux gouvernements.*[74]

The criteria that would have allowed the qualification of domestic law as 'arbitrary' were not explained, but international law is relevant in this respect:

> *lesdites lois belges sont conformes, en effet, à l'art. 297 du Traité de paix, qui, dans sa lettre b, permet aux puissances alliées de liquider les biens des ressortissants allemands, ainsi que des sociétés "contrôlées par eux" sur le territoire de ces puissances.*[75]

Only then did the Tribunal address the issue of nationality from the point of view of the Treaty of Versailles in general. Regarding the liquidation, determining the enemy character of the company amounted to establishing irreversibly its German nationality:

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73 Belgo–German MAT, *Peeters van Haute et Duyver c Trommer et Gruber* (20 October 1922) 2 Recueil TAM 384.

74 ibid, 388. Unofficial translation: 'it cannot be objected that this refusal to recognise the Belgian character of the defendant constitutes, on the part of Belgium, an arbitrary act which is not binding on a court such as the M.A.T., an international tribunal set up jointly by the two governments'.

75 ibid. Unofficial translation: 'the said Belgian laws are indeed in conformity with Art. 297 of the Peace Treaty, which, in its letter b, allows the Allied Powers to liquidate the property of German nationals, as well as companies "controlled by them" on the territory of these Powers'.

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on pourrait néanmoins prétendre que le Traité de paix n'attribue pas la nationalité allemande aux sociétés contrô1ées par des Allemands, mais se borne à les assimiler aux ressortissants allemands quant aux droits de rétention et de liquidation conférés aux puissances allies, sans toucher à leur nationalité qui reste déterminante à tous autres égards;
... cette objection est, elle aussi, sans portée;
... traiter une société comme allemande au point de vue de sa liquidation et la liquider, c'est-à-dire la faire disparaître, équivaut en effet à la transformer définitivement en société allemande;
... à ne s'en tenir même qu'au texte du Traité de paix, on ne voit pas comment on expliquerait la lettre b de l'art. 297 autrement que par l'attribution du caractère ennemi aux sociétés contrôlées par des ressortissants ennemis;
... une dernière objection peut être opposée, c'est que l'article 297 ne modifie pas d'une manière générale les règles ordinaires sur la nationalité des sociétés, mais qu'il se contente de considérer certaines sociétés des pays belligérants comme sociétés ennemies pour autant que l'exige leur liquidation et le règlement des mesures de guerre, mais que, dans l'application des art. 299 et 304 b du Traité, c'est-à-dire pour les différends tels que le présent litige, relatifs aux contrats conclus avant la ratification du Traité de paix, la prépondérance des intérêts ennemis ne suffit pas à modifier la nationalité d'une société;
... cette théorie pourrait, semble-t-il, être défendue avec succès s'il s'agissait d'une société qui, après avoir été traitée comme ennemie pendant la guerre, aurait repris aujourd'hui sa vie de société nationale, par exemple d'une société allemande mise sous séquestre en Allemagne et aujourd'hui libre du séquestre en application de l'art. 297 a du Traité;
... en l'espèce, tout au contraire, la Société Trommer et Gruber n'existe plus que pour sa liquidation et ... le seul moyen d'éviter le risque de décisions contradictoires el de conflits de compétence est, de reconnaître à cette société une seule et unique nationalité pour tout ce qui se rapporte à sa liquidation, qu'elle soit opérée par le séquestre belge ou par l'associé allemand établi maintenant en Allemagne;
... il convient, en résumé, de considérer la Société Trommer et Gruber, mise sous séquestre comme société allemande en Belgique, où elle a son siège, comme société allemande pour tout ce qui concerne sa liquidation, et notamment pour le présent procès, qui n'est qu'un épisode de cette liquidation.[76]

76 ibid, 389. Unofficial translation: 'it could be argued, however, that the Peace Treaty does not confer German nationality on German-controlled companies, but merely assimilates them to German nationals with regard to the right of

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This particular way to make sense of Article 297(b) of the Treaty of Versailles while maintaining the theoretical distinction between nationality and enemy character is persuasive. However, it differs not only from the position of other MATs but also from *Van Peteghem c Staackmann, Horschitz et Tielecke*.

Given these disparate approaches, it is not surprising that the Permanent Court of International Justice ('PCIJ') avoided endorsing the control test from the point of view of general international law. In cautious terms, it suggested that, while this test could be chosen for specific purposes in treaty provisions, it could not be assumed to be the criterion of corporate nationality:

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retention and liquidation conferred on the Allied Powers, without affecting their nationality, which remains decisive in all other respects;
... this objection is also irrelevant;
... to treat a company as German from the point of view of its liquidation and to liquidate it, that is to say to make it disappear, is in fact equivalent to transforming it definitively into a German company;
... even if one were to confine oneself to the text of the Peace Treaty, it is difficult to see how letter b of Art. 297 could be explained other than by the attribution of enemy status to companies controlled by enemy nationals;
... a final objection may be raised, namely that Article 297 does not modify in a general way the ordinary rules on the nationality of companies, but merely considers certain companies of the belligerent countries as enemy companies in so far as their liquidation and the settlement of war measures require, but that, in the application of Arts. 299 and 304(b) of the Treaty, ie for disputes such as the present one, relating to contracts concluded before the ratification of the Peace Treaty, the preponderance of enemy interests is not sufficient to change the nationality of a company;
... this theory could, it would seem, be successfully defended in the case of a company which, after having been treated as an enemy during the war, would today have resumed its life as a national company, for example a German company placed in receivership in Germany and now free from receivership pursuant to Art. 297(a) of the Treaty;
... in the present case, on the contrary, the Trommer & Gruber company exists only for its liquidation and ... the only way to avoid the risk of contradictory decisions and conflicts of jurisdiction is to recognise that this company has a single nationality for all matters relating to its liquidation, whether it is carried out by the Belgian receiver or by the German partner now established in Germany;
... it is appropriate, in short, to consider the company Trommer & Gruber, placed in receivership as a German company in Belgium, where it has its registered office, as a German company for all matters relating to its liquidation, and in particular for the present lawsuit, which is only one episode in this liquidation'.

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> The Geneva Convention [of 15 May 1922 between Germany and Poland regarding Upper Silesia] has adopted, as regards the expropriation regime and in so far as companies are concerned, the criterion of control; this, however, does not prevent other criteria which might be applicable in respect of the nationality of juristic persons from possessing importance in international relations, from other standpoints, for instance, from the standpoint of the right of protection.[77]

Contemporary scholars (from both Allied Powers and defeated countries) generally disapproved of the use of the control test as a corporate nationality test. Rühland argued that the Treaty of Versailles itself distinguished nationality and control, so that the latter was only relevant for specific purposes.[78] Even beyond treaty interpretation, authors did not have the same assessment of what constituted 'mere formal circumstances without any real importance' as the French-German MAT in *Société du Chemin de fer*. For Marburg and Travers, nationality and control should have been clearly distinct: the former is stable throughout the life of the corporation, while the latter depends on contingencies and is therefore temporary.[79] Similarly, Lipstein considered the control test dangerous, unreliable and inaccurate, as it could lead to heavy fluctuations in corporate nationality.[80] Vaughan Williams and Chrussachi shared this opinion and observed that the test could only be used in practice because the outbreak of the war had crystallized the then existing state of things.[81] Marburg seems to be the only author who defined as 'progressive' ('*fortschrittlich*') the adoption of the control test in the domestic law of several States during the war.[82] This caused criticism by Morstein Marx, who considered the case law of the French-German MAT as an 'opportunistic creation' ('*Zweckschöpfung*')

77 PCIJ, *Certain German Interests in Polish Upper Silesia (Merits)*, 25 May 1926, Series A, n 7, para 240

78 Rühland (n 23) 418–19. Art 244, annex 3, para 3 Treaty of Versailles mentions '(t)he ships and boats mentioned in paragraph 1 include all ships and boats which (a) fly, or may be entitled to fly, the German merchant flag; or (b) are owned by any German national, company or corporation or by any company or corporation belonging to a country other than an Allied or Associated country and under the control or direction of German nationals'. Article 288, annex, para 5 refers to 'a company incorporated in an Allied or Associated State had rights in common with a company controlled by it and incorporated in Germany'.

79 Marburg (n 63) 107; Travers (n 6), 58–60, 83–84, and 98–99.

80 Lipstein (n 63) 163.

81 Williams and Chrussachi (n 41) 342.

82 Marburg (n 63) 41.

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justified by egoism and the necessity of war ('*sacro egoismo und Kriegsnot*').[83] Overall, the control test was perceived as an unfortunate but ephemeral consequence of the war.[84]

After World War II, Paul de Visscher retrospectively considered that the control test did not reflect customary international law of the interwar period and in no way influenced subsequent customary law.[85] The fate of the control test at the international level was also affected by the fact that it was abandoned at the domestic level some years after the end of the War. For example, the French Cour de cassation reverted to the traditional criterion of *siège social* to determine corporate nationality in some judgments starting from 1928, and even more clearly after World War II.[86] Seizure and liquidation measures were revived during World War II, but in the drafting and the application of post-World War II treaties, it was clear that the control test only applied to seizure and liquidation of enemy property, not to the determination of corporate nationality.[87] Although MATs' case law on corporate nationality once again attracted some attention immediately after World War II,[88] the control test became a tool of the past.

4. *The Unstable Interplay between Corporate Nationality and Shareholders' Rights*

Shareholders' claims are by definition distinct from claims by corporations. However, MATs' case law in this respect is relevant to analyse corpo-

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83 Fritz Morstein Marx, book review (1928) 53(1) Archiv des öffentlichen Rechts 151, 152.

84 Joseph Charles Witenberg, 'La recevabilité des réclamations devant les juridictions internationales' (1932) 41 Recueil des cours de l'Académie de droit international 1, 75. However, the author considered the admissibility of shareholders' claims a '*tendance [qui] semble mieux correspondre aux aspirations modernes*' (ibid).

85 Christian Dominicé, *La notion du caractère ennemi des biens privés dans la guerre sur terre* (Droz 1961), 148–49; Paul De Visscher, 'La protection diplomatique des personnes morales' (1961) 102 Recueil des cours de l'Académie de droit international 395, 444.

86 Yvon Loussouarn, 'La condition des personnes morales en droit international privé' (1959) 96 Recueil des cours de l'Académie de droit international 443, 464–71.

87 De Visscher (n 85) 448 and 456–57.

88 Pieter N Drost, *Contracts and Peace Treaties* (Nijhoff, 1948), 40–58; John Hanna, 'Nationality and War Claims' (1945) 45(3) Columbia Law Review 301, 323–39.

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rate nationality, as solutions were inspired by different conceptions of the corporate veil. Unsurprisingly, this led to diverging approaches.

Some MATs refused to pierce the corporate veil for the determination of the nationality of the corporation, so that they considered that they had no jurisdiction to hear claims by shareholders. In *Magyar Altalanos Hitelbank (Banque générale de crédit hongroise) c Etat SHS*, the Hungaro-Yugoslav MAT found that shareholders may not act on behalf of their company.[89] The shareholders were Hungarian, but the company had its *siège social* and its main place of business in Germany, which led the Tribunal to conclude that the company was of German nationality. This case was quoted with approval in the award in *Österreichische Credit Anstalt für Handel und Gewerbe et Wiener BankVerein, réquerantes, Deutsche Industrie gesellschaft AG intervenante, c Etat SHS.*[90] Claims were brought, under Article 249(b) of the Treaty of Saint-Germain, on the liquidation of the property of nationals of the former Austrian Empire, by Austrian shareholders of a German company. They invoked the Austrian control of the company and intended to enforce the claims of the company against the defendant State. The Tribunal considered that it had no jurisdiction under the Treaty of Saint-Germain: the company, created under German law and having its principal office in Germany, was of German nationality. Other arbitral tribunals had already adopted the same approach in diplomatic protection cases before the war.[91]

On the contrary, in some cases, the French-German MAT considered that it had jurisdiction to settle disputes brought by French shareholders. In *Huta Bankowa c Etat allemand*, the Tribunal admitted claims by shareholders of a corporation based on their right to obtain the reparation of damage arising from the alleged decrease in the value of their shares.[92] There is no contradiction with the distinction between the shareholders and the corporation: the Tribunal clarified that shareholders may not individually avail themselves of the rights of their company, which is a separate

89 Hungaro–Yugoslav MAT, *Magyar Altalanos Hitelbank (Banque générale de crédit hongroise) c Etat SHS* (2 April 1927).

90 Austro–Yugoslav MAT, *Österreichische Credit Anstalt für Handel und Gewerbe et Wiener BankVerein, réquerantes, Deutsche Industrie gesellschaft AG intervenante, c Etat SHS* (8 September 1927) 7 Recueil TAM 794.

91 French–Chilean Arbitral Tribunal, *Guano Case* (5 July 1901) 15 RIAA 125, 318; Netherlands–Venezuela Mixed Claims Commission, *JM Henriquez* (1903) 10 RIAA 714; *Baasch et Römer* (1903) 10 RIAA 723.

92 Franco–German MAT, *Huta Bankowa c Etat allemand* (7 December 1922) 3 Recueil TAM 325.

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legal entity. This line of reasoning had already been implicitly adopted in pre-war diplomatic protection cases[93] and was later confirmed in the ICJ's case law.[94]

In *Wenz et Cie c Etat allemand*, claims were brought by a new partnership including only French partners of a former French-German partnership. Claims were found admissible, but only up to the amount of the interests of French partners, while claims regarding the interests of former German partners were found inadmissible.[95] This award is coherent with the rest of the case law of the French-German MAT on partnerships. As in *Mercier*,[96] the new partnership did not have a separate legal personality and thus a nationality different from that of partners. Thus, it was considered French for the purposes of Article 292 of the Treaty of Versailles. Moreover, the exclusion of German partners of the former partnership during the war was adopted by a French legal decision. Under these circumstances, the creation of a new French partnership was not the result of a choice of the partners and intervened before the entry into force of the Treaty of Versailles: even modern-day concepts like abuse of corporate nationality[97] would be inapplicable.

The Tribunal highlighted further consequences of the crucial role of the nationality of partners in *Wernlé et Cie c Etat allemand*,[98] which explicitly refers to *Wenz*. Claims were brought by French partners in proportion to their share in the capital of a partnership established in Germany without legal personality. Even these claims were considered admissible, which can be explained by the lack of any corporate veil. The Tribunal explicitly observed that the partnership, a *société en commandite*, lacked a separate legal personality and that the theory of control was not applicable. This line of reasoning was not new either. Already in *Hargous v Mexico*, the umpire awarded a US individual reparation of damage suffered by a partnership

93 *Ruden (United States v Peru)* (1870) 2 Moore's Arbitrations 1653; *Delagoa Bay Company (United States v Portugal)* (29 March 1900) 2 Moore's Arbitrations 1853; *El Triunfo (United States v El Salvador)* (8 May 1902) 15 RIAA 467; *Cerruti (Italy v Colombia)* (6 July 1911) 11 RIAA 377; *Alsop (United States v Chile)* (15 July 1911) 11 RIAA 349. See P De Visscher (n 85) 469–70.

94 *Ahmadou Sadio Diallo*, Preliminary Objections, Judgment of 24 May 2007, ICJ Reports 2007, 582, para 64.

95 Franco–German MAT, *Wenz et Cie c Etat allemand* (22 December 1922) 2 Recueil TAM 780.

96 See above, *Mercier* (n 3).

97 See eg Zongnan Wu, 'Abuse of Rights in the Context of Corporate Nationality Planning' (2019) 4(1) *European Investment Law and Arbitration Review Online* 1.

98 Franco–German MAT (25 June 1927) 7 Recueil TAM 612.

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(without legal personality) in proportion to his shares (two-thirds of the capital, while the remaining third was owned by a German).[99]

The admissibility of shareholder claims was also partially accepted in US-German relations.[100] In *Standard Oil v Germany, Sun Oil v Germany and Pierce Oil Corporation v Germany*, the US-German Claims Commission found that claims were admissible, but that the shareholders had already been compensated, through their company, for the damage that they had suffered. The case concerned seven ships owned by a British corporation and sunk by Germany. The claimants were the American shareholders of the British corporation, who argued that they had been 'indirectly damaged'. The Commission considered the claim admissible but found that the shareholder had been indirectly compensated, as Great Britain had paid the British corporation the value of the ships.[101]

The *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers (USA v Reparation Commission)* case suggested that shareholders' claims were potentially admissible regarding a dissolved corporation. The case regarded a seizure of oil tankers by the German government to a German company, which was a subsidiary of an American company (Standard Oil). After the Allied Reparation Commission had rejected Standard Oil's claim for compensation, the US Government, acting in diplomatic protection, argued that the company was entitled to reparation for the seizure, as it had the 'beneficial ownership' of the tankers. With the approval of the US Government, the Reparation Commission set up an arbitral tribunal to settle the dispute. The Tribunal rejected the US Government's claim: the German company was the sole owner of the seized vessels, as 'the highest courts of most countries continue to hold that neither the shareholders nor their creditors have any right to the corporate assets, other than to receive, during the existence of the company, a share of the profits, the distribution of which has been decided by a majority of the shareholder'.[102] However, the Tribunal also acknowledged that shareholders have 'the right to share

99 *Hargous v Mexico* (Edward Thornton, Umpire, under the convention of July 4, 1868, between the United States and Mexico) 3 Moore's Arbitrations 2327.

100 The United States did not ratify the Treaty of Versailles, but concluded the Treaty of Berlin of 1921 and a subsequent agreement in 1922. On the US–German Mixed Commission, see: Arthur Burchard, 'The Mixed Claims Commission and German Property in the United States of America' (1927) 21(3) American Journal of International Law 472.

101 US–German Claims Commission, *Standard Oil v Germany, Sun Oil v Germany and Pierce Oil Corporation v Germany* (21 April 1926) 7 RIAA 301.

102 *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers (USA v Reparation Commission)* (5 August 1926) 2 RIAA 777, 787.

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in the division of the assets of the company when dissolved',[103] which can be interpreted as the recognition of the admissibility of claims by shareholders of dissolved companies. In other words, if the German company had been dissolved, claims on behalf of Standard Oil would have been admissible. Curiously, this case was quoted by the ILC in support of Article 11(b) of the 2006 ILC Draft Articles of Diplomatic Protection, regarding the incorporation in the State allegedly responsible for causing an injury, as a precondition to doing business there.[104] However, this aspect is not discussed in the award. The case is much more relevant for Article 11(a), which codifies well-established case law which spans, with some nuances, from the *Delagoa Bay Railway* case to ECHR cases, through *Barcelona Traction*.[105] In any case, all forms of shareholder protection which can be found in MATs' case law are far from fully-fledged protection of controlled companies 'by substitution', as can be found in several investment treaties.[106]

5. *Taking Stock: The Legacy of MATs' Case Law on the Nationality of Legal Persons*

As shown by these examples, some MATs awards can be retrospectively seen as a step in a relatively coherent line of cases. All in all, MATs' case law contributed in a non-negligible (albeit not decisive) way to the emerging concept of corporate nationality and to its determination, even if the most original feature, the control test, turned out to be ephemeral. Interestingly, it was only in relatively recent years that the MATs' case law was retrospectively seen as a subsidiary means to determining customary norms. Nowadays, issues of corporate nationality are mainly dealt with

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103 ibid, 787 and 791. See Gabriel Bottini, *Admissibility of Shareholder Claims under Investment Treaties* (Cambridge University Press 2020) 106.

104 Commentaries, doc. A/61/10, *Yearbook of the International Law Commission*, 2006, vol II, Part Two, 41, note 136.

105 Art 11 Draft Articles of Diplomatic Protection reads as follows: 'A State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation unless: (a) the corporation has ceased to exist according to the law of the State of incorporation for a reason unrelated to the injury; or (b) the corporation had, at the date of injury, the nationality of the State alleged to be responsible for causing the injury, and incorporation in that State was required by it as a precondition for doing business there' (Commentaries, doc. A/61/10, Yearbook of the International Law Commission, 2006, vol II, Part Two, 40–41).

106 Eg 2012 US Model BIT, Article 24(1)(b); CETA, 8.23(1)(b).

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through treaty provisions, whose conception does not seem to have been significantly inspired by the experience of MATs. Firstly, Article 54 of the Treaty on the Functioning of the European Union provides for an obligation of equal treatment of European companies, following a version of the cumulative requirement of the place of incorporation and the *siège social* set by the ICJ in the *Barcelona Traction* case, whereas MATs generally used these criteria alternatively.[107] Secondly, the rationale of the theory of control makes it very difficult to consider it as an ancestor of the control test currently enshrined in investment treaties, unless at a very abstract level. The corporate veil is pierced for very different reasons. War measures extended the legal regime of enemy property to corporations, based on the assumption that all nationals of enemy States were enemies. On the contrary, in international investment law, the control test is a form of protection (or promotion) based on the fact that investors are sometimes required (or may wish) to incorporate an entity in the host State as a vehicle for their investment activity. Thus, several investment treaties define the nationals of each State party as also including legal persons directly or indirectly controlled by nationals of that State.[108] The rationale of the theory of control of the French-German MAT is perhaps closer to the role of control within denial of benefits clauses, especially when they refer to the absence of diplomatic relations or issues of peace and security.[109] However, even in such situations, the control test is a necessary, but not

107 The provision reads as follows: 'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States'.

108 Eg under Article 8.1 of the Comprehensive Economic and Trade Agreement between Canada and the European Union, 'investor means a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party; For the purposes of this definition, an enterprise of a Party is:
(a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or
(b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a)'. See also Article 25(2)(b) of the ICSID Convention'. Some investment treaties further clarify what is meant by 'control': according to UNCTAD's Investment Policy Hub, 273 treaties (209 of which are in force) contain provisions to this effect.

109 Eg under Article 8.17 of the 2012 US Model BIT: '1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of

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a sufficient condition for the applicability of these provisions. Moreover, if the conditions of these provisions are met, investment tribunals have no jurisdiction, investors' claims are inadmissible or substantive benefits based on the treaty are denied to investors. Overall, these legal effects are the opposite of those of the theory of control in respect of peace treaties.

However, MATs' case law on corporate nationality did modestly contribute to the determination of international procedural law as a coherent set of rules, alongside decisions by other international courts and tribunals, especially in ILC commentaries and in some scholarly writings.[110] Significantly, the ICJ did not contribute to this trend. The mainstreaming of MATs' case law on the nationality of legal persons shows that the assessment of this historical experience has evolved over time. The relatively recent inclusion of MATs' case law in the mainstream of public international law on corporate nationality may seem surprising. Subsequent case law has clearly helped find consistency which cannot be found in MATs' case law as such. Different MATs had different approaches to the same issues, and the case law of some MATs was even characterised by internal inconsistencies, which perhaps can only be explained by the different

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such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:
(a) does not maintain diplomatic relations with the non-Party; or
(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.
2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise'. Under art 8.16 of the Comprehensive Economic and Trade Agreement between Canada and the European Union: 'A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of that Party and to investments of that investor if:
(a) an investor of a third country owns or controls the enterprise; and
(b) the denying Party adopts or maintains a measure with respect to the third country that:
(i) relates to the maintenance of international peace and security; and
(ii) prohibits transactions with the enterprise or would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments'.

110 Carlo Santulli, *Droit du contentieux international* (2nd edn, LGDJ 2015) esp. 246–47 on the theory of control.

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composition of each tribunal in different cases.[111] As has been shown, ambiguity was not only dependent on the drafting of peace treaties, but also on diverging views on more general issues. MATs' awards often featured an intrinsic methodological ambiguity, which resulted in diverse combinations of domestic, comparative and international law. Under these conditions, it is not surprising that MATs' case law was controversial in its time. At least, MATs settled a significant number of cases, not all of which were published, often corresponding to complex factual situations which show just how dense transnational relations affected by World War I were.

Apart from technical considerations, the historical reputation of MATs' case law certainly suffered from the context in which it emerged. To some extent, MATs could have been seen as a step towards more effective reparation for individuals. However, they were also based on the asymmetrically drafted provisions of the peace treaties,[112] of which they multiplied the vindictive and punitive dimensions.[113] Although, as has been shown, awards did not systematically tend to broaden their jurisdiction, MATs had difficulty in departing from a form of victors' justice. The fate of the theory of control is a symptom of this phenomenon: it did not go down in history as a tool that eased access to international justice, but as an unwelcome heritage of the war. Regarding issues of corporate nationality, MATs can certainly be considered as an experiment in the adjudication of private rights beyond the legal order of each State, but it would be difficult to conclude that the experiment was completely successful.

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111 Eg in *Société du Chemin de fer*, the members of the French–German MAT were Botella (president), Serbuys, Scholz, Sirey, Simon, while in *Charbonnage Frédéric-Henri*, the members were Asser (president), Bondi, Gandolphe, Simon, Sirey. In *Peeters van Haute et Duyver c Trommer et Gruber*, the members of the Belgo–German MATs were Moriaud (president), Fauquel, Hoene, Steven, Uppenkamp, while in *Van Peteghem c Staackmann, Horschitz et Tielecke*, they were Moriaud (president), Hoene, Rolin, Steven, Simon.

112 Walter Schätzel, 'Die Gemischten Schiedsgerichte der Friedensverträge' (1930) 18 Jahrbuch des öffentlichen Rechts der Gegenwart 378, 453.

113 On the ambivalence of the Treaty of Versailles, see, Michel Erpelding, 'Introduction: Versailles and the Broadening of "Peace Through Law"', in Michel Erpelding, Burkhard Hess, and Hélène Ruiz Fabri (n 12) 11; Emanuel Castellarin, 'L'apport du traité de Versailles au droit international. Un regard rétrospectif à l'occasion du centenaire', in Société française pour le droit international, *Le traité de Versailles: Regards franco-allemands en droit international à l'occasion du centenaire* (Pedone 2020) 7; Pierre-Marie Dupuy, 'Conclusions générales', ibid, 307.

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Chapter 6: Splitting the Atom of Nationality: The Mixed Arbitral Tribunal for Upper Silesia and the Emergence of Citizenship in International Law

Momchil L Milanov[*]

'So it has happened that the worst disasters have come to light when secular societies have sought to become organic, a recurrent aspiration among all societies that develop the cult of themselves. Always with the best intentions. Always to regain a lost unity and supposed harmony'.
Roberto Calasso, *The Unnameable Present*

1. *Whose 'Grandmother is Dead'?*

At 4 pm on 31 August 1939, Reinhard Heydrich, head of the Reich's *Sicherheitsdienst* (SD), telephoned SS-Sturmbannführer Alfred Naujocks and delivered a coded message: '*Großmutter gestorben*' (Grandmother died). Naujocks had been sent to Upper Silesia a couple of days earlier with a special mission – to organise a provocation that could serve as a pretext for the invasion of Poland. It is pointless and presumptuous to try to uncover the meaning behind the code word, but one is tempted to see it as signalling the definitive demise of the League of Nations in all senses – physical, legal, institutional, and most important of all – symbolic. A couple of hours later, Naujocks and a squad of heavily armed SD men dressed as Polish insurgents carried out a fake attack on the radio transmitter in Gleiwitz, German Upper Silesia. The body of a concentration camp inmate named Franciszek Honiok, dressed similarly to the raiders, was found outside the radio station, as if he had been killed in a gun battle with German police.[1] Honiok, an ethnic Pole who had participated in

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1 Frederick Taylor, *1939: A People's History* (Picador 2019) 320ff.

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the 1921 uprisings and had later been arrested for pro-Polish activities, was the first victim of the Second World war. It is no mere coincidence that the most devastating war in human history started as a 'false-flag' operation against the radio station in Upper Silesia;[2] that Honiok was its first victim, and that there was no actual declaration of war. The shelling of Westerplatte by the battleship *Schleswig-Holstein* early on the following morning announced the second victim of the war: the entire international order established in Paris 20 years earlier and the demise of its institutional incarnation – the League of Nations. The symbolic importance of the relationship between Upper Silesia and the League cannot be understated. For 15 years, between 1922 and 1937, the legal regime of the region established under the auspices of the League had succeeded in keeping volatile political passions under control. The 'international experiment of Upper Silesia' was associated with and later formed part of the broader 'experiment narrative' of the League.[3] Those who plotted to destroy the League were aware of the symbolic importance of the region.

The history of Upper Silesia since the 14th century resembles a case study for an undergraduate international law course. A vital economic area in Central Europe with rich resources and a long history of a disputed (trans)border region,[4] Silesia is situated at the crossroads of Germanic and Slavic Europe.[5] Although for many centuries this 'land-in-between'[6] did

2 On the 'radio-war' between Poland and Germany in Upper Silesia in the interwar period, see Peter Polak-Springer, 'Jammin' with Karlik': The German-Polish 'Radio War' and the Gleiwitz 'Provocation', 1925–1939' (2013) 43 European History Quarterly 279.

3 See Jean d'Aspremont, 'The League of Nations and the Power of "Experiment Narratives" in International Institutional Law' (2020) 22 International Community Law Review, 275–90; Christian Tams, 'Experiments Great and Small: Centenary Reflections on the League of Nations' (2019) 62 German Yearbook of International Law 62; Nathaniel Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (1992) 4 Yale Journal of Law & the Humanities 376.

4 Michel Erpelding, 'Local International Adjudication: The Groundbreaking 'Experiment' of the Arbitral Tribunal for Upper Silesia' in Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (eds), *Peace through Law* (Nomos 2019) 278. F Gregory Campbell, 'The Struggle for Upper Silesia, 1919–1922' (1970) 42 Journal of Modern History 361.

5 Tomasz Kamusella, 'The Changing Lattice of Languages, Borders and Identities in Silesia', in Tomasz Kamusella, Motoki Nomachi and Catherine Gibson (eds), *The Palgrave Handbook of Slavic Languages, Identities and Borders* (Palgrave 2016) 188.

6 Philipp Ther, 'Caught in Between: Border Regions in Modern Europe' in Omer Bartov and Eric D Weitz (eds), *Shatterzone of Empires Coexistence and Violence in the German, Habsburg, Russian and Ottoman Borderlands* (Indiana University

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not belong to Poland, the majority of the population spoke either Polish or Silesian.[7] As pointed out by Michel Erpelding, the period between the creation of the Second German Reich in 1871 and the outbreak of the First World War marked the rise of nationalism,[8] further exacerbated by the German defeat in the war and the revival of Poland. Unsurprisingly, the application of the principle of self-determination (*le mot du jour* was also a *mot valise* accommodating contradictory meanings and ideas) provoked tension, frustration, and disappointment.[9] The collapse of the multi-ethnic empires let the genie of nationalism out of the bottle. Two different strands of nationalism clashed – the (re)nationalising policy of the newly (re)created states like Poland confronted the homeland nationalism of revisionist states like Germany, forming the 'vicious circle of nationalist resentment which became such a characteristic feature of the interwar period'.[10]

Press 2013) 487: 'Even the term "borderlands" has potential drawbacks, because of prominence of the word "border," which in today's perspective automatically connotes the boundaries of nation states. The "lands in between" … do not necessarily end *at* state borders, but often transcend them and encompass areas of both sides … one can label "the lands in between" as *intermediary spaces.* This term has a geographical dimension, in the sense of a location between (inter) national centers and spaces … A vivid example can again be provided by Upper Silesia, where Czech, Austrian, Prussian, German, and Polish rule not only shaped the region's history but also its language.'

7 Erpelding (n 4) 278. There seems to be a disagreement on whether the Silesian is a language or a dialect. See Magdalena Dembinska, 'Ethnopolitical Mobilization without Groups: Nation-Building in Upper Silesia' (2013) 23 Regional & Federal Studies 47, 54–55.

8 Erpelding (n 4) 279; Tomasz Kamusella, 'Nation-Building and the Linguistic Situation in Upper Silesia' (2002) 9 European Review of History 37, 46.

9 On the ambiguity in the meaning and scope of the term, see Christopher Casey, *Nationals Abroad* (CUP 2020) 91: 'Robert Lansing, the American Secretary of State who accompanied Wilson to Paris as a legal advisor, worried, "When the president talks of 'self-determination' what unit has he in mind? Does he mean a race, a territorial area, or a community? [...] The phrase is simply loaded with dynamite.'

10 See also Oliver Zimmer, 'Nationalism in Europe, 1918–45' in John Breuilly (ed), *The Oxford Handbook of the History of Nationalism* (OUP 2013) 417. As observed by Kamusella: 'The ideology of nation-building gave rise to two basic strains of civic and ethnic nationalism.' German and Polish nationalism arguably belonged to the latter as opposed to its 'civic' counterpart in France and USA. 'In the framework of civic nationalism citizenship equals nationality, thus, citizenry *is* nation. Ethnic nationalism requires proof of appropriate and ethnically construed nationality before one can be granted with citizenship of an ethnic nation-state'. Kamusella (n 8) 38. Another instance of this opposition of Western (civic) and Eastern (ethnic) nationalism could be found in the dictum of the PCIJ in the

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One of its most sinister incarnations was the ideal of ethnic homogeneity, ie the overlap between population, ethnicity and jurisdiction over a given territory.[11] The pursuit of this idea(l) in the aftermath of the Great War revealed what nowadays appears to be a received truth: ethnic or religious homogeneity has devastating and irreparable consequences which involve the complete eradication of centuries-old ties.[12] The main objective of the present chapter is to demonstrate and analyse how the Arbitral Tribunal for Upper Silesia managed to protect (even if temporarily) the rights of individuals and groups and thus maintain these old ties. At the same time, the action of the League may be seen as legitimising the ideal of homogeneity for it rubberstamped the partition of the territory.[13]

Greco-Bulgarian communities case in which the Court acknowledged the existence of a distinct 'Eastern' understanding of 'community': 'By tradition, which plays so important a part in Eastern countries, the "community" is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions…' PCIJ Ser B no 17, 21.

11 Alfred Zimmern quotes John Stuart Mill who writes that it is 'in general a necessary condition of free institutions that the boundaries of governments should coincide in the main with those of nationalities'. Alfred Zimmern, 'Nationality and Government' in Alfred Zimmern, *Nationality & Government with Other War-time Essays* (Chatto & Windus 1918) 46. An even more forceful and radical exposition of the same view can be found in Carl Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press 1988) 9: 'Democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity'. Renan wrote in 1882: 'Unity is always effected by means of brutality'. Ernst Renan, 'What is a Nation?' in Homi Bhabha, *Nation and Narration* (Routledge 1990) 11.

12 As Timothy Wilson has argued, the excessive violence of Upper Silesia's plebiscite era was due largely to the lack of clear national dividing lines between towns or regions. Because one's neighbour could easily be in the other national camp, violence could emerge anywhere – the schoolhouse, the pub, the private residence – as a means of creating national divisions at the micro level where none had previously existed. Tim Wilson, *Frontiers of Violence: Conflict and Identity in Ulster and Upper Silesia, 1918–1922* (OUP 2010). Cited in Brendan Karch, *Nation and Loyalty in a German-Polish Borderland* (CUP 2018) 125.

13 Ther (n 6) 491. Its influence was felt not only in the context of Upper Silesia and plebiscites in general but also with regard to the infamous 1923 agreement between Greece and Turkey on the exchange of populations. The minority protection and the exchange of populations are 'radical alternatives' in the expression of Özsu. See Umut Özsu, 'Fabricating Fidelity: Nation-Building, International Law, and the Greek-Turkish Population Exchange' J.S.D. thesis, 2011, iii. Online at: <https://tspace.library.utoronto.ca/bitstream/1807/31888/7/Ozsu_Umut_201111_S

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The League took over Upper Silesia in 1920 and was bent on making it into a showcase solution to a dispute between two nation-states.[14] Of the five plebiscites that were organised in the contested borderlands of Central Europe[15] the one in Upper Silesia which took place in March 1921 marked the largest such voting exercise after the World War. The overall vote in favour of Germany was approximately 60 %, characterised by a marked discrepancy between urban and rural areas.[16] It is important to note that Upper Silesians were essentially being asked to vote on state rather than national belonging. 'Many were expected to vote on the basis of very pragmatic considerations related to perceived security, freedom, and prosperity as citizens of one state or the other'.[17]'There was no 'option' to remain Polish *and* German or to declare an allegiance to Silesia.[18] Neither side was prepared to recognise an identity which fell outside the two options.[19] *Tertium non datur.*

JD_thesis.pdf> accessed 3 July 2020; See also Umut Özsu, *Formalising Displacement* (OUP 2015) 70–98, 72.

14 Kamusella (n 8) 49.

15 Plebiscites were held in Schleswig, Allenstein and Marienwerder, Klagenfurt, and Sopron, in addition to Upper Silesia. Several other plebiscites were discussed, planned, or attempted, but never carried out fully. See Sarah Wambaugh, *Plebiscites since the World War* (Carnegie Endowment for International Peace 1933).

16 Karch (n 12) 139: 'These results [of the plebiscite], at a broad level, adhered to linguistic divides: the heavily Polish-speaking eastern rural and suburban centers voted for Poland, while German urban centers cast majorities for Germany'.

17 Karch (n 12) 137.

18 Ther (n 6) 491; Karch (n 12) 117: At no time did autonomists advocate a distinct Upper Silesian nationality; rather, they argued for various levels of federalized self-rule that would theoretically enable the peaceful coexistence of Polish and German speakers. On the other hand see Tomasz Kamusella, 'Upper Silesia in Modern Central Europe: on the significance of the non-national/a-national in the age of nations', in James Bjork, Tomasz Kamusella, Tim Wilson and Anna Novikov (eds), *Creating Nationality in Central Europe, 1880–1950 Modernity, violence and (be)longing in Upper Silesia* (Routledge 2016) 8: 'Contrary to what the relevant national master narratives maintain, the population concerned did have their own identity(ies) of an a-national or non-national kind. Thus, instead of passively awaiting ennationalization from above, they deployed their identity as a national one or negotiated its (more or less accepted) position. It was done in the context of the currently obtaining national identity connected to the state that was at any particular time in possession of Upper Silesia or of a fragment thereof'.

19 Tomasz Kamusella, 'Upper Silesia 1918–45' in Karl Cordell (ed) *The Politics of Ethnicity in Central Europe* (Macmillan 2000) 98.

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The plan drafted by the League's Secretariat divided the highly contested industrial area in two. Upper Silesia was partitioned to the dissatisfaction of both Germany and Poland.[20] In the following years, approximately 170 000 pro-Germans and 100 000 pro-Poles chose to emigrate and relocate to the other side of the border where they would be part of the ethnic majority.[21] Notwithstanding these important numbers, significant minorities chose to remain in their pre-partition homes.[22] The economic unity of the area was shattered.[23] In 1922, pursuant to the plan, Germany and Poland concluded a bilateral convention (hereafter the 'Geneva Convention' or 'GC') regulating some essential matters related to the territory.[24] With its 606 Articles, it was the most elaborate international regime of its time[25]. The conclusion of this convention must have felt like a remarkable and impossible feat comparable to completing a cathedral in a year. Throughout its entire existence, the Geneva Convention functioned in an atmosphere of mutual lack of trust which stemmed from the diametrically opposing views held by the states on the role of minorities: Poland viewed ethnic Germans as a fifth column whose primary loyalty was to Germany and consequently tried to reduce to a minimum the number of Germans quali-

20 Carlile Macartney, *National States and National Minorities* (OUP 1934) 198.

21 See Kamusella (n 19) 98.

22 Karch (n 12), 144. Erpelding (n 4) 281. 44 % of Upper Silesians in the new Polish partition and 29 % in the German partition had voted for the other state. Brendan Karch, 'Polish nationalism and national ambiguity in Weimer Upper Silesia' in James Bjork, Tomasz Kamusella, Tim Wilson and Anna Novikov (eds), *Creating Nationality in Central Europe, 1880–1950 Modernity, Violence and (Be)Longing in Upper Silesia* (Routledge 2016) 150.

23 Carlile Macartney, 'National States and National Minorities', in Stuart Woolf (ed), *Nationalism in Europe, 1815 to the Present: A Reader* (Routledge 1995) 112.

24 Convention between Germany and Poland relating to Upper Silesia (signed 15 May 1922, entered into force 15 June 1922) 9 LNTS 465; 118 BSP 365. The convention contained several innovations. Some of the most significant among them were the protection of 'vested rights' ('*droits acquis*'), ie rights acquired before the partition (art 4 GC), the right of residence and non-discrimination of those persons who chose to retain their domicile on one side of the territory while opting in favour of the nationality of the other state (arts 40–45 GC); rights of minorities (arts 64–158 GC).

25 Nathaniel Berman, '"But the alternative is despair": European Nationalism and the Modernist Renewal of International Law' (1993) 106 Harvard Law Review 1893–98.

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fied to receive Polish nationality.[26] Germany in turn focused on converting as many of its nationals as possible to Polish.[27]

The convention divided the territory and provided a painstakingly detailed regime protecting the special rights of the inhabitants of the region, including the right to nationality, the right of residence and the rights of minorities.[28] It established the organs in charge of overseeing the application of the convention: a Mixed Commission, chaired by the former Swiss President Felix Calonder, and a Mixed Arbitral Tribunal, presided by the young Belgian lawyer Georges Kaeckenbeeck. The Convention set up complex machinery which effectively dissolved, defused, and transformed nationalistic aspirations into administrative/legal procedures. The regime established by the treaty was supposed to last only fifteen years.[29] For that limited period, the highly disputed political issues were in some sort of *stasis*. The Clausewitzian formula was turned on its head: law and not war became the continuation of politics by other means.

The Mixed Arbitral Tribunal for Upper Silesia[30] stands out as perhaps the most innovative international judicial body of its time.[31] Its rich case law heralded some truly remarkable developments. Suffice it to give three examples: in the ground-breaking decision in *Steiner and Gross v Poland*,[32]

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26 Georges Kaeckenbeeck, *The International Experiment of Upper Silesia* (OUP 1942) 158: '… German officials tried to counteract all promptings to opt in favour of German nationality by intimating it as a duty for Germans to remain in Poland and strengthen the German minority there. People repeatedly complained to the Arbitral Tribunal of having thus been made to stay in Poland, and when they later asked to be naturalised Germans again, of having been met with a refusal accompanied by the remark that they had had a right of option of which they had not availed themselves.' See St 143/36 *Rzepka* (13 May 1937) 7 Arb Trib Dec 250ff.

27 Kaeckenbeeck (n 26) 123, 522.

28 It is worth recalling that the minorities protection system in the interwar period applied only to the states in Central and Eastern Europe; in the West this concept practically did not exist.

29 Article 1 GC.

30 The nomenclature in the present paper follows the one adopted by Erpelding (n 4), ie Mixed Commission/Mixed Arbitral Tribunal *for* Upper Silesia. While not being part (strictly speaking) of the dozens of MATs directly created by the Paris Peace Treaties, the Arbitral Tribunal for Upper Silesia can nevertheless be considered as having direct links with the latter, as its creators conceived it as an evolved version of the Paris MATs. See also Erpelding (n 4) 289.

31 Michel Erpelding, 'Introduction: Versailles and the Broadening of "Peace Through Law"' in Michel Erpelding, Burkhard Hess and Hélène Ruiz Fabri (eds), *Peace through Law* (Nomos 2019) 26.

32 C 7/27, *Steiner & Gross v Poland* (30 March 1928) 1 Arb Trib Dec 8–10. See Erpelding (n 4) 299–300.

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the Tribunal recognised the right to sue one's own country, which could be considered as an immediate predecessor of the individual application in Article 34 of the European Convention on Human Rights[33]. The second innovation was the procedure which resembles the pilot judgment procedure before the European Court of Human Rights (ECtHR), used to identify structural problems underlying repetitive cases.[34] The third example is immediately related to the topic of the present chapter and concerns the competence to exercise judicial control over matters of nationality and the protection of the right of residence of non-nationals. Paul Weis, one of the most distinguished specialists on nationality and statelessness wrote that:

> The establishment of international judicial machinery for the adjudication of conflicts in questions of nationality which could be set in motion by an individual whose nationality is in doubt and to which individuals would, therefore, directly or through the intermediary of an international agency acting on their behalf, have access, is essential for their solution.[35]

Together with the Conciliation Commission, the Tribunal was in charge of 'sorting out' the individuals[36] with *erga omnes* effect,[37] one of the most consequential attempts to limit sovereignty.[38] Nationality is the last bas-

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33 See W Paul Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals* (Martinus Nijhoff 1966) 41–42. The search in the preparatory works of the ECHR did not reveal any explicit references to the case law of the Arbitral Tribunal. Much of the case turned on the interpretation of art 4(2) of the Convention. The tribunal found that this provision clearly conferred jurisdiction on it to hear claims of individuals against states and that art 4(2) contained no limitations on the right of action by private persons. Since the clear aim of the Convention was to protect private rights, the necessary jurisdiction to hear such claims had been conferred on the tribunal. Annual Digest 1927–28 (1928), case No 188, 291. See Georges Kaeckenbeeck, 'The Character and Work of the Arbitral Tribunal of Upper Silesia' (1935) 21 Transactions of Grotius Society 27, 36.

34 Article 592 GC. Applied for the very first time in the *Wagner* case (1933); cited in Erpelding (n 4) 303. See Kaeckenbeeck (n 26) 194.

35 Paul Weis, *Nationality and Statelessness in International Law* (Sijthoff 1979) 255.

36 Arts 55–58 GC.

37 Art 591 (2) GC.

38 Nathaniel Berman, 'Intervention in a "Divided World"', in Philip Alston and Euan Mcdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 235. The interwar experiments '… create a legal space for themselves by bracketing the question of sovereignty, either by explicitly deferring the question to a later time (the Saar…), superimposing a unified, experimental regime on

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tion of sovereignty[39]. A hundred years later, there remain very few exceptions of international courts and tribunals competent to exercise direct control over matters of nationality. The Inter-American Court of Human Rights is the most obvious example.[40]

This chapter argues that the reasoning and the conclusions of the Arbitral Tribunal for Upper Silesia in matters of nationality and residence could be considered among the first signs of the long process (which is still ongoing) of the separation of citizenship from nationality; a process from which the latter may emerge 'the more dominant descriptor, with all of its implications of equality and rights'.[41] It argues that the Tribunal decoupled nationality from rights without necessarily 'weakening the state as a location of identity'.[42] However, by no means does the chapter try to imply that the Tribunal was using the concepts of nationality and citizenship in the same way. That ahistorical thinking would be manipulative and tantamount to ventriloquism. The French text of the Convention, the Polish Minorities Treaty and the Versailles Treaty did not even use the term '*citoyen*' (citizen) but '*ressortissants*' (nationals), which indicates not the belonging to a particular nation or ethnic group but the (primarily) jurisdictional link which exists between an individual and a state.[43]

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top of sovereign divisions (Upper Silesia…), or creating a novel a-sovereign entity (Danzig).'

39 Kristin Henrard, 'The Shifting Parameters of Nationality' (2018) 65 Netherlands International Law Review 293.

40 Art 20 of the American Convention on Human Rights provides for the right to nationality. The Inter-American Court of Human Rights has made some very important pronouncements in this regard and has been able to protect persons who otherwise would have remained stateless. See Momchil Milanov, 'Nationalité, citoyenneté, apatridie : le statut international des apatrides entre l'érosion des concepts et la réaffirmation des droits', in Jean-Denis Mouton and Peter Kovacs, *The Concept of Citizenship in International Law* (Brill / Nijhoff 2018) 289–91.

41 Kim Rubenstein, 'Globalization and Citizenship and Nationality' in Catherine Dauvergne (ed), *Jurisprudence for an Interconnected Globe* (Ashgate 2003) 161 (highlighting 'confident, even triumphalist discourse of citizenship as emancipation'). Cited in Peter Spiro, 'A New International Law of Citizenship' (2011) 105 AJIL 694, 717.

42 Spiro (n 41) 697. I believe it is so in the Upper Silesian context because on the one hand the pressure exerted by the League on the two states to reach an agreement did not undermine the nation-state as a locus of identity; on the contrary, it even reinforced it because the individual inevitably faced a choice. On the other hand, it is doubtful whether the participants in the plebiscite were really asked to define their identity: the only thing they were asked to do was to choose a state.

43 The Versailles Treaty and the Polish minorities treaty use the terms '*habitants*', '*ressortissants*', '*nationaux*'. None of them mentions 'citoyen'. According to Blüh-

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The four remaining sections are structured as follows. Section 2 outlines the conceptual distinction between nationality and citizenship, which will be illustrated with concrete examples in Section 4. Section 3 briefly discusses two important cases which had an immediate incidence over the approach on nationality and citizenship cases adopted by the Tribunal. Section 4 contains the core argument of the paper. It discusses five instances in which the Arbitral Tribunal for Upper Silesia was able to protect the nationality and rights of individuals, either directly, under the provisions of the Geneva Convention on nationality and residence, or indirectly, through the provisions on minorities. Section 5 concludes.

2. *Nationality and Citizenship: Two Sides or Two Different Coins?*

Throughout the 'long 19th century' nationality gradually became the main link between an individual and a state both in public and private international law. In respect of the former, there were no other contestants; this was not the same situation in the case of the latter, where it had to compete with domicile.[44] Together with territory and rights, nationality was an essential element of the 19th-century positivist triangle. The creation of the Arbitral Tribunal coincided with the period when for the first time this triad underwent a significant change. The First World War revealed the cracks on its façade; its entire construction premised on the all-encompassing concepts of jurisdiction and sovereignty, was put under considerable strain.[45] If nationality simultaneously meant two things, the link between an individual and a state, but also the relationship between

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dorn, the MATs have unanimously accepted that the term 'ressortissant' is larger than 'national'. See Rudolf Blühdorn, 'Le fonctionnement et la jurisprudence des Tribunaux arbitraux mixtes créés par les Traités de Paris' (1932) 41 Recueil des Cours 205.

44 On this competition see León Castellanos-Jankiewicz, 'Harnessing the Adjacent Possible: From Conflict of Laws to Human Rights', forthcoming: 'before the nineteenth century it was generally accepted in continental Europe that the personal status of individuals was connected to their domicile. But, after the French Revolution, personal status came increasingly under the influence of nationality'.

45 Hannah Arendt, *The Origins of Totalitarianism* (first published 1951, Harcourt Brace Jovanovich 1973) 267: The war 'sufficiently shattered the facade of Europe's political system to lay bare its hidden frame', cited in Aristide Zolberg, 'The Formation of New States as a Refugee-Generating Process' (1983) 467 The Annals of the American Academy of Political and Social Science 24, 28.

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an individual and a nation,[46] large groups of persons risked finding themselves 'beyond the pale of law'. Another *lien de rattachement* was necessary and that genuine link between a person and a territory was domicile. It shifted the focus from nationality (and ethnicity) to an enduring territorial link[47] and demonstrated that belonging to the nationality of the majority is not a *conditio sine qua non* for the enjoyment of rights.[48]

2.1 General Observations

A graphic table in the recently published *Oxford Handbook on Citizenship* shows that the usage of 'nationality' and 'citizenship' in Google books follows a very similar trajectory: both steadily rise and peak in the 1920s, before declining gradually until the 1980s when a new surge begins.[49] This apparent similarity may be misleading. The relationship between the two concepts is by no means settled and it is further complicated on the one hand by the multiplicity of meanings attached to them and on the other, by the role of contingency in international relations as explicitly acknowledged by the Permanent Court of International Justice (PCIJ) in the *Nationality Decrees* advisory opinion[50], as well as by the Harvard Research in International Law which concluded that:

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46 Casey (n 9) 87.

47 See eg Hannah Arendt, *Men in Dark Times* (Harcourt, Brace 1968) 81: 'A citizen is by definition a citizen among citizens of a country among countries. His rights and duties must be defined and limited, not only by those of his fellow citizens, but also by the boundaries of a territory'.

48 Mira Siegelberg, *Statelessness: A Modern History* (HUP 2020) 169 where she mentions the 1930 course given by René Cassin at the Hague Academy in which he argued that privileging domicile over nationality would mitigate the personal tragedies arising from the absence of citizenship. See René Cassin, 'La nouvelle conception du domicile dans le règlement des conflits de lois', 34 Recueil des Cours (1930) 659–663. See also Maximilian Koessler, '"Subject," "Citizen," "National", and "Permanent Allegiance" (1946) 56 Yale Law Journal 76: 'It would also seem to be no unreasonable guess that domicile rather than birthplace or filiation may in the future be the favorite fact of attachment for the acquisition of nationality'.

49 See Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink, 'Introduction', in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds) *The Oxford Handbook of Citizenship* (OUP 2017) 3–4.

50 *Nationality Decrees Issued in Tunis and Morocco* (1923) PCIJ Rep Series B no 4, 24: 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of

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> Nationality has no positive, immutable meaning. On the contrary, its meaning and import have changed with the changing character of states… It may acquire a new meaning in the future as the result of further changes in the character of human society and developments in international organization.[51]

The most widely shared perceptions on the relationship between nationality and citizenship can be reduced to two. According to the first view, although the two concepts used to be clearly distinguishable, today they are practically interchangeable.[52] According to the second view, both concepts are closely related but not synonymous;[53] they are the two sides of the same coin; nationality designates the international aspects of the relationship between an individual and a state while citizenship is 'the highest of political rights/duties in municipal law'.[54] In the same current of thought, for some, the relationship between the two concepts may be seen through the dialectic of 'form' and 'substance' where nationality denotes a formal link between an individual and a state and citizenship is a complex of rights and duties. In recent years, yet another group of scholars have argued in favour of the existence of an autonomous position of citizenship in international law.[55] The present chapter subscribes to this view and at-

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international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain'.

51 Research in International Law of the Harvard Law School, *The Law of Nationality,* 23 AJIL 1, 21 (Special Supp. 1929)

52 Alice Edwards, 'The meaning of nationality in international law in an era of human rights: procedural and substantive aspects', in Alice Edwards and Laura van Waas, *Nationality and Statelessness under International Law* (CUP 2014) 13–14; Yaffa Zilbershats, *The Human Right to Citizenship* (Brill 2002) 5 (noting that the 'instances in which a difference still exists between nationality and citizenship are rare').

53 Green H Hackworth, 3 *Digest of International Law* (US Government Printing Office 1942) § 220, cited in Patricia McGarvey-Rosendahl, 'A New Approach to Dual Nationality' (1985) 8 Houston Journal of International Law 305.

54 See Spiro (n 41) 695. Paul Weis, *Nationality and Statelessness in International Law* (Sijthoff 1979) 4–5; Edwards (n 52) 13. Sebastien Touzé, 'Rapport introductif : La notion de nationalité en droit international, entre unité juridique et pluralité conceptuelle', SFDI, Colloque de Poitiers, *Droit international et nationalité* (Pedone 2012) 18.

55 Spiro (n 41) 694; Jean-Denis Mouton, 'La citoyenneté en droit international: un concept en voie d'autonomie?' in Jean-Denis Mouton and Peter Kovacs, *Le concept de citoyenneté en droit international/The Concept of Citizenship in International Law* (Brill 2019) 81ff.

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tempts to provide an early example of this autonomous existence through the prism of inclusion and protection.[56] But before plunging into any substantive discussion of the Tribunal's case law, it is necessary to explain the meaning of these two concepts for the present chapter.

The concept of nationality is prone to confusion precisely because it contains at least two very different possible meanings – one centred on the formal link between an individual and state on the plane of international law and the other in which the emphasis is put on the nature of that link. In 1943, W Bisschop observed in rather terse terms:

> The word 'Nationality' does not mean what it says, nor does it say what it means. Etymologically it would mean the condition of *belonging to a nation, of being a national.* In International Law 'nations' are an unknown quantity. A nation is a concept of municipal law and means a group of persons who, through racial, religious or economical ties, are bound together to follow a common pursuit. The word 'national', if used in International Law, has a technical meaning. The Law of Nations or Public International Law is the law prevailing between States [...] *The word 'national' is used in connection with a State and then means a member or a subject of such a State.* An individual who is a national of a State is internationally only known through the State to which he belongs.[57]

In 1918, the British historian of German descent Alfred Zimmern suggested that 'Nationality … is a form of corporate sentiment. I would define a nation as a body of people united by a corporate sentiment of peculiar intensity, intimacy and dignity, related to a definite home-country'.[58] Similarly, some years later, the PCIJ observed in the *Certain German Interests in*

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56 See Friedrich Kratochwil, 'Citizenship: On the Border of Order' (1994) 19 Alternatives 486. Neil Walker, 'The Place of Territory in Citizenship' in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds) *The Oxford Handbook of Citizenship* (OUP 2017) 557.

57 William R Bisschop, 'Nationality in International Law' (1943) 28 Transactions of the Grotius Society 151, 151–152. (Emphasis added) On the confusion between 'nation' and 'state', See Casey (n 9) 87–8. Among the very interesting citations contained in *Nationals Abroad*, it is worth mentioning the one from Oppenheim: 'nationality as citizenship of a certain state must not be confounded with nationality as membership of a certain nation in the sense of a race,' and reminded his readers that 'although all Polish individuals are of Polish nationality *qua* race, they have been, since the partition of Poland … either of Russian, Austrian, or German nationality *qua* citizenship.'

58 Zimmern (n 11) 52.

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Polish Upper Silesia case, that nationality is the 'personal tie' that connects physical persons to a state.[59]

While the spatial dimension in 'nationality' is arguably less significant, in the conceptual realm of 'citizenship' territory plays an important, if not primary, role.[60] Some scholars have argued that territory is a socio-political category which allows for people to be governed and provides them with an identity, different from the one determined by their origin. Charles Meier's observation is particularly eliciting in this regard:

> The tendencies we lump together under the idea of globalization suggest that the attributes of territory are changing rapidly. ... What has weakened is precisely a *traditional sense of territory*. *The political rights that came with territory included determination of who belonged and who was foreign*, how wealth would be generated and distributed, how the domain of the sacred must be honored, how families reproduced themselves. Territory is thus a *decision space. It established the spatial reach of legislation* and collective decisions. At the same time, territory has specified the domain of *powerful collective loyalties*. *Political and often ethnic allegiance has been territorial* … Territory has thus also constituted an *identity space* or a space of belonging.[61]

It must be made clear that the purpose of this chapter is not to deal with the relationship between nationality and citizenship on the one hand, and concepts such as identity and belonging.[62] Nor is its intention to deal with the sanction of identity and belonging by international law. It is completely unnecessary to dwell on these untameable concepts; the presence

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59 *Certain German Interests in Polish Upper Silesia (Germany v Poland)* (1926), PCIJ Rep Series A no 7, 70.

60 Casey observed that: 'In the age of nationalism, the politics of expansion and boundary claims were increasingly (although by no means exclusively) conducted by reference to people and their ethnolinguistic identities rather than to territory'. See Casey (n 9) 89.

61 Charles Meier, *Once within Borders* (Harvard University Press 2016) 3 (footnotes omitted) (emphasis added).

62 See Magdalena Dembinska, 'Adapting to Changing Contexts of Choice: The Nation-Building Strategies of Unrecognized Silesians and Rusyns' (2008) 41 Canadian Journal of Political Science 916. On citizenship as *belonging* and *status*, see Kratochwil (n 56) 485, 490; Henrard (n 39) 278. Spiro (n 41) 694. Haldun Gülalp, 'Introduction: citizenship vs. nationality', in Haldun Gülalp (ed), *Citizenship and Ethnic Conflict: Challenging the Nation State* 1: 'nation-states define their national communities in diverse ways, but the core elements of nationality usually include a combination of such historically rooted identities as religion, race, or ethnicity'.

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of domicile establishes an objective link between individual and territory under which his rights can be protected.

While keeping in mind this multiplicity of meanings, in this chapter 'nationality' is understood as membership primarily based on ethnic ties. In that sense, the tension between nationality as ethnicity and citizenship as a status of persons living on a certain territory seems to be just another instance of the old competition between *jus sanguinis* and *jus soli*. In the context of Upper Silesia in the interwar years, the enjoyment of rights depended on the factor of domicile counterbalancing ethnicity as a decisive *indicium* of belonging.

The importance of the distinction between nationality and citizenship appears most clearly when juxtaposed to the figure of the alien,[63] what could be called the 'non-national-citizen' as opposed to the term 'non-citizen national' used by Maximilian Koessler. Koessler, who was born in Austria and later emigrated to the United States, may be seen as an early precursor to the conceptual distinction between 'nationality' and 'citizen-

63 Paul Lagarde, 'Nationalité' in Denis Alland and Stéphane Rials, *Dictionnaire de la culture juridique* (PUF 2003) 1052: '*la notion de nationalité n'a d'intérêt juridique que par l'existence de différences entre le national et l'étranger*'. See Linda Bosniak, 'The Citizenship of Aliens' (1998) 56 Social Text 29: 'the idea of foreignness helps us to define the kinds of identities and experiences we commonly associate with citizenship.' See also Linda Bosniak, 'Universal Citizenship and the Problem of Alienage' (2000) 94 Northwestern University Law Review 963, 975: 'If, on the other hand, citizenship theory were to take the subject of alienage into account, matters of citizenship-as-status and citizenship-as rights would come to seem far more interesting and far more urgent as well… alienage does not offend the norm of universality so long as a person is assigned the status on a temporary basis.' Mira Siegelberg explains the position of Maximilian Koessler: 'He stated that the status of the "non-citizen national" would be the central object of his investigation because of the potential for international law to regulate nationality as opposed to citizenship, which could only come under the control of municipal law. Koessler sought proof for a substantive distinction between nationality and citizenship, which for him meant delineating a space in which international law had control over the boundaries of naturalization.' See in particular his article 'Rights and Duties of Declarant Aliens', (1942–3) 91 University of Pennsylvania Law Review 324. He proposed to examine 'whether international law is bound to recognize a nationality which by the provisions of the respective municipal law has become a hollow, if not farcical concept.' Siegelberg (n 48) 153–4. However, Koessler considered nationality and citizenship as the external/international and internal/domestic facets of the same coin and in that sense, he differed from the approach taken in the present chapter which argues that citizenship may play an autonomous role in international law.

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ship'.[64] The distinction between nationality and citizenship shows that the category of 'alien residents' is smaller than what it may seem from the majority's point of view.

If nationality connotes ethnicity, thus excluding persons not belonging to the majority, citizenship appears as a much more inclusive concept: a citizen is a person who possesses the highest degree of membership in a political community on a certain territory with all the rights and duties flowing from this membership irrespective of ethnic or religious ties. 'Citizenship is still nothing but equality between individuals independent of their social condition'.[65] Those rights and duties exist primarily on this territory, and it is on that territory that the link between individual and state (characterised by the dialectic of protection and allegiance) is strongest. Thus, contrary to nationality which oscillates between a subjective feeling of belonging and a formal link,[66] citizenship appears as an objective legal status. Territory acts as a force field, in which the relationship between an individual and a state reaches its maximum intensity. The citizen may be a national and indeed, more often than not this is precisely the case. In other situations, however, the person's belonging to a certain community is not contingent on ethnic ties with the majority; and in any case, this is not his or her defining feature. In these cases, citizenship may also serve as a protection against nationalist excesses. For instance, the note sent by Clemenceau to Paderewski on June 24th 1919 just before the signature of the Polish Minorities Treaty, states : '*Les clauses 3 à 6 visent à assurer à toute personne résidant réellement dans les territoires transférés sous la souveraineté polonaise tous les privilèges afférant à la qualité de* citoyen'.[67] This vision of citizenship is in strong contrast with the ideal of ethnic homogeneity, according to which only ethnic nationals can be full citizens.[68] As pointed

64 See Koessler (n 48) Journal 65–7.

65 Etienne Balibar, 'Propositions on Citizenship (1988) 98 Ethics 723, 726.

66 Kratochwil (n 56) 485: '… focal points of the concept of citizenship: *belonging* and *status* (understood as a bundle of distinctive rights) … these notions constitute the core of our understanding of citizenship.'

67 'Articles 3 to 6 aim to guarantee to any person who has established his permanent residence on the territories transferred to Poland all the privileges related to the citizenship status' (Translated by the author). Cited in Marc Vichniac 'Le statut international des apatrides' (1933) 43 Recueil des Cours 145 (emphasis added).

68 Cf Arendt (n 45) 275: 'Some years later the Minority Treaties revealed "that only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions, that persons of different nationality needed some law of exception until or unless they were completely assimilated and divorced from their origin"'.

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out by Spiro, the reconceptualization of citizenship status involves a shift from an identity to a rights frame.[69] The provisions on the rights of permanent residents in the Geneva Convention constitute a truly watershed moment for the emergence of citizenship as an autonomous concept.[70] But this chapter would certainly be incomplete without mentioning that the distinction between nationality and citizenship was used by the Nazi regime to emphasise the importance of ethnicity. In 1935, Germany enacted the Nuremberg Laws that created two separate kinds of nationality/citizenship – *Reichsbürger* for ethnic Germans and *Staatsangehörige* reserved for non-ethnic Germans (ie Jews and ethnic minorities).[71]

2.2 *Nationality and Citizenship in the Partition of Upper Silesia*

The persons who found themselves as a minority on the wrong side of the arbitrarily drawn partition line were in a radically different situation from those who formed part of the majority. As pointed out by Kamusella, 'the sought-for equation of citizenship with nationality (that is, the [f]act of belonging to an ethnolinguistically defined nation) was initially somewhat softened by the Minorities Treaties'[72] and in particular, by the Geneva Convention. Part II of the Convention, based on Article 91 of the Versailles Treaty[73] and the Polish Minorities Treaty[74] provided for various

69 Spiro (n 41) 695.

70 Berman (n 25) 1894–95: 'The Convention's provisions regarding individuals bestowed both substantive and procedural rights on the inhabitants of Upper Silesia that moved towards extending them an autonomous international legal status outside the state system.' He further pointed out: 'the Convention gave such individuals a novel international legal status by reconfiguring that traditional bulwark of the state system, the distinction between "inhabitants" and "citizens," a phenomenon encountered in a different form in the Saar'.

71 Kamusella (n 19) 99. Gerhard Wolf, 'Exporting *Volksgemeinschaft*. The *Deutsche Volkliste* in Annexed Upper Silesia' in Martina Steber and Bernhard Gotto (eds) *Visions of Community in Nazi Germany* (OUP 2014) 132.

72 Kamusella (n 19) 17.

73 Berman (n 25) 1832: 'Article 91 embodied the traditional rule that citizenship follows territory, as well as three modifications of that rule. Each of these modifications reflected at least one of the new principles of international law: the new respect for subjective choice, legitimation of state power on the basis of the state's conformity to the "nation," and the new identification of individuals on the basis of their objective membership in such a "nation."'

74 Art 3 provides for the acquisition of Polish nationality through domicile and stipulates for the persons affected a right of option in favour of their former

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situations in which the persons who at a certain point of time had their domicile in Upper Silesia could acquire a new nationality or preserve their habitual residence.[75]

It is unnecessary to present all the possible hypotheses provided for in the Convention. Suffice it to mention some of the main provisions which were later complemented by the case law of the Tribunal. Germans domiciled in Polish Upper Silesia before 1 January 1908 would automatically lose their German nationality and acquire Polish nationality.[76] Germans could opt for German nationality for two years after the transfer of sovereignty.[77] The same right existed for Poles. The language used in Article 91 and the Geneva Convention clearly shows the distinction between ethnic belonging and the acquisition of nationality[78] and the crucial role played by domicile. In some cases, the German nationals born in Polish Upper Silesia but not domiciliated there at the time of the transfer would acquire Polish nationality in addition to their German nationality if they had family ties to the region and vice versa. They had two years to renounce one of the nationalities; otherwise, their nationality would be determined by their domicile.[79] Thus, the German nationals domiciled in Polish Upper Silesia could either opt for Germany or remain there.[80] The exercise of the right of option did not necessarily imply a duty to emigrate: the optants could remain in the portion of Upper Silesia that the partition had made 'foreign territory' to them.[81] The right of residence included the

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nationality. Art 4 provides for the acquisition of Polish nationality through birth within the territory and stipulates for the persons affected the right of renouncing this nationality.

75 Casey observed that the Peace Treaties 'also contributed to the conflation of the legal and ethnic categories... In effect, treaty provisions like Article 91 linked membership within a political community to membership in an ethnic community. That is, "Poles" who were legal Germans could opt to fix that anomaly. As a clerk in novelist B Traven's dark comedy on interwar nationality politics asked a sailor, "Did you, within the proper time given, declare before a German authority … that you wish to retain German citizenship after the Polish provinces according to the provisions of the Treaty of Versailles were returned to Poland?"' See Casey (n 9) 92.

76 Art 25 § 1 GC.

77 Art 25 § 4 GC. In that case those who opted for Germany would need to transfer their domicile there within twelve months of the declaration of option.

78 'Poles who are German nationals over 18 years of age and habitually resident in Germany will have a similar right to opt for Polish nationality.'

79 Art 26 GC.

80 Arts 40–45 GC.

81 Berman (n 25) 1895 citing Kaeckenbeeck (n 26) 188.

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right to exercise the profession or economic activity they practised before the transfer of sovereignty and the right to be treated on an equal footing with nationals.[82] From the language used by the Polish Minorities Treaty, we can surmise the existence of several concentric circles: the innermost composed of nationals-citizens notwithstanding their belonging to the ethnic majority in the respective state; persons belonging to an ethnic, religious or linguistic minority; and finally, all permanent residents.[83] The distance between the first and the second circle is reduced to a minimum by the equality of treatment 'in law and in fact'.[84] This is the basis of citizenship as a status protecting the persons when 'the politics of national loyalty [do] not necessarily correspond to linguistic boundaries'.[85] In the legal framework of the Convention habitual residence played a crucial role. In a great many cases submitted to the Tribunal, what mattered was to establish the domicile of the applicant on a certain date. The defining feature is threefold: the continuous presence on a certain territory which, pursuant to the Convention, gives rise to a legal status consisting of rights and duties. Citizenship does not aim to substitute nationality, but it definitely has an effect on it: it counterbalances and complements it. It also enlarges the scope of the group of subjects possessing the highest civil status in society.[86] This innovation is at the origin of the discourse heralding the emergence of a new 'international law of citizenship'.[87] As the recent

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82 Art 43 GC.

83 André Mandelstam, 'La protection des minorités' (1923) 1 Recueil des Cours 367. See also Kratochwil (n 56) 502: 'Attempts to mediate these tensions [resulting from the drawing of boundaries between "insiders" and "outsiders"] in the fashion of Montesquieu, by positing three concentric circles of "belonging" that at the same time provide for a hierarchical and "functional" integration of identity and authority, are unlikely to succeed.' See Arts 2, 7 and 8 of the Polish Minorities Treaty.

84 Art 8 of the Polish Minorities Treaty; Art 68 GC.

85 Karch (n 12) 140.

86 There seems to exist a certain proximity between the idea developed in the present paper and the concept of 'quasi-nationality'. The similarity resides in that both cases attempt to relativise the figure of the alien; in Upper Silesia the persons belonging to the minorities were not aliens because their domicile predated the transfer of sovereignty just like the long-term foreign residents could be considered as quasi-nationals. Sébastien Touzé, 'La "quasi-nationalité", Réflexions générales sur une notion hybride' (2011) 115 RGDIP 5, 10, spec. 19–20.

87 Spiro (n 41) 717: 'This new discourse also supports arguments that habitual territorial residents should enjoy access to citizenship.' See also Diane Orentlicher, 'Citizenship and National Identity', in David Wippmann (ed), *International Law and Ethnic Conflict* (Cornell University Press 1993) 299: 'Access to citizenship for

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study by Timothy Wilson has shown, identities in ethnically mixed border regions like Upper Silesia were extremely fluid.[88] The Geneva Convention left aside the question of identity (individuals could exercise their right of option and on a broader scale the same role was played by plebiscites)[89] and focused only on the 'objective determination' of nationality through domicile.[90] It is hard to overstate the revolutionary character of this objective determination operated by a third impartial judicial organ and submitting to judicial control one of the most sensitive facets of sovereignty.[91]

3. *Lawfare in The Hague, Mixed Feelings in Vienna*

In the first five years of its existence, the Arbitral Tribunal dealt with only 11 cases on nationality.[92] This was mainly due to two reasons: first, the period of option lasted until 15 July 1924; and second, many individuals were undecided which nationality to choose.[93] Even though their decision was not related to the identity but the formal link to a particular state, the choice would have serious repercussions on their everyday lives. But before the Tribunal could actually start the process of 'sorting out Poles and Germans', two important developments took place which should be seen in the broader context of the confrontation between Germany and Poland throughout the entire 1920s. Two cases decided in Vienna and The Hague set the background against which the Tribunal assumed its task and which had an immediate incidence on the approach of the Tribunal

habitual residents is founded in democracy and equality values, on a territorial-civic basis'.

88 See Timothy Wilson, *Frontiers of Violence: Conflict and Identity in Ulster and Upper Silesia, 1918–1922* (OUP 2010). See also Kamusella (n 8) 37–62. Cited by Volker Prott, *The Politics of Self-Determination* (OUP 2016) 132.

89 The right of option provided in Art 91 of the Treaty 'embodied the subjective idea of choice on the individual level, just as the plebiscite principle embodied it on the collective level'.

90 See also the judgment of the PCIJ in the *Rights of Minorities in Upper Silesia (Minority Schools)*, in which it declared that identity could not be subjected to 'objective' determination. (1928) PCIJ Series A no 12, 32.

91 Paul Weis, 'Statelessness as a Legal-Political Problem' in *The Problem of Statelessness* (World Jewish Congress 1944) 23: 'it becomes clear that, the compulsory settlement of conflicts of nationality laws by a supra-national judicature whose judgments would be binding on the States becomes imperative.'

92 In the next five another 153 cases were brought and the last four and a half years show a dramatic increase with 610 cases. Kaeckenbeeck (n 26) 131.

93 Kaeckenbeeck (n 26) 130.

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on nationality and citizenship: the 1923 advisory opinion of the PCIJ on the acquisition of Polish nationality[94] and the 1924 arbitral award rendered by Georges Kaeckenbeeck.[95] Both states were engaged in what can be qualified as 'lawfare'[96] or 'judicial diplomacy'[97] as a number of cases (contentious and advisory proceedings) were argued before the PCIJe.[98]

3.1 The 1923 Acquisition of Polish Nationality Advisory Opinion

The advisory opinion requested by the Council of the League concerned the interpretation of Article 4 of the Polish Minorities Treaty. Some persons, who were formerly German nationals, were treated by the Polish government as not having acquired Polish nationality and as continuing to possess German nationality, which exposed them to the treatment laid down for persons of non-Polish nationality and prevented them from enjoying the guarantees granted by the Treaty. Since these persons were born in the territory which was transferred to Poland and since their parents had their habitual residence there at the date of birth of these persons, Germany argued that they fell within the scope of Article 4(1) and could consequently be considered as Polish nationals. Poland considered that the correct interpretation of that provision required that the parents of these persons had to be habitually resident on that territory both at the date of birth and at the date of entry into force of the treaty (10 January 1920). On 15 September 1923, the Court handed down its advisory opinion in

94 *Acquisition of Polish nationality* (1923) PCIJ Rep Series B no 7, 6.

95 *Affaire relative à l'acquisition de la nationalité polonaise (Allemagne/Pologne)* 1 RIAA (10 July 1924) 401–438.

96 David Kennedy, 'Lawfare and Warfare' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP 2012) 160: '"Lawfare" – law as a weapon, law as a tactical ally, law as a strategic asset, an instrument of war. … [L]aw can often accomplish what might once have been done with bombs and missiles: seize and secure territory, send messages about resolve and political seriousness, even break the will of a political opponent.'

97 Terry D Gill, *Litigation Strategy at the International Court* (Martinus Nijhoff 1989) 6.

98 Suffice it to mention the *Chorzow* cases saga comprising the *Certain German Interests in Polish Upper Silesia* and *Factory at Chorzow*, *Rights of Minorities in Upper Silesia*, as well as the advisory opinions on *German Settlers in Poland*, *Acquisition of Polish Nationality* and *Access to German Minority Schools in Upper Silesia*.

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which it unanimously[99] found: first, that the issue fell within the scope of competence of the League and therefore within the guarantees protected by the League;[100] second, Article 4 of the Polish Minorities Treaty referred 'only to the habitual residence of the parents at the date of birth of the persons concerned.' In other words, it did not impose overly stringent requirements on the persons in question. The nationality of a state is not a necessary precondition for the membership of a minority within that state. The broad interpretation of the term 'minority'[101] adopted by the Court included inhabitants who differed from the population in race, language, or religion, ie inhabitants of this territory of non-Polish origin, whether they were Polish nationals or not.[102] In a telling *obiter dictum*, the Court observed that:

> One of the first problems which presented itself in connection with the protection of the minorities was that of preventing these States from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, *in spite of the link which effectively attached them to the territory* allocated to one or other of these States. It is clearly not a purely *fortuitous circumstance* that the

99 Judge Finlay appended observations in which he expressed that the Court 'should not merely have based its answer to the Polish contention as to competency on the view that the minority contemplated by Article 12 may be one of inhabitants simply, but that it should also have pointed out that, … the Polish case fails even if the minority were to be taken on the basis of *ressortissants*'. See PCIJ Rep Series B no 7 (Finlay) 26.

100 See Paul de Vineuil, 'Les résultats de la troisième session de la Cour permanente de Justice internationale' (1923) 4 Revue de droit international et de législation comparée (3rd ser.) 593.

101 Nathan Feinberg, 'La juridiction et la jurisprudence de la Cour permanente de Justice internationale en matière de mandats et de minorités' (1937) 59 Recueil des Cours 587, 635.

102 PCIJ 14: 'these clauses [of the Minorities treaties] considerably extend the conceptions of minority and population, since they allude on the one hand to the inhabitants of the territory over which Poland has assumed sovereignty and on the other hand to inhabitants who differ from the majority of the population in race, language or religion. The expression "population" seems thus to include all inhabitants of Polish origin in the territory incorporated in Poland. Again, the term "minority" seems to include inhabitants who differ from the population in race, language or religion, that is to say, amongst others, inhabitants of this territory of non-Polish origin, whether they are Polish nationals or not.'

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> Treaties for the protection of minorities contain provisions relating to the acquisition of nationality.[103]

In the abovementioned passage the Court defended the position that although an effective link between the inhabitants and the territory must exist, this requirement need not be interpreted in an overly formalistic manner. The Court considered that the interpretation of the Polish government would 'amount to an addition to the text' which would only make sense if the habitual residence of the parents was aimed to create a presumption in favour of a 'closer, more enduring and more powerful link [between the children and] … Poland'. This, however, was not the case. Thus, pursuant to Article 4, ethnic Germans were considered as having acquired, *ipso facto*, the status of Polish *ressortissants*, *de plein droit et sans aucune formalité*, if born of parents domiciled in Poland at the time of birth.[104] The value of the judgment lies in this rejection of the excessively restrictive interpretation of the conditions for the acquisition of Polish nationality. The Court's interpretation inevitably undermined what Ole Spiermann qualified as 'the national principle of self-containedness'.[105]

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103 Ibid, 15 (emphasis added). In this passage, the Court arguably secretly paraphrased Count Rostworowski, who had argued in the parallel case concerning the German Settlers in Poland (which was decided five days before the present one, on 10 September 1923), that the fact that most of the settlers affected by the disputed Polish legislation were German, was merely a '*coïncidence fortuite*'. See the pleadings of Count Rostworowski in the *German Settlers in Poland* case, where he stated that : '*Le fait que les colons [of German settlers] sont exclusivement classés ou se classent d'eux-mêmes dans la catégorie d'Allemands au point de vue ethnique, est* une coïncidence fortuite *au point de vue de la législation et de la jurisprudence polonaises, mais elle s'explique au point de vue historique, notamment par la tendance de l'ancien Gouvernement prussien de faire servir l'œuvre de colonisation dans les provinces polonaises au renforcement du germanisme.*' PCIJ Rep Series C03/2, 436. ('The fact that the settlers are categorised or consider themselves as Germans from an ethnic point of view is a fortuitous coincidence from the point of view of the Polish legislation and case law but which can be explained from a historical point of view, in particular by the tendency of the former Prussian government to use settlers in the Polish provinces in order to strengthen Germanism'.) Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice* (CUP 2005) 187: 'As for the *German Settlers* opinion concerning discrimination in the context of property rights, the Permanent Court sensibly concluded that the Polish Government's declared policy of de-Germanisation amounted to discrimination, if not in law, then in fact.'

104 Observations of Judge Finlay, PCIJ Rep Ser B no 7, 23.

105 Spiermann (n 103) 79: According to this principle 'the state is seen as perfectly capable on its own, that is, in its national law, to regulate the relationship

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However, the advisory opinion left open one important question because it did not provide a precise definition of the term 'domicile'.

3.2 The 1924 Vienna Arbitral Award

As soon became clear, the advisory opinion of the PCIJ failed to settle the issue of domicile. Although both states accepted in principle the definition ('permanent establishment with the intention of remaining'), many practical problems arose concerning its interpretation and in the following months, the controversy between Germany and Poland at the Council of the League festered.[106] After lengthy exchanges, an agreement was reached to initiate an arbitration which would eventually serve as a basis of a convention to be drafted by the two governments under the presidency of the arbitrator, none other than Georges Kaeckenbeeck, President of the Tribunal for Upper Silesia. On 10 July 1924, after the submission of the written pleadings (oral rounds were excluded as they would unnecessarily exacerbate the tension), Kaeckenbeeck gave a ruling on twelve issues on which the governments maintained opposing views.[107] There were twelve questions in total which concerned two issues: the meaning and (territorial and temporal) scope of the term 'domicile' and option.[108] For the present chapter, only the former will be discussed. The importance of domicile resides in that it establishes the link between a person and territory. It is at the heart of the conceptual triangle formed by territory, nationality/citizenship, and rights. The place where a person habitually resides is the place where he or she should enjoy the full spectrum of rights and their most effective protection.

The German government argued for a more flexible approach while Poland predictably favoured a strict interpretation implying an exclusive

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between individuals, and between individuals and the state; thus individuals are not normally a concern for the international law of coexistence.'

106 Kaeckenbeeck (n 26) 125.

107 1 RIAA 401–28 (in French).

108 As to the former some of the questions before the Arbitrator were whether it needed to be uninterrupted, the domicile of parents, whether the persons in questions needed to be German nationals at birth or at the moment of the transfer of sovereignty, the acquisition of the nationality by descendants, the nationality of women and children; regarding the exercise of options, he had to decide on the necessity to recognise their validity by the other state, the validity of options in some specific cases, the obligation to emigrate in the twelve months after the exercise of option (only for German nationals).

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concentration of personal and economic relations in a single place.[109] Kaeckenbeeck began his analysis by insisting on the existence of an autonomous concept of domicile in public international law which differed from public law and even private international law.[110] For him. there was no doubt that the genuine connection between an individual and state was characterised by a concentration of a certain degree of economic and personal relations. The individual's habitual residence is the place where he or she is principally resident.[111] But the requirement of exclusivity of all economic relations in a single place supported by the Polish government is unjustly rigid and does not reflect the exigencies and the conditions of economic life.[112] Nor was the expression 'in a single place' to receive a strict interpretation.

> The choice of domicile as an indication of the links existing with a particular territory does not require the establishment to be localised in absolute terms. Changes of residence or even of municipality within the territory in question do not affect in any way the domicile as it is understood here. There is no need [for the persons in question] to remain fixed in a particular spot; what is required is a certain stability in the territory.[113]

In other words, what matters is not the almost dogmatic fixation on a particular immutable point in space but whether the person in question has fulfilled the objective and the subjective elements contained in the definition provided by the PCIJ, ie permanence and intention to remain. The rejection of the requirement of exclusivity led Kaeckenbeeck to admit the possibility that a person may have two domiciles in two different

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109 1 RIAA 407–409.

110 ibid, 407.

111 Cf Article 5 of the Convention on Certain Questions relating to the Conflict of Nationality Laws (signed 12 April 1930, entered into force 1 July 1937) 179 LNTS 90.

112 1 RIAA 408: '*Une concentration exclusive correspondrait d'ailleurs très mal à la vie sociale et économique actuelle qui, loin de se concentrer entièrement en un seul endroit, donne souvent lieu à une décentralisation très considérable*'.

113 ibid, 408: 'Le domicile choisi comme indice d'attache à un territoire ne demande pas un établissement absolument localisé. Des changements de demeure ou même de localité à l'intérieur du territoire en question ne nuisent nullement au domicile tel qu'il faut l'entendre ici. *Il ne faut pas la fixité sur un même point; il faut la fixité dans le territoire*'. (translation by the author) (emphasis added). See also *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ Rep Ser A no 7 (1926) 79

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territories. That conclusion *per se* would not mean that two domiciles open the way for the acquisition of dual nationality. The latter was excluded by the right (which in a way was also a duty) of option. Individuals had the right to choose but they were also obliged to choose and even the non-exercise of that right could be considered as a matter of personal choice. Although Kaeckenbeeck indicated what domicile is not: ('*pas un établissement absolument localisé … il ne faut pas la fixité sur un même point*') but he carefully avoided defining the meaning of 'territory' ('*il faut la fixité dans le territoire*')[114] which was left to be determined by the Tribunal in each case. This flexible interpretation was matched by a broad territorial and personal scope. The habitual residence in Articles 3 and 4 of the Minorities Treaty concerned the entire territory of Poland and not only the part ceded by Germany. Women and children could acquire Polish nationality if they fulfilled the legal conditions even if their respective husbands or legal representatives did not fulfil the said conditions. After protracted negotiations during which the League continued to apply pressure, a compromise agreement was finally concluded in Vienna on August 30, 1924, which adopted the Polish view of option and the German theory of domicile.[115] As will be demonstrated in the next section, the reasoning and the conclusions reached by Kaeckenbeeck in the arbitral award exerted significant influence over the approach of the Mixed Arbitral Tribunal in its case law on the matters of nationality and right of residence.

4. *'It Was Above All Life That Was to Be Interpreted': The Five Pillars of Citizenship Protection in the Case Law of the Tribunal*

In a speech before the Grotius Society in 1935, Kaeckenbeeck observed that:

> Anyone who examines the five volumes of precedents of the Arbitral Tribunal will be struck by the place occupied by nationality cases. The reason is this: the provisions of the Geneva Convention concerning

114 '[T]he establishment [need not] to be localised in absolute terms … There is no need [for the persons in question] to remain fixed in a particular spot; what is required is a certain stability in the territory'.

115 Jacob Robinson, Oscar Karbach, Max Laserson, Nehemiah Robinson and Marc Vichniak, *Were the Minorities Treaties a Failure?* (Institute of Jewish Affairs 1943) 121–22.

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> nationality will still have to be frequently applied after both the Conciliation Commission and the Arbitral Tribunal have ceased to exist.[116]

But the Tribunal's contribution goes even beyond this already quite impressive feature of its jurisdiction. This section will show that in several ways the Tribunal was able to protect the rights of individuals differing from the majority in Upper Silesia. The Tribunal would not be able to achieve that without the firm basis provided by the Geneva Convention, the Polish Minorities Treaty, and the Versailles Treaty. It did so by relying on the principle of effective interpretation, which was finding its place in international law and to which the PCIJ also had recourse in the context of minorities.[117] The relative brevity of the decisions was in stark contrast with the meticulous qualification of the facts. However, despite the painstakingly detailed legal regime, life quickly rushed in bringing up situations which were not foreseen by the drafters of the Convention. This was particularly relevant in the context of the determination of domicile. In the words of its President:

> in the matter of the definition of domicile, so vital for the application of the Geneva provisions on change of nationality, the Arbitral Tribunal above all repudiated rigid, automatic criteria. Its decisions were a constant reminder that all the facts must first be ascertained, and then be considered as a whole. *It was above all life that was to be interpreted*.[118]

Thus, it is not at all surprising that the interpretation of domicile was among the most important questions in the rich case law of the Tribunal. Whether certain conduct amounted to 'temporary abandonment' (*abandon temporaire*), whether it was the same as 'momentary abandonment' ('*abandon passager*') and how could one discern the subjective element (the intention to return) were hotly contested issues that receive an authoritative interpretation in *Puchalla*.[119]

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116 Kaeckenbeeck (n 33) 37.

117 See Spiermann (n 103) 188. On the principle of effectiveness in treaty interpretation in this context see also Hersch Lauterpacht, *The Function of Law in the International Community* (OUP 2011) 134.

118 Kaeckenbeeck (n 26) 141 (emphasis added).

119 4 Arb Trib Dec 126ff. The importance of the case resided in the need for the Tribunal to decide on the meaning of the term 'temporary abandonment' as an essential condition for the preservation of German citizenship in the case of persons who already had their permanent residence in the Polish part of Upper Silesia before 1908 (Art 25 § 2)

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Kaeckenbeeck and his colleagues were very much aware that nationality questions were at the heart of the sensitivities and sovereignty of states. Exercising judicial control over issues of nationality is one of the most conclusive proofs of the existence of a right to nationality, 'the acquisition or loss of which should be a matter of law, and not simply one of discretion for national authorities'.[120] This clearly illustrates Kaeckenbeeck's attitude towards the 'principle of self-containedness'.

The following subsections will first address the direct implications of the Tribunal's case law on citizenship. I start with the most immediate instance, namely the right to a nationality, followed by the right to residence and its corollary the protection against expulsion, the prohibition of discrimination and finally the protection of stateless persons and dual nationals. The last subsection deals with some instances of indirect protection such as vested rights which emphasise the role of domicile and consequently, of citizenship.

A preliminary clarification is warranted: Upper Silesia represented a peculiar instance of state succession under hybrid (international/local) administration. The fundamental disagreement between Germany and Poland on all matters of nationality and permanent residence resulted in a zero-sum game, the first victims of which were the individuals affected by the transfer of sovereignty. That is also why most cases were negative conflicts where the persons concerned would end up *de jure* or *de facto* stateless.[121] All the instances discussed in the following subsections were used to mitigate the negative effects of the partition on these vulnerable groups.

120 Kaeckenbeeck (n 26) 521. For the sake of clarity, it has to be pointed out that access to the Tribunal was open only after recourse to the Conciliation Commission had failed. Several passages in the *International Experiment of Upper Silesia* are revelatory of the tension between the two institutions which held opposing views on the issue of nationality. The Commission tried to block the way to the Tribunal and to transform the right of the inhabitants to acquire a nationality in conformity with the provisions of the Geneva Convention into the obligation of putting up with the nationality which the officials of both states agreed to confer to them. It is easy to imagine that the members of the Conciliation Commission viewed with suspicion the attempts of the Tribunal to apply the Convention and to protect the rights of individuals and considered them as 'international encroachments'. Kaeckenbeeck (n 26) 130, 142.

121 ibid, 123.

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4.1 The Right to a Nationality

The first and most powerful incidence of territory on nationality, where we see most clearly how permanent residence paves the way to the full range of rights is the conception of the right to a nationality.[122] The previous section broached the issue in relation to the meaning of domicile. But the entire purpose of the interpretation of that term is precisely to determine who can undergo the spectacular transformation from a non-national permanent resident into a citizen. The existence of a customary provision on the right to a nationality in international law is subject to intense ongoing debate, especially in the context of statelessness, where its absence is felt most acutely. The Geneva Convention was perhaps the first international instrument to establish a subjective right to a nationality on which the Arbitral Tribunal was competent to make binding pronouncements with lasting effects. The majority of the post-WWI treaties contained clauses on nationality, but they were mostly concerned with the avoidance of statelessness (not very successfully in this regard)[123] and did not go as far as to amount to a recognition of the subjective right to a nationality.

The right for permanent residents of German origin to acquire Polish nationality is also the instance where nationality and citizenship merge into one inseparable compound. In all other situations, notably the right of residence, the individual is protected as a citizen by his or her domicile. The subjective right to a nationality constitutes an important exception in the broad framework of the regulation of this extremely delicate issue. As pointed out by President Kaeckenbeeck:

> As international lawyers are wont to say, nationality is a reserved matter, i.e. one for which international law gives the States a sort of blank cheque. But this reservation is in reality only partial, and the cheque is not quite blank.[124]

122 See Kaeckenbeeck (n 26) 214. The term preferred in the present chapter is 'right to a nationality' which implies a particular nationality as opposed to 'right to nationality'.

123 Vichniac (n 67) 145–46.

124 Kaeckenbeeck (n 26) 520. See also ibid, 521.

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4.2 The Right of Residence and the Protection Against Expulsion

The previous sections posited that the 1919 treaties and the Geneva Convention as *lex specialis* distinguished between citizenship based on domicile and nationality based on descent. The gateway to the subjective right to a nationality and all the other rights was Article 29 GC which contained the definition of domicile. It was also one of the very last provisions on which agreement had been reached in Geneva[125] and it is hardly surprising that the definition was intentionally left ambiguous. It was only the 1924 arbitral award that provided the necessary clarity with an interpretation expressing support for the flexible approach defended by the German government.

The right of residence is the first instance where nationality and citizenship take different paths.[126] It is an original creation of the Convention. In essence, it gave people settled in Upper Silesia at the time of partition the right to remain there undisturbed for fifteen years even though they had not acquired, or they had lost the nationality corresponding to their place of residence. Those who could benefit from the right were therefore always aliens, ie persons not belonging to the majority[127]. Another offshoot of this right was contained in Article 43 which provides that regarding their business or lucrative activities, these aliens could not be subjected to other restrictions than such as existed by law at the time of partition and were for the rest to be treated on the same footing as nationals[128].

The Tribunal examined each case with meticulous care to determine the domicile of the person(s) in question. The situations varied and significant flexibility was warranted. The Tribunal did not set out a strict approach to domicile – it merely 'collected the facts and drew from them a natural conclusion'.[129] Of course, it is difficult to take this statement at face value. There could be no such thing as a 'natural conclusion' because most of the cases discussed by Kaeckenbeeck in his book presented a difficulty of one sort or another: either the facts could not be clearly established, or they simply did not fit the existing legal regime. The tribunal used a variety of interpretive techniques and the flexibility demonstrated by Kaeckenbeeck as arbitrator in Vienna, continued in Beuthen. A good illustration of the flexibility is presented by the *Czollek* case. The applicant was born in

125 Kaeckenbeeck (n 26) 135.
126 Arts 40 and 41 of the Convention.
127 Kaeckenbeeck (n 33) 38.
128 Art 43 GC.
129 Kaeckenbeeck (n 26) 137.

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Krascheow in German Upper Silesia, and he lived there until 1921 when he moved to Beuthen and Siemianowice (on the Polish side) to work as a stoker. One day Czollek was arrested by German officials who found a membership card of the Polish insurgents. After a judicial procedure, the government of Oppeln issued an order of expulsion because it considered him to be a Polish national. The main question before the Tribunal was whether on 15 June 1922 Czollek had his domicile in Krascheow or Siemianowice. Czollek, however, kept close ties with his parents on the German side. He spent all his free time with his family, he contributed significantly to paying the loan for the family house and his clothes were regularly washed and mended at home and he took victuals with him to his workplace. He had gone to Siemianowice on the Polish side only because he found a position there. The Polish authorities had issued him with a circulation permit, which stated that he was German. The Tribunal considered that his domicile was where his activities, interests of personal and economic nature were concentrated. Czollek was declared to be a German national and his expulsion did not take place.[130] Kaeckenbeeck reiterated that the Tribunal merely 'collected the facts and drew from them a natural conclusion, which was also a human one. It showed the Conciliation Commission what it should have done'.[131] The attempt of the Tribunal to locate the centre of vital interests strongly resembles the so-called 'genuine link' doctrine. And just like in *Nottebohm* three decades later, the context of the case was that of a single nationality.[132] But the definitive interpretation of Article 29 came in the *Halamoda* case.[133] The applicant was prosecuted for not possessing a Polish passport and for residing without permission at Bresnitz. Halamoda claimed German nationality because he had his domicile in German Upper Silesia at the time of the transfer of sovereignty. The local German administration of Ratibor considered him as a Pole because of his domicile in Polish Upper Silesia. Like Czollek, Halamoda found work in Polish Upper Silesia, and

130 Kaeckenbeeck (n 26) 136.

131 Kaeckenbeeck (n 26) 137.

132 *See Nottebohm* 1955 ICJ Rep 22 (noting approach of arbitral bodies to claims of dual nationals to give 'their preference to the real and effective nationality ... that based on stronger factual ties between the person concerned and one of the States whose nationality is involved'). On the criticisms regarding the approach of the Court, see Robert Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 Harvard International Law Journal 1. See also Ian Brownlie, 'The Place of the Individual in International Law' (1964) 50 Virginia Law Review 446.

133 1 Arb Trib Dec 122.

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he returned every Saturday to his family in Bresnitz in the German part; he carried out domestic tasks, he washed his clothes there and prepared food for work. The Tribunal adopted a holistic approach towards the factual background, considering all the circumstances. It confirmed its conclusion in *Czollek* and found that the domicile of Halamoda was in German Upper Silesia. The Tribunal did not use or impose a strict methodology on how to determine the domicile; it preferred to remain flexible and take all the circumstances into account. In the cases, mentioned by Kaeckenbeeck, the workplace seems to have been attributed less weight than personal interests. Family relations were granted particular attention, even though the Tribunal did not elevate the place of residence of wife and children to the rank of a decisive criterion.[134]

Another example of the rejection of formalism in the appreciation of facts was *Lindhorst*. The claimant had lived in Polish Upper Silesia around the time of the transfer of sovereignty but moved to Bielefeld just before the transfer while his family had remained in Poland in preparation to join him. The German authority took the view that he 'had become a Pole'.[135] After Lindhorst was able to prove that he did not have a domicile in Poland after mid-June 1922 and all his furniture was packed and waiting to be shipped to Germany, the Tribunal reversed the decision of the Conciliation Commission and concluded that Lindhorst was able to preserve his German nationality. The absence of his family in the relevant period did not have a decisive impact on his situation.[136] The decision is another instance of the difference of approach between the Tribunal and the Conciliation Commission. One of the most important threats to the right to nationality was that the individual's right to a nationality could be effectively replaced by the agreement of the members of the commission.[137]

If protecting the right to a residence was the basis of the citizen as a member of the community, that right would be seriously impaired if it had not been complemented by the protection against expulsion. The power to decide whom to exclude physically remains an important

134 Kaeckenbeeck (n 26) 139. 3 Arb Trib Dec 76.

135 Kaeckenbeeck (n 26) 139.

136 For other cases demonstrating the flexibility of the approach, see *Fuchs*, 5 Arb Trib Dec 88 or Kaeckenbeeck, (n 27) 140–1; *Kasparek* 7 Arb Trib Dec 278; cases of vagabonds St. 106/33, St 161/35; of prisoners: *Drewniok*, 7 Arb Trib Dec 64; St. 14/29, St. 20/32; of a permanent invalid at home: *Dubiel*, 3 Arb Trib Dec 34; of refugees: St. 4/29, St. 114/33, St. 24/32

137 Kaeckenbeeck (n 26) 143.

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prerogative of states.[138] Article 44 of the Geneva Convention stipulated the right of states to expel persons for reasons of public security (internal and external) or any other reason of police, hygiene, morals or public assistance. Cases of expulsion were frequently dealt with urgently such as *Schult* where the interim decision (resembling the provisional measures order in the International Court of Justice procedure) was dictated by Kaeckenbeeck on the phone to the Polish police who were already at the house 'ready to proceed with the forcible removal of Director Schult and his family'.[139] The authority issuing the expulsion order also had to demonstrate the existence of one of the grounds listed in Article 44. If the Tribunal was not satisfied with the information provided, it could conclude that the expulsion order constituted a violation of the right to residence as demonstrated by *Diederichs.*[140] The Tribunal did not deny the margin of appreciation left to states but it used it to strengthen its power of judicial overview. If the authority could prove the existence of a link between the circumstances, the measure and motives of state security, the Tribunal could do nothing but find that the right to residence has not been violated. It could not 'in each particular case pass on the necessity of the measure.'[141]

While admitting that the right of residence played a significant role in all matters of territorial adjustments, Kaeckenbeeck did not hide his scepticism regarding the general usefulness of this right.[142] 'It would certainly be wrong to deny that under exceptional circumstances a right of residence may, for small numbers of people, prove a boon and a definitely humane solution. But mostly it appears, from my experience, politically unsound

138 In *Hochbaum*, a landmark case on expulsion, the Tribunal referred to 'the right of the Contracting Parties to forbid, for reasons of State security … this reservation – which is unqualified – concerns the fundamental right of every sovereign State to decide, within its own discretion, upon the staying of aliens in its territory', 5 Arb Trib Dec 140. See Gerard Conway, 'The Arbitral Tribunal for Upper Silesia' in Ignacio de la Rasilla and Jorge E Viñuales (eds) *Experiments in International Adjudication* (CUP 2019) 110.

139 Kaeckenbeeck (n 26) 208.The decision was based on Article 599 GC. 'This interim decision is necessary because, owing to the shortness of the time limit, the Arbitral Tribunal has no possibility of examining the merits of the case, whereas the carrying out of the expulsion would cause considerable damage to the persons concerned'.

140 2 Arb Trib Dec 84.

141 ibid.

142 Kaeckenbeeck (n 26) 213.

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and humanly dangerous'.[143] This statement comes in stark contrast with the overall exposition of the case law of the Tribunal in which the right of residence features prominently. Paradoxically, Kaeckenbeeck contrasts the negative conclusion on the right of residence with the international judicial control of change of nationality, which was and remains a much more contested issue. It is perplexing why he considered that matters of nationality *per se* were less susceptible to provoke tension than a permanent residence, given that the former was more immediately related to subjective perceptions of identity than the latter which was more susceptible to objective appreciation. Judging from the conclusions regarding the Tribunal's success, Kaeckenbeeck seemed to take the view that the right to a residence could not be compared with the right to *a* nationality, implicitly revealing the tension between nationality and citizenship; furthermore, even though at the time the advent of such a right outside the narrow context of Upper Silesia was deemed possible, in the present context the development of this subjective right is slow and rather unsatisfactory while citizenship enjoys more attention.

4.3 The Prohibition of Discrimination

As already mentioned, Article 43 of the Convention provided that people who had the right to preserve their residence could not be subjected to other restrictions than such as existed by law at the time of partition and were for the rest to be treated on the same footing as nationals. Due to the severe economic crisis in the area, individuals dismissed by their employers frequently relied on this provision and argued that their dismissal in preference to certain nationals, not entitled by their social circumstances to more regard, was due to pressure of the authorities on their employers.[144] The case of *Gilga* clearly illustrates the importance of this element in the legal framework of the Convention.[145] The second case is not part of the case law of the Tribunal, but is related to the Upper Silesian context and represents special interest: the famous *Bernheim* petition.

Gilga had worked for 25 years for the Rybnik coal-mining company. In September 1930 he was given notice for the reason of staff reduction. He protested and after some lengthy administrative procedures, his protest

143 ibid.
144 Kaeckenbeeck (n 33) 38.
145 4 Arb Trib Dec 260.

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was rejected by the Conciliation and Arbitral Commission which stated that since Gilga was an alien (German), given the absolute necessity of reducing staff, it was possible to dismiss him as alien. The Tribunal stated that:

> Denying protection to persons possessing the right to residence would thus mean differential treatment as compared with nationals with regard to lucrative activities and it would be contrary to article 43. This does not imply that persons possessing the right of residence should be treated more favourably than nationals. If, therefore, nationals have to be dismissed for economic reasons, the dismissal may also extend under the same conditions to persons possessing the right of residence because they are not entitled to privileged treatment. *But neither should they be less well treated.* In their case, as in the case of nationals, there must therefore be examined without regard to nationality whether, taking into account a social and family conditions, there are actual reasons important enough to justify their dismissal. … the only reason for the dismissal of the complainant was his nationality. His right of residence has not been taken into consideration in this connexion and has therefore been violated.[146]

This is a strong statement in favour of establishing a link between rights, territory, and citizenship where a permanent resident cannot be discriminated against because he did not belong to the ethnic majority.

The other important case was not decided by the Arbitral Tribunal but its presence is justified first, by the relevance for non-discrimination and second, for the attention it attracted to the point that we can arguably consider *Bernheim* as an instance of strategic human rights litigation *avant la lettre*.[147] The condition of the Jewish inhabitants in German Upper Silesia had worsened considerably in the first months of 1933 following Hitler coming to power. In a meeting in Katowice, leaders of the Jewish community in Upper Silesia decided to attempt to attract the attention of the Council of the League of Nations. To do so, it was necessary to file a petition on behalf of someone who was no longer on that territory to

146 Cited in Kaeckenbeeck (n 26) 199.

147 This short exposition of the *Bernheim* case is based on the article by Johann W Brugel, 'The Bernheim petition: A challenge to Nazi Germany in 1933' (1983) 17 Patterns of Prejudice 17–25. 'Strategic litigation is the identification and pursuit of legal cases as part of a strategy to promote human rights. It focuses on an individual case in order to bring about broader social change', <https://trialinternational.org/topics-post/strategic-litigation> accessed 30 January 2023.

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avoid worsening his personal situation. This person was Franz Bernheim. Between 1931 and 1933 he lived in Gleiwitz and worked in a company from which he was dismissed in April. Bernheim was a brother-in-law of a left-wing publisher, which additionally exacerbated his position and led him to emigrate to Prague. The petition was drafted by the president of the Jewish party of Czechoslovakia, Dr Emil Margulies, and sent to Pablo de Azcárate, head of the Minorities Section in the League Secretariat. The petition reproduced recent German legislation and made a larger case for the treatment of the Jewish minority in Upper Silesia, claiming that it was in breach of several provisions of Part III of the Geneva Convention which guaranteed the equality of all German nationals (ie citizens) before the law.[148] Bernheim requested that the Council annul all the legislative and administrative measures, that the rights of the Jews be restored and they receive compensation.[149] The machinery of the League was set in motion with impressive speed. Only two days later the Secretary-General of the League circulated the petition to the members of the Council. The German representative at the Council Keller considered that Bernheim was not even entitled to lodge a complaint since he was neither by origin nor by other means connected with Upper Silesia. Keller declared that Germany was open to settling the matter through the 'local procedure' provided by the Convention but the Council decided to ask three international lawyers to prepare an opinion on whether 'with a view to determining the Council's incompetence to decide on the said petition, it can be validly argued that the petitioner does not belong to the minority because he has no sufficient connections with Upper Silesia'.[150] The committee, composed of Max Huber, Maurice Bourquin and Manuel Pedroso, found that the German arguments regarding the admissibility of the petition were ill-founded. Their answer was as follows: 'If these facts are correct – and they have not been disputed – the undersigned concludes that Herr Franz Bernheim must be regarded legally as belonging to a minority within the meaning of Article 147 GC'.[151] The text of the Convention did not require that 'the petitioner must either have been domiciled in the plebiscite area for a certain minimum period, or have connections with it of a specific

148 For a more detailed exposition of the provisions in question, see André Mandelstam, 'Les dernières phases du mouvement pour la protection internationale des droits de l'homme' (1933) 12 Revue de droit international 469, 502.

149 ibid, 503.

150 Only the first argument is mentioned here. The other two are not directly relevant for the purposes of our study. Kaeckenbeeck (n 26) 264.

151 ibid, 265.

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nature, such as origin or family ties, or possess the nationality of the State of Prussia'.[152] The fact that Bernheim was not physically present in the territory of Upper Silesia could not deprive him of the right conferred to him by Article 147. Moreover, the committee found that the fact that the petitioner was not affected himself by the legislation in question, did not affect the petition. 'The only interest the petitioners are required to have is that resulting from their being actually members of a minority'.[153] In the end, the case came before the Mixed Commission, which granted Bernheim compensation although the German representative tried to prevent this by arguing that Bernheim was dismissed because of his incompetence and communist tendencies and not for ethnic reasons.[154] After a couple of months, the administration in Oppeln declared that the legislation in question had no validity in Upper Silesia.[155] The victory was short-lived since after the lapse of the Geneva Convention on 15 July 1937 all the measures were reinstated. On the other hand, Germans in Polish Upper Silesia were systematically discriminated against, not for ethnic reasons, as noted by Kaeckenbeeck, but as part of the process of 'polonisation' of the region in the context of a severe economic crisis.[156]

4.4 The Protection of Dual-Nationals and Stateless Persons

The Geneva Convention did not mention the possibility of dual citizenship, but it did not exclude it either. In practice, however, both states were extremely reluctant to grant full rights to dual nationals.[157]

In the context of widespread nationalism where identity, loyalty and nationality were intrinsically related, double nationality and statelessness were regarded with equal suspicion.[158]

The protection against statelessness and the protection of dual nationals is an essential pillar in the process of autonomisation of citizenship. Their presence in the same subsection is justified by the general attitude towards them. Both were perceived as equally anomalous situations, two sides of

152 League of Nations, C.366.1933.I Geneva June 2nd, 1933, cited in Kaeckenbeeck (n 26) 265.
153 ibid.
154 Kaeckenbeeck (n 26) 266; Brugel (n 147) 23.
155 ibid.
156 Kaeckenbeeck (n 26) 267.
157 Erpelding (n 4) 288.
158 See Casey (n 9) 100.

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the same coin, resulting from the positive or negative conflict of laws.[159] The procedure foreseen by the Convention followed the prevailing trend at the time: it aimed to sort out persons and to reduce their links to single citizenship. If a genuine link meant a link with a single state, 'to the exclusion of any other state'[160] and genuine loyalty could exist only towards one state, a person without a state is as unfit for citizenship as the dual national. To eliminate this, the Convention had two instruments: option and renunciation. While the former was meant to readjust the relationship between individuals and states, the latter was clearly meant to put an end to dual nationality without, however, resulting in statelessness.[161] The peace treaties aimed to get rid of statelessness and they failed signally in that endeavour.[162] The Geneva Convention contains a complex set of interlocking rules for the acquisition and loss of nationality[163] which had the residual effect of reducing the possibility of statelessness. The system could be qualified as thoroughly territorial because most of the safety valves preventing the person from statelessness were based on his or her domicile. Some provisions had the same function, although implicitly, for instance, those on the change of nationality of married women and children.[164] Article 28 provided the last line of defence, some sort of a legislative *pis-aller* in cases when it was impossible to determine the nationality according to the provision of the Convention, nor determine the habitual residence. Pursuant to this provision, all persons born within the plebiscite area before the date of the transfer of sovereignty and whose nationality could not be determined, are to be considered nationals of the state to which the place of their birth has been attributed as a consequence of the partition. Of course, the scope of the provision is limited only to persons born in Upper Silesia. The usefulness of the provision was well illustrated by the *Dominik* case.[165] Its complex factual background involved several moves back-and-forth between German and Polish Upper Silesia, at times without informing the police authorities and staying for weeks and

159 See the Preamble of 1930 Convention.

160 *Nottebohm* 23: 'the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with *that of any other State*." (emphasis added).

161 Kaeckenbeeck (n 26) 157.

162 Norman Bentwich, 'Statelessness through the Peace Treaties after the First World War' (1944) 21 BYBIL 171.

163 Arts 25–28 GC.

164 Arts 30–31.

165 Kaeckenbeeck (n 26) 180.

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months in parents' or friends' houses. The lapse of time and the conflicting statements of the witnesses additionally complicated the establishment of facts. Since the nationality of Dominik could not be determined on the basis of Article 26(1) or (2), Article 28 came into play. According to the reasoning of the Tribunal, Article 28 became operative when it was not certain whether a particular person had to change their citizenship or had to remain German.[166] The provision had one inherent limitation, however: the person in question had to have been born in Upper Silesia. Once again, the territorial link provided the indispensable (albeit limited) safety net for the prevention of statelessness.[167]

The situation of dual nationals was of similar vulnerability because many of them were *de facto* stateless. Many families were treated as Poles by the German authorities while the Polish administration considered them as German or having both nationalities. As a consequence, they had to renounce one of their nationalities, but the Convention contained more automatic machinery in which domicile played an important role. Pursuant to Article 26 (3) the domicile at the end of the two years was, in the absence of express renunciation, decisive for the nationality to be preserved. But there were some diabolically complicated situations. In *Plonka* a person born in what had been Russia and after the war, Poland, found himself *de facto* stateless: he was domiciled in Polish Upper Silesia but if the relevant provision of Article 25 GC was applied to him, he would be German; the German authorities considered him to fall under Article 7 of the Vienna Convention and consequently, for them he was a Polish national.[168] Plonka was in the position where he could 'fall between two sovereignties'.[169] The German authorities confiscated his German passport, which Plonka argued violated Article 83 of the Geneva Convention[170] in view of the fact that his acquisition of German nationality would have automatically deprived him of the prior Polish nationality that he had,

166 Kaeckenbeeck (n 26) 182. The main problem consisted in the need to operate an interpretation harmonious with Article 6 of the Polish Minorities Treaty.

167 The need for certain links between an individual and a state as a basis for conferring nationality was emphasized by various members of the International Law Commission in the debates on elimination and reduction of statelessness. Habitual residence and the question of allegiance recur in these discussions. Brownlie (n 132) 440.

168 2 Arb Trib Dec 100.

169 Kaeckenbeeck (n 26) 179.

170 Article 83 stated that the Contracting Parties undertake to assure full and complete protection of life and liberty to all inhabitants of the plebiscite territory, without distinction of party, nationality, language, race or religion.

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meaning he would now be *de facto* stateless.[171] On 15 June 1922 (the date of the transfer of sovereignty), Plonka was domiciled in Polish Upper Silesia, but Article 25 did not apply to him because on that day he was already a Polish national and could therefore not acquire Polish nationality again. The Arbitral Tribunal's decided that:

> The fact is that Leo Plonka, a German subject by birth, had already acquired Polish nationality on January 10th, 1920, because his birthplace, Bolesławice, district of Wielun, was in former Russian Poland, which is now Polish territory, and the Court of Arbitration can undoubtedly base its decision on the fact that Plonka's parents were domiciled at the time of his birth in 1878 on what is now Polish territory – according to the unrefuted evidence laid before the Court, the family only removed to Germany in 1896. Accordingly, in the case of Leo Plonka the conditions of article 4 of the Minorities Treaty concluded on June 28th, 1919 between Poland and the United States of America, Great Britain, France, Italy and Japan, are complied with; in addition Article 2 (3) of the Polish law of January 20th, 1920 (Legal Gazette, IJo.7 § 44), expressly recognises the applicability of that Treaty.[172]

However, the Arbitral Tribunal decided that he had also remained a German national: '… since he was at the time domiciled in German Upper Silesia (Article 7 of the German-Polish Convention for the interpretation of the Minorities Treaty, dated August 30th, 1924); as from 10 January 1920, therefore, he possessed both Polish and German nationality.'[173] In a great many cases, for example *Scherff*[174] (which happened to be also the first case on nationality) and *Bulla*[175], the Tribunal found that the persons had both nationalities. However, this had the same practical consequences as having no nationality at all.[176] The Tribunal explicitly condemned this attitude in *Kirsch*.[177] Since the conclusion reached by the Conciliation Commission that Kirsch had dual nationality, she had encountered many practical difficulties as she was recognised neither as a German nor as a Pole.[178] The Tribunal confirmed her dual nationality and it stated that the

171 Conway (n 138) 112.
172 *Plonka* (n 168), paras 9–10.
173 ibid, para 11.
174 1 Arb Trib Dec 58.
175 4 Arb Trib Dec 106.
176 Kaeckenbeeck (n 26) 134.
177 7 Arb Trib Dec 50.
178 Kaeckenbeeck (n 26) 134.

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consequence of dual nationality must be that the person concerned had to be considered as a national in each of the two states. It must not lead to the authorities of each state acknowledging only the nationality of the other state, and therefore treating persons with dual nationality as if they had none.[179] In factually and legally complex cases such as *Skrzipietz,* who was also threatened with *de facto* statelessness and expulsion if he did not get a German passport, the Tribunal chose the most straightforward solution and it found that since Skrzipietz was born in the plebiscite area, Article 28 GC was applicable and he was a German national.[180]

4.5 The Indirect Relevance of Citizenship Through the Protection of Minorities

While the previous sub-sections confronted head-on the most conspicuous aspects of the emergence of citizenship as an autonomous concept, the present complements the picture with some instances where indirectly the Convention was able to provide certain protection to non-nationals thus diminishing the role of nationality. In other words, individuals who were not of German or Polish nationality, but whose rights came within the scope *ratione materiae* of the Geneva Convention, could also bring claims before the Arbitral Tribunal.[181] All the examples are drawn from Part III of the Geneva Convention which deals with the protection of minorities. Although Articles 56 and 58 limit the jurisdiction of the Tribunal and the Conciliation commission only to issues falling in Part II (Nationality and domicile), in some cases indirectly the rights of minority members were protected in all matters regulated by Part III.

The first case where nationality and citizenship differed and the protection of minorities served as a safety net for the protection of both was *Bruck*.[182] The case concerned a medical doctor, a German national domiciled in Polish Upper Silesia who was dismissed because he was not a Polish national. Pursuant to Article 40 Dr Bruck had the right to preserve his domicile. and he also enjoyed the rights provided for in Articles 43 (free exercise of one's profession) and 82 (free access to public institutions).[183] He claimed a violation of those provisions. The Polish rep-

179 Kaeckenbeeck (n 26) 134.
180 See Kaeckenbeeck (n 26) 188.
181 Conway (n 138) 118.
182 1 Arb Trib Dec 70.
183 Art 43 protects the right to continue exercising the profession after the transfer of sovereignty to the persons who were allowed to retain their domicile; Art

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resentative strongly contested the jurisdiction of the Tribunal because *inter alia* the provisions in question belonged to Part III (rights of minorities). The Tribunal found (while interpreting Article 56), that its jurisdiction is not 'conditional on the rights in question being attached to the right of residence through a provision of Part II [of the Geneva Convention]; [the words '*en vertu des dispositions de la présente partie*' in article 56] made it conditional on the rights in question being attached to a right of residence valid under the provisions of Part II.'[184] In other words, what really mattered for the protection of the rights under Part III (Protection of minorities) was that the person had a valid residence under Part II. The Tribunal rejected the argument raised by the Polish representative that the correct procedure in the case of Article 82 (concerning the preservation of the domicile of certain persons) was the special petition procedure for minorities, ie Council of the League, Minorities Office, President of the Mixed Commission, President of the Arbitral Tribunal.[185] But the conditions for the right of residence imposed by Article 40 were very different from the conditions of members of minority (Article 74). The former was not a subdivision of the latter. Thus, the scope *ratione personae* of the right to a residence was larger than the category of persons belonging to a minority. Kaeckenbeeck commented that 'the importance of the decision consisted less in the Tribunal's finding that rights resulting from Dr Bruck's right of residence in Polish Upper Silesia had been infringed than in the authoritative expression of the Tribunal's determination to discountenance measures of exclusion for reasons of nationality at the expense of persons having a right of residence in either part of Upper Silesia.'[186] Such cases, as unpleasant as they were, were not an exception.

Another important contribution of the case law of the Tribunal where the strengthening of citizenship is more visible is the confirmation of the principle of family unity. In the *Neumann* case, the four children of a German father killed in the war were deprived of their father's war pension by the Polish state because they were not Polish nationals. After the partition, the children's stepfather had become a Polish citizen through his domicile (Article 25 GC). His wife, the mother of the children, had acquired Polish nationality through the marriage. The question was whether the children had also *ipso facto* acquired the new nationality from their mother. The Tri-

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82 extends the equality treatment of domiciliated members of the minorities in several cases.

184 Kaeckenbeeck (n 26) 190.

185 Art 147ff of the Convention.

186 Kaeckenbeeck (n 26) 191.

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bunal took the view that the mother had acquired *ipso facto* the nationality of her second husband according to Article 31 (4) GC. This acquisition was shared by her children pursuant to Article 31 (1).[187] The acquisition was derivative but nonetheless *de plein droit*.[188] Moreover, the subsequent reacquisition of German nationality by the stepfather and their mother in 1926 by naturalisation did not affect their Polish nationality.[189]

5. Conclusion

This chapter has attempted to show the crucial role of domicile in the case law of the Arbitral Tribunal for Upper Silesia concerning nationality and residence. It demonstrated some of the ways in which the Tribunal contributed to the emergence of citizenship as an autonomous concept in international law, distinct from nationality. On the one hand, the 1922 Geneva Convention provided a solid basis of the individual's right to a nationality, the acquisition or loss of which should be a matter of law and not simply at the discretion of the national authorities, an achievement largely unsurpassed.[190] On the other hand, the analysis of the case law demonstrates the remarkable range of instances where citizenship, understood as status comprising rights and duties granted to individuals linked to a certain territory, may provide protection to those who share the same territory with an ethnic majority without belonging to it. Upper Silesia was in the vanguard of the experiments of the League of Nations. Its success may be explained by three reasons. The Tribunal was able to contain some of the ugliest manifestations of nationalist aspirations (on both sides) – expulsion, discrimination, denial of rights and statelessness.

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187 In the event of a change of nationality as of right, the legitimate children of at least 18 years whose parents are alive, will acquire the nationality of those of the parents who is granted their legal representation. If only one parent is still alive, the child will acquire his/her nationality. If both parents are alive but they have been deprived of legal representation, the child will acquire the father's nationality father. (translated from French by the author) ('*En cas de changement de nationalité intervenant de plein droit, les enfants légitimes âgés au moins de dix-huit ans dont les parents sont tous deux en vie, acquièrent la nationalité de celui des parents auquel revient la représentation légale. Si un seul des parents est en vie, l'enfant acquiert sa nationalité. Si les parents sont tous deux en vie, mais sont tous deux privés de la représentation légale, l'enfant acquiert la nationalité du père*').

188 Kaeckenbeeck (n 26) 153.

189 ibid, 154.

190 See Kaeckenbeeck (n 26), 521.

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The second consideration is related to sovereignty. The Tribunal followed the reasoning of PCIJ in *Wimbledon* in the sense that absolute sovereignty does not and could not exist. Moreover, the decision to enter into an international engagement is one of the most characteristic features of sovereignty.[191] Third, the Arbitral Tribunal for Upper Silesia was a ground-breaking experiment because it was able to bind the wounds caused by the partition of the hotly disputed territory while dealing with one of the most sensitive characteristic traits of sovereignty: the competence to decide who is a national.[192] The biggest achievement of the Convention and the tribunal, in particular, was the ability to dissolve complex questions of identity and politics into legal procedures, criteria, technicalities and legal principles. In doing so, it significantly extended the category of persons possessing full membership in the political community without necessarily identifying with the ethnolinguistic or religious majority. All the tenets discussed in Section 4 constitute the building blocks of the emerging international human rights law as an immediate predecessor of the post-WWII legal regime. The answer to the old question of whether human rights are a citizen's rights depends on the definition of a 'citizen'.

The success was, as we know very well, only temporary. The outbreak of World War II put a violent caesura to the League of Nations. This chapter started with the ordinary Polish worker Franciszek Honiok who happened to be the first victim of the war. It is a much less known fact that in the 1920s, after staying in Poland for a couple of years, Honiok returned to his homeland in the German part of Upper Silesia. He became a salesman for agricultural machinery. The German authorities attempted to expel him, but Honiok sought protection from the machinery established by the Geneva Convention and was able to prove that he had the right to retain German citizenship.[193] His tragedy is a sad reminder that individuals

191 PCIJ Series A no 1, 25.

192 Arendt (n 45) 278: 'theoretically sovereignty is nowhere more absolute than in matters of emigration, naturalization, nationality and expulsion.'

193 It is not entirely clear whether he applied to the Mixed Commission for Upper Silesia or to the Conciliation commission in matters of nationality. The search in the archives of the Tribunal and the Conciliation commission in matters of nationality gave no results. Authors like Eugeniusz Guz, *Zagadki i tajemnice kampanii wrześniowej* (Bellona 2011) 147 and Roger Moorhouse, *Poland 1939* (Basic Books 2020) seem to repeat what was said by Donald Cameron Watt *How war came: the immediate origins of the Second World War* (Pantheon 1989) 532: 'The first casualty of the Second World War had, however, died before 4.45 when the guns began. His name was Franz Honiok. He was a "Konserve". He had been a salesman for agricultural machinery, who came from a small town

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and groups could only be safe when their rights are protected under international law.

2022 marks the centenary of the Geneva Convention, which presents an excellent opportunity to reassess the relevance of the triangle of nationality-territory-rights. Unfortunately, the issue of nationality as ethnicity has not been resolved, as demonstrated by some initiatives which resurface periodically. The potential land swap between Kosovo and Serbia threatens to create new vulnerable persons and to open a Pandora's box of territorial claims and ethnic nationalism.[194] The attempt to 'sort out' or exchange individuals and groups, or to swap territories to achieve some anachronistic ideals, will result only in the perpetuation of antagonism, suffering, and the severance of centuries-old ties.

near Gleiwitz. He was a sympathizer for Poland, had fought on the Polish side in 1921 in Silesia, and *lived for a couple of years in Poland before returning to Germany. A German attempt to expel him had been foiled by his appeal to the League of Nations arbitration tribunal for issues of personal nationality in Geneva*'. Watt seems to have confused the MAT and the Conciliation commission in matters of nationality. Moreover, they were not situated in Geneva.

194 Sasa Dragojlo and Xhorxhina Bami, 'Land Swap Idea Resurfaces to Haunt Serbia-Kosovo Talks' (*Balkan Insight*, 16 June 2020), online at: <https://balkaninsight.com/2020/06/16/land-swap-idea-resurfaces-to-haunt-serbia-kosovo-talks> accessed 3 July 2020.

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