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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1. The Form(s) of Conclusion of Treaties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1. Observance of Treaties

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

2.1.1. Internal Law and Observance of Treaties

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

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

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

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

28 ibid, 787–88.

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

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

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

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

2.1.2. Third States and Observance of Treaties

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

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

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

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

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

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

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

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

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

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

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

2.2. The Scope of Application of Treaties

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

2.2.1. The Spatial Dimension of the Scope of Treaties

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

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

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38 ibid, 454 (translation by the author).

39 ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966-II) Yearbook of the International Law Commission 187, 226, art 30, para 1.

40 Anglo-German MAT, *Niger Company Limited c État allemand* (25 July 1923) 3 Recueil TAM 232, 233–34.

41 ibid, 235.

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

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

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

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

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

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42 ibid, 236.

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

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

2.2.2. The Temporal Dimension of the Scope of Treaties

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

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

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

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

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

45 ibid, 440.

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

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

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

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

2.3. *Interpretation of Treaties*

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

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

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

2.3.1. The Rules of Interpretation

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

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

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

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

52 ibid, 929 (translation by the author).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

61 ibid, 227 (translation by the author).

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

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

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

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

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

67 ibid.

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

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

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

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

2.3.2. Interpretation of Treaties Authenticated in a Plurality of Languages

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

82 ibid (translation by the author).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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86 German-Belgian MAT, *Rymenans et C^o^ c État allemand* (11 February 1922) 1 Recueil TAM 878, 881.
87 *Hirschberg et Wilczynski c État allemand* (n 51) 930 (translation by the author).
88 ibid, 929 (translation by the author).
89 Anglo-German MAT, *Tesdorpf and C^o^ c État allemand* (8 November 1922 and 25 April 1923) 3 Recueil TAM 22, 28 (emphasis in original).
90 VCLT, 340, art 33 (4).

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

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

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

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

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

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

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

93 ibid.

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

95 ibid.

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

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

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

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

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

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

98 VCLT, 350, art 73.

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

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

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

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

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

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

4. Concluding Remarks

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

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

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

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

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