

Public and Private International Law Bulletin

Research Article

 Open Access

Investor's Quest for Judicial Security: Reading Ottoman Capitulations from the Contemporary Understanding of International Economic Law



Yatırımcının Yargılamaya İlişkin Beklentileri: Osmanlı Kapitülasyonları'nı Güncel Uluslararası Ekonomi Hukuku Açısından Okumak

Akif Emre Öktem¹  & Berk Demirkol²  

¹ Galatasaray University, Faculty of Law, Istanbul, Türkiye

² Potestas Partners, Dubai, UAE

Abstract

International investment law relies on extending legal protections to foreign capital beyond the national judicial system. Such protection is not, however, exclusive to the contemporary era; throughout history, States have developed similar mechanisms to promote foreign capital flow. Ottoman capitulations provide an early example of the substantive and procedural guarantees granted to foreign investors. This article demonstrates that capitulations provided solutions that exceeded the limitations of Ottoman law through consular courts, mixed commissions, and arbitration, and in this respect, display functional parallels with contemporary investment dispute resolution methods. This article further examines the most-favoured-nation (MFN) clauses and observes that, in the Ottoman practice, the unilateral and extensive application of these clauses gradually weakened the Ottoman Empire's jurisdiction over foreigners. The article also examines the practice of individuals seeking a more advantageous status under the protection of different political authorities ("nationality shopping"), noting that in the Ottoman period this was implemented by shipping under foreign flags or through the "protégé" system. Ultimately, the article highlights the functional parallels between Ottoman capitulations and modern international economic law.

Öz

Günümüzde uluslararası yatırım hukuku, yabancı sermayeye yönelik hukuki güvencelerin ulusal yargı sisteminin ötesine taşınmasına dayanır. Ancak bu tür güvenceler yalnızca modern döneme özgü değildir; tarih boyunca devletler yabancı sermayeyi teşvik etmek için benzer mekanizmalar geliştirmiştir. Osmanlı kapitülasyonları, bu bağlamda yabancı yatırımcılara tanınan maddi ve usulî güvencelerin erken bir örneğini sunmaktadır. Bu çalışma, kapitülasyonların yabancılara konsolosluk mahkemeleri, karma komisyonlar ve tahkim benzeri yollarla Osmanlı hukukunun sınırlarını aşan çözümler sağladığını ve bu yönüyle günümüz yatırım uyuşmazlıklarının çözüm yöntemleriyle işlevsel paralellikler taşıdığını göstermektedir. Ayrıca, en çok kayırlan ulus (MFN) hükümleri ele alınmakta; Osmanlı uygulamasında bu hükümlerin tek taraflı ve geniş kapsamlı uygulanmasının yabancılar üzerindeki yargı yetkisini zamanla zayıflattığı tespit edilmektedir. Çalışma aynı zamanda bireylerin daha avantajlı statü elde etmek için farklı siyasi otoritelerin himayesine geçme uygulamasını ("nationality shopping") incelemekte ve bunun Osmanlı döneminde yabancı bayrak altında seyretme veya "protégé" sistemi aracılığıyla gerçekleştiğini göstermektedir. Sonuç olarak, Osmanlı kapitülasyonları ile modern uluslararası ekonomi hukukundaki paralellikler ortaya konmaktadır.

Keywords

Ottoman Capitulations · International Investment Law · International Economic Law · WTO · Most-Favoured-Nation Clause (MFN) · Nationality Shopping · Judicial Privileges

Anahtar Kelimeler

tahkim · yatırım tahkimi · uyuşmazlık çözüm mekanizmaları · kapitülasyonlar · uluslararası ticaret hukuku · uluslararası yatırım hukuku



Citation: Öktem, AE and Demirkol, B, 'Investor's Quest for Judicial Security: Reading Ottoman Capitulations from the Contemporary Understanding of International Economic Law' (2025) 45(2) Public and Private International Law Bulletin 292. <https://doi.org/10.26650/ppil.2025.45.2.1787173>

 This work is licensed under Creative Commons Attribution-NonCommercial 4.0 International License.  

 2025. Öktem, A. E. & Demirkol, B.

 Corresponding author: Berk Demirkol bd@potestas.co.uk



I. Introduction

It would be trite to suggest in this day and age that host states engage in international obligations and undertakings towards foreign investors to attract foreign investment. These undertakings mainly serve to enable a flow of foreign investment into the host state, and could be categorised under two pillars. First, the host state should establish a convenient investment environment by enabling, facilitating and encouraging foreign investment. This may include guarantees with respect to human rights, the rule of law and access to justice, which might also be observed in the context of the unification of the European market. Second, foreign investment disputes should be resolved by a neutral, independent mechanism. Most of the investment treaties today provide both these substantial and procedural guarantees.

One would note that the underlying element of providing such guarantees is to strengthen the judicial security granted to foreign investors and traders. The idea of attracting foreign investment in return for a guarantee for judicial security is, however, not new. The correlation between these two dynamics has been known for a long time. In this context, capitulations—and more specifically Ottoman capitulations—can be considered as an early example of a premature iteration of contemporary foreign investment protection.

This paper analyzes Ottoman capitulations and attempts to find similarities and discrepancies with the contemporary understanding of international economic law. The authors of this paper observe three main points bearing substantial similarities between the Ottoman capitulation regime and the current dynamics of international economic law. First, the judicial mechanisms introduced by the capitulations and the investment treaties are both based on the presumption that the domestic judicial system was/is slow, unreliable, and insufficient to render justice and that an alternative system that operates outside the domestic judiciary was/is needed. Second, the inclusion of most-favoured-nation (MFN) clauses in capitulations by the Ottoman Empire created a system similar to the World Trade Organisation (WTO). Third, the fact that these international instruments (capitulations or investment treaties) vest foreign nationals with substantial and procedural rights makes nationality a commodity¹ and leads to nationality shopping.

This paper will first examine the evolution of the capitulation regime, the content of capitulations and their abolition by the Treaty of Lausanne. It will then discuss the three observations and arguments mentioned above, namely, the reform of the Ottoman judicial system as a requirement to attract foreign capital, MFN clauses in the Ottoman capitulations as a pioneering example of a multilateral (but one-sided) trade system, and an increased nationality shopping under the applicable capitulations.

II. Evolution of the Ottoman Capitulation Regime

A. Definition

The international instrument including the granting of capitulations could be in the form of a treaty or a unilateral act of the state. The author of the unilateral act or one side of the treaty would be the Ottoman Empire, other Muslim states, or other Eastern as well as Far Eastern states; whereas the other side of the treaties would be an Occidental state. The main function of the capitulations was to provide foreigners with immunity from local jurisdiction. Foreigners in the territory of the host state providing capitulations were subject to the diplomatic and consular authorities of their home state.²

¹See Jorun Baumgartner, *Treaty Shopping in International Investment Law* (Oxford University Press 2016) 9.

²'Capitulations', Jean Salmon (ed), *Dictionnaire de Droit International Public* (Bruylant 2001) 149.

Capitulations concluded by the Ottoman Empire granted the subjects of Occidental states the right to travel and reside in the Ottoman territory, inviolability of domicile, freedom of trade, religious freedoms, tax and custom duty immunities, as well as immunity from the jurisdiction of the domestic courts of the Ottoman Empire. These capitulations also provided protection for non-Muslim religious institutions operated by the clergy of the relevant European states.³ Some of these institutions, especially high schools such as St Benoit, St Joseph, St Michel and Dame de Sion, survived the termination of the capitulations and are still among the leading high schools in modern Turkey.⁴

B. Origins

It is commonplace to suggest that the history of the capitulations began with the 1535 Treaty concluded between the Ottoman Emperor Suleiman the Magnificent and the French King Francis (François) I.⁵ It is also traditionally accepted that all subsequent treaties were closely modelled after this treaty and that other nations claimed treatment as favourable as the one granted under the 1535 Treaty.⁶ However, modern history strongly contests the authenticity of the 1535 Capitulations⁷ and argues that it was simply a draft treaty.⁸

The first “genuinely Ottoman” capitulations offering French traders special advantages were, therefore, the capitulations of 1569.⁹ Capitulations attributed to the reign of Suleiman should be renewals of prior capitulations granted to France by the Mamluks in Egypt. The scope of the capitulations was, however, extended to the effect that the capitulations were applied in the entire Ottoman Empire.¹⁰ Nevertheless, the 1535 Capitulations’ legend was so lasting that it had become customary in legal studies on Ottoman Capitulations to refer to it as the original legal model.

In any case, the origins of the Ottoman capitulations can be traced back to a much older era: In the 14th century, Ottoman rulers had already granted commercial and legal privileges to Occidental powers, particularly to Genoa and Venice.¹¹ An example of such privileges can be found in the 1387 Genoa Treaty.¹² The Ottoman practice of granting capitulatory privileges was inspired by those granted to wealthy European, mainly Italian, trading states (i) by Muslim rulers around the Mediterranean,¹³ (ii) by the Crusader States,¹⁴

³See Domenico Gatteschi, *Manuale Di Diritto Pubblico e Privato Ottomano* (Posta Europea di V Minasi e c 1865) XXV–XXVII.

⁴The existence of British, French and Italian schools and charitable institutions was guaranteed by virtue of exchanges of letters between the Turkish delegation and the British, French and Italian delegations on the same day as the signature of the Lausanne Treaty. See *Düstur*, III. Tertip, C V (Necmi İstiklal Matbaası 1931) 290–301.

⁵See 1875–79: *Dainese v Hale* (1875) 91 US Reports 13 and *Dainese v United States* (1879) 15 Court of Claims Report 64: ‘their accepted foundation in international law is the treaty made with the French in 1535’ reported in ‘The Attempt of Turkey to Abrogate the Capitulations’ (1914) 8 American Journal of International Law 873–874.

⁶Philip Marshall Brown, *Foreigners in Turkey: Their Juridical Status* (Princeton University Press 1914) 33.

⁷Pierre Duparc (ed), *Recueil Des Instructions Données Aux Ambassadeurs et Ministres de France*, XXIX, Turquie (Centre national de recherche scientifique 1969) XI.

⁸The treaty that J. de la Forest, the ambassador of King Francis, drew up in discussions with the Grand-Vizier Ibrahim Pasha was not confirmed by Ottoman Emperor Suleiman, and soon afterwards Ibrahim was executed. This draft text was discovered only in 1777. See Halil İnalçık, ‘İmtiyazat’, *Encyclopaedia of Islam*, Vol III (2nd edn, Brill 1986) 1179 1183–1184. For the controversy on the very existence of this treaty, see Gaston Zeller, ‘Une Légende Qui a La Vie Dure: Les Capitulations de 1535’ (1955) 2 *Revue d’histoire moderne et contemporaine* 127, 127–132; Joseph Matuz, ‘À Propos de La Validité Des Capitulations de 1536 Entre l’Empire Ottoman et La France’ (1992) 24 *Turcica* 183, 183–190.

⁹Zeller (n 8) 130.

¹⁰İnalçık (n 8) 1183–1184.

¹¹Ernest Nys, *Le Droit International, Les Principes, Les Théories, Les Faits*, Vol II (Alfred Castaigne, Albert Fontemoing 1905) 406; Edhem Eldem, ‘Capitulations and Western Trade’ in Suraiya N Faruqi (ed), *The Cambridge History of Turkey*, Vol 3: *The Later Ottoman Empire - 1603–1839* (Cambridge University Press 2006) 289; Halil İnalçık, *Ottoman Empire, the Classical Age, 1300–1600* (Phoenix 1998) 134; İnalçık, (n 8) 1182.

¹²For the original text in Latin and its translation into English, see Kate Fleet, ‘The Treaty of 1387 between Murād I and the Genoese’ (1993) 56 *Bulletin of the School of Oriental and African Studies* 13, 13–33.

¹³Gatteschi (n 3) V; Hrand Asadur and Halil Cemalettin, *Ecanibin Memalik-i Osmaniye’de Haiz Oldukları İmtiyazat-ı Adliye* (Hukuk Matbaası 1330–1332) 4; Nasim Sousa, *The Capitulatory Régime of Turkey: Its History, Origin and Nature* (The Johns Hopkins Press 1933) 47 ff; Alexander H de Groot, ‘The Historical Development of the Capitulatory Regime in the Ottoman Middle East from the Fifteenth to the Nineteenth Centuries’ (2003) 83 *Oriente Moderno* 575, 577–578; Tullio Scovazzi, *Corso Di Diritto Internazionale*, Vol I (Giuffrè Editore 2018) 39–40.



(iii) by the Byzantine emperors,¹⁵ and (iv) by the post-Seljuk Turkish principalities.¹⁶ Although granted in different contexts, these four categories of capitulations seem to originate from the same dynamics: The rising Italian city-states sought after new markets for the capital they had accumulated, whereas states located on the Old World trade routes needed to attract international trade into their territories, especially in the aftermath of new geographical discoveries offering alternative routes.¹⁷ In other words, economically underdeveloped states undertook to implement an exceptional legal regime to attract foreign capital into their territories.

When Mehmed II (“the Conqueror”) conquered Constantinople in 1453, he renewed and confirmed the privileges granted to the Venetians and the Genoese by the Byzantine emperors. In 1528, Suleiman the Magnificent confirmed the privileges granted by the Mamluks to the French and Catalans in Egypt¹⁸.

The first “authentic” French Capitulations are the Capitulations of 1569, which were considered, by French diplomacy, as *‘le plus ample et avantageux traité qui jamais fut tiré du Levant.’*¹⁹ However, the Levant (“Ottoman”) trade witnessed, by the end of the sixteenth century, a gradual “internationalisation” with the entry of the English and the Dutch into the Eastern Mediterranean. England obtained in 1580 her own capitulations, inaugurating the competitive context of Western trade that would characterise the seventeenth century.²⁰ The Dutch obtained their own capitulation in 1612 and²¹ Austria in 1616.²² A genuine “rush” for capitulations occurred within a period of some fifty years.²³ European states concluded brand-new capitulations or renewed their previous capitulations throughout the 17th and 18th centuries.

The prevailing classical doctrine had persistently suggested that the *raison d’être* of the capitulations was the incompatibility between Muslim law and European legal systems.²⁴ An analysis of earlier capitulations could, however, demonstrate otherwise. By the early 20th century, Western authors realised the conspicuous continuity between the Byzantine privileges granted to European powers and the Ottoman capitulations.²⁵

The extraterritorial immunities enjoyed by European states and their subjects were certainly not shocking at those times, when the very concept of jurisdiction was personal and not territorial. These privileges were not particular to the Ottoman Empire or the Muslim states. In fact, extra-territorial judicial privileges have

¹⁴François Alphonse Belin, *Des Capitulations et Des Traités de La France En Orient* (Challamel Ainé 1870) 29; Gérard Pélissié du Rausas, *Le Régime Des Capitulations Dans L’Empire Ottoman* (Arthur Rousseau ed, 1902) 15–16.

¹⁵Travers Twiss, *The Law of Nations Considered as Independent Political Communities: On the Rights and Duties of Nations in Time of Peace* (2nd edn, Clarendon Press 1884) 450; Pélissié du Rausas (n 14) 17–18; Tijl Vanneste, *Intra-European Litigation in Eighteenth- Century Izmir: The Role of the Merchants’ Style* (Brill 2022) 30.

¹⁶de Groot (n 13) 578; Kate Fleet, ‘Turkish-Latin Diplomatic Relations in the Fourteenth Century: The Case of the Consul’ (2003) 83 *Oriente Moderno* 605, 607–608; İnalçık (n 8) 1183; Maria Pia Pedani Fabris, *La dimora della pace: Considerazioni sulle capitolazioni tra i paesi islamici e l’Europa, Quaderni di Studi Arabi* (Studi e testi, 2, Università Ca’ Foscari di Venezia, Dipartimento di Scienze Storico-Archeologiche e Orientalistiche, 1996) 18.

¹⁷M Murat Baskıcı, ‘Lozan Barış Andlaşmasının Ekonomik ve Mali Hükümleri’ in Çağrı Erhan (ed), *Yaşayan Lozan* (Kültür Bakanlığı Yayınları 2003) 322.

¹⁸Güneş Işık, ‘Les capitulations accordées à la nation française en 1569: Essai de contextualisation et édition critique’ (2022) 53 *Turcica* 139.

¹⁹İnalçık (n 8) 1183–1184.

²⁰Eldem (n 11) 289–290.

²¹de Groot (n 13) 602.

²²See Gabriel Effendi Noradounghian (ed), *Recueil d’actes Internationaux de l’Empire Ottoman*, Vol I (Pichon 1897) 113 ff.

²³Eldem (n 11) 292.

²⁴Lucius Ellsworth Thayer, ‘The Capitulations of the Ottoman Empire and the Question of Their Abrogation as It Affects the United States’ (1923) 17 *American Journal of International Law* 207, 209; Gatteschi (n 3) XXIX; Maurice M Picard, ‘Vers La Fin Des Capitulations’ (1923) 50 *Journal du droit international* 55; Frédéric Abelous, *L’évolution de La Turquie Dans Ses Rapports Avec Les Étrangers* (Pédone 1928) 28–29; J.S. Kandelaft, *L’avenir Réserve Au Régime Des Capitulations En Turquie* (1911) 38; Louis-Joseph-Delphin Féraud-Giraud, *La Juridiction Française Dans Les Échelles Du Levant et de Barbarie* (A Durand 1859) 9; Henry Bonfils, *Manuel de Droit International Public* (1912) 567 para. 909; *Dainese v. Hale* (n 5) 13; *Dainese v. United States* (n 5) 64.

²⁵Edwin Pears, ‘Turkish Capitulations and the Status of British and Other Foreign Subjects Residing in Turkey’ (1905) 21 *Law Quarterly Review* 408; Brown (n 6) 28, 31–32; Sousa (n 13) 15–16.



been common since the Antiquity.²⁶ The principles of extraterritoriality were also established and widely applied in the early Middle Ages by the Barbarians such as the Goths, Burgundians, Franks, and Lombards.²⁷ By the late Medieval period, extraterritorial rights were granted not only between Christians and Muslims but also between Christians and Christians, Christians and Pagans, and Muslims and Pagans. European cities exercised jurisdiction over their merchants who engaged in foreign commerce and lived abroad.²⁸ Before granting extensive extraterritorial privileges to Italian cities, Byzantine emperors had concluded treaties with the Varangians in Russia, which contained grants of extraterritoriality.²⁹ Italian cities not only enjoyed extraterritorial judicial privileges in Byzantium by virtue of treaties but also obtained³⁰ such privileges from the Crusader States.³¹ Italian cities granted each other similar extraterritorial judicial privileges as well. Italian consuls with judicial functions were found in England and the Netherlands in the 15th century.³² Consulates in Italian cities also acted as legal mediators between a host city and a foreign trading community.³³

That is to say, capitulations were not specific to Ottomans and had nothing to do with the difference in legal systems due to religious beliefs. Capitulations were simply a natural consequence of a Medieval system characterised by the personality of laws, which were then considered compatible with the territorial sovereign's prerogatives³⁴ and allowed the foreigner to carry his own laws wherever he went. Nevertheless, the regime of capitulations became utterly abnormal with the emergence of the concept of the modern state, which required the concomitance of three *sine qua non* constitutive elements: government, nation and territory—with a special emphasis on the third element of this new holy trinity: 'It is territory, rather than the people which form[ed] the modern state. [T]erritoriality is the basis of statehood in international law.'³⁵ The territoriality of a state's jurisdiction, which is a corollary principle to the understanding of the modern state, could no longer suffer any exception. While European states embracing the territoriality principle progressively abandoned extraterritorial judicial privileges, the exceptional régime of capitulations survived in the Ottoman Empire as a relic of the medieval personality of the laws principle³⁶.

C. Legal nature and structure of capitulations

The nature of the capitulations—unilateral acts or bilateral treaties—has been the subject of an endless controversy³⁷ that was not of a purely theoretical character: Turkish doctrine and political discourse upheld the legality of the 1914 unilateral abrogation of capitulations by claiming that they were unilateral acts granting rights that could be withdrawn at any time by the will of the state that had granted them, namely,

²⁶See Herodotus, *The History of Herodotus, Book II* (GC Macaulay ed, 2008) c 178 <<http://www.gutenberg.org/files/2707/2707-h/2707-h.htm#linknote-331>>.

²⁷Sousa (n 13) 9.

²⁸Thayer (n 24) 207.

²⁹Alexander Wood Renton, 'The Revolt against the Capitulatory System' (1933) 15 *Journal of Comparative Legislation and International Law* 212, 212–213; Brown (n 6) 11; Thayer (n 24) 207–209.

³⁰Twiss (n 15) 450; Belin (n 14) 22; Brown (n 6) 13.

³¹Belin (n 14) 25–26; Pélissié du Rausas (n 14) 15–16; Sousa (n 13) 21.

³²Thayer (n 24) 208.

³³Vanneste (n 15) 90.

³⁴Ahmed Réchid, 'La Condition Des Étrangers Dans La République de Turquie' (1933) 46 *Recueil des Cours de l'Académie de Droit International de La Haye* 173.

³⁵Alexander Orakhelashvili, 'International Law and Geopolitics: One Object, Conflicting Legitimacies?' (2008) 39 *Netherlands Yearbook of International Law* 155, 160.

³⁶Pedani (n 16) 41.

³⁷See Viorel Panaite, *The Ottoman Law of War and Peace: The Ottoman Empire and Tribute Payers* (East European Monographs 2000) 240–241; Habib Abi-Chahla, *L'extinction Des Capitulations En Turquie et Dans Les Régions Arabes* (Picart 1924) 95–98; Eldem (n 11) 294; Maurits H van den Boogert, 'Consular Jurisdiction in the Ottoman Legal System in the Eighteenth Century' (2003) 83 *Oriente Moderno* 613, 623.



the Ottoman Empire.³⁸

Interestingly, while discussing the legal nature, little attention was paid to the particularities of any given capitulation or to the period in which it was granted. In fact, the legal nature of the capitulations must be analysed in two periods: from the mid-14th to mid-18th century and from the mid-18th century until the termination of the capitulations. Obviously, this classification involves some exceptions.

During the first period, capitulations were, indeed, “gracious concessions” unilaterally granted by an imperial edict or personal declaration of the Ottoman Sultan.³⁹ These capitulatory privileges were limited, theoretically, to the life of the ruling Sultan:⁴⁰ they expired as the edicting Sultan passed away⁴¹ and needed to be renewed after the next Sultan acceded to the throne. However, Du Rausas explains that in accordance with the actual practice, there was, by no means, any legal vacuum during these “capitulatory interregna” in which renewal had not yet been recorded. The capitulatory privileges and institutions remained active since the capitulations had just codified and developed the previous customary practice going back to medieval Muslim states and Byzantium.⁴² This custom coexisted with, and perhaps independent of, treaties, as evidenced by the resolution of maritime and commercial disputes with the French prior to the first “formal” French capitulation of 1569, in the absence of a formal treaty.⁴³

The apparently unilateral character of the first-period capitulations is, yet, highly questionable. The 1387 Genoa Treaty was definitely bilateral and involved synallagmatic privileges.⁴⁴ The 1454 Venetian Capitulation, a copy of which has survived in the Cretan archives in Venice⁴⁵, had ‘the form and the substance of a genuine and proper treaty, with reciprocal obligations’.⁴⁶ The unratified (draft) 1535 French Capitulation provided reciprocal rights and privileges for both French and Ottoman subjects⁴⁷ and was therefore similar to a synallagmatic treaty⁴⁸. Pedani puts forward the interesting thesis that the earliest capitulations were *instrumenta reciproca*, which underwent progressive mutations, coming to adapt to the new aura of sacredness that surrounded the figure of the sultan. After Kanuni’s death in 1566, the capitulations took the form of unilateral concessions.⁴⁹

Even the capitulations, which were unilaterally granted by an imperial edict, had all been bilaterally negotiated.⁵⁰ Instead of qualifying them with this awkward and somehow oxymoronic term of “unilateral treaty,”⁵¹ it would be perhaps more appropriate to consider these early capitulations as unequal or

³⁸İsmet Pasha, ‘December 2, 1922’ *Records of Proceedings and Draft Terms of Peace. Presented to Parliament by Command of His Majesty* (His Majesty’s Stationery Office 1923) 471–472, 478; Mahmoud Essad, *Du Régime Des Capitulations Ottomanes: Leur Caractère Juridique d’après l’histoire et Les Textes* (Fratelli Haim 1928) 73–79.

³⁹Duparc (n 7) XXXIII–XXXIV.

⁴⁰Sousa (n 13) 160.

⁴¹Bonfils (n 24) 565.

⁴²Pélissié du Rausas (n 14) 25, 57, 60, 80; confirmed by Belin, (n 14) 95.

⁴³İşiksel (n 18) 154.

⁴⁴Fleet (n 12) 16–17 articles 3, 4, 5. On the other hand, the clauses of the Turkish-Genovese treaty of 1387 are remarkably similar to the commercial treaties concluded between European states at the time (see, the Treaty of 17 August 1417 concluded between Henry V of England and the Duke of Burgundy and Count of Flanders cited by ‘Draft Articles on Most-Favoured-Nation Clauses’ (1978) II *Yearbook of the International Law Commission*, Part Two 20.

⁴⁵Pauline Guéna, ‘Qui a lu les capitulations? Note à partir d’un copie crétoise de 1454’ (2022) 53 *Turcica* 116.

⁴⁶Gatteschi (n 3) XXI f 3; Brown (n 6) 28–30.

⁴⁷Noradounghian (n 22) 83 and ff.

⁴⁸İşiksel (n 18) 140.

⁴⁹Pedani (n 16) 30–31.

⁵⁰Panaite (n 37) 242; van den Boogert (n 37) 24; Kandelafté (n 24) 42; İnalçık (n 8) 1184; Charles A Frazee, *Catholics and Sultans, The Church and the Ottoman Empire, 1453–1923* (Cambridge University Press 1983) 67–68.

⁵¹Pélissié du Rausas (n 14) 14; Mahmoud Essad (n 38) 71, 116.



asymmetric treaties, the asymmetry being two-fold: First, although bilaterally negotiated, the capitulation was a discretionary international act of the Ottoman Empire, which thus enjoyed a position of superiority. Second, the beneficiaries of the capitulation were exclusively subjects of the European powers to whom the capitulation was granted; Ottoman subjects did not enjoy reciprocal capitulatory rights in the territory of the relevant European powers (the only major exception being the ephemeral 1454 Venetian Treaty).

The reason why bilateral treaties were disguised into unilateral acts can be found in the overwhelming necessity to reconcile the subtleties of classic Islamic law with the realities of foreign policy. Classical Islamic scholarship theoretically divided the world into two, the *Dar al-Islam* (Abode of Islam) and *Dar al-harb* (Abode of War). No lasting peace, legally speaking, is permissible between the Islamic empire and its non-Muslim enemies. The Ottoman Capitulations served to regularise the permanent residence of the subjects of the supposedly belligerent non-Muslim states in the Ottoman domains in disregard of the hypothetical permanent state of holy war/jihad. The Ottomans simply adhered to and developed the existing legal and political practices of their Muslim predecessors, which systematically maintained, in the late Medieval period, lasting commercial and diplomatic relations with non-Muslim powers. To conceal the inherent conflict between the Sharia and the actual practice, the distinction between foreign and domestic affairs was eliminated, resorting to domestic arrangements fitting within the legal principle of *aman*⁵², safe-conduct to be given to non-Muslim visitors. Western states were only too keen to embrace such fictions, which allowed the flourishing of the capitulations as a splendid product of the down-to-earth legal thinking of pragmatic Ottoman statesmen.⁵³ This trick is reminiscent of early Byzantine practice: trade relations with other states were regulated through the unilateral imperial chrysoboll that was presented as a document granted by the only emperor on earth to an inferior who had solicited his favour, since it was unthinkable that a basileus could treat foreign sovereigns as equals.⁵⁴ This fiction parallels that of the Ottoman Sultan as the sole Caliph, who would compete for the title of Universal Emperor, as Suleiman the Magnificent had done with Charles V.⁵⁵

Foreign commercial and political relations, conducted on the basis of reciprocity and bilateralism, could thus, by subtle legal formulation, be reduced to administrative ordinances of the home government in the form of imperial edicts, which were nominally in accordance with the prescripts of Islamic law. Clashes between religious law and the capitulations were certainly possible, but eminent Ottoman legal scholars avoided providing any opinion in relation to the validity of capitulations and tacitly condoned them in practice.⁵⁶

The development of the modern law of nations in Europe during the 16th and 17th centuries and the “legalistic hardening of the Ottoman practice of foreign affairs”⁵⁷ made it necessary to conclude capitulations in the form of proper bilateral treaties.

⁵²In reality, the “aman” is by no means an institution peculiar to Islamic law: The identical Italianate chancery practice of patents/safe conducts “stems from precedents in Roman and Germanic laws, together with likely Byzantine and Islamic influences. (...) and became a crucial instrument for collecting transit revenue and projecting political power” (Ian F. Hathaway, ‘Layers of protection: Safe conduct practices and diplomacy in the sixteenth-century mediterranean’ in (2022) 53 *Turcica* 178) Between the Ottoman Empire and Italian States, it was often a reciprocal practice: “In the sixteenth century, the authorities of the Republic of Venice and the grand Duchy of Tuscany competed in attracting merchants from the Ottoman domain by bestowing on them commercial and legal rights enshrined in charter of privileges, called *condotte* in Venice and *livornine* in the Tuscan port of Livorno” (Tommaso Stefani, ‘Ottoman Capitulations in Comparative Perspective, Sixteenth and Seventeenth Centuries’ (2022) 53 *Turcica* 206.

⁵³de Groot (n 13) 576, 579, 603.

⁵⁴Pedani (n 16) 18.

⁵⁵Halil İnalcık, ‘The Rise of the Ottoman Dynasty’ in *The Ottoman Empire, The Classical Age, Phoenix* (1994), 58; Özlem Kumrular, *Avrupa’da Türk Düşmanlığının Kökeni-Türk Korkusu* (Doğan Kitap 2008), 229-230.

⁵⁶Van den Boogert (n 37) 619-620.

⁵⁷de Groot (n 13) 577.



In traditional historiography, the 1740 French Capitulations are considered to be the first bilateral capitulatory instrument in the proper and modern form of a treaty with reciprocal rights and obligations.⁵⁸ Considering this treaty as the first bilateral capitulatory instrument is highly questionable because previous bilateral peace treaties involved capitulatory provisions, including judicial privileges.⁵⁹ In addition, a bilateral treaty of commerce and navigation had already been concluded with Sweden in 1737.⁶⁰ However, the 1740 Treaty, an output of the successful French mediation⁶¹ that led to the signing of the 1739 Peace Treaty of Belgrade that was advantageous to the Ottomans,⁶² was certainly a milestone in the uniformisation process of the capitulatory system: Its articles were numbered (one of the earliest examples in the Ottoman practice, although the numbers appear only in the French text), it involved comprehensively elaborated provisions codifying the rights of French subjects, including judicial immunities and contained the “perpetuity clause” (article 85) so that the parties did not need to renew the treaty. It was the most complete and important capitulatory instrument, which achieved to become the “capitulatory monument,”⁶³ a model that would serve for other European states that would be entering into the Ottoman market in the 18th century.⁶⁴

From 1740 onwards, the capitulations were granted by bilateral or plurilateral treaties that were rather entitled as treaties of “friendship, commerce, navigation.” The term “capitulation” was gradually avoided and replaced by terms such as “rights” and “privileges.” New or confirmative capitulatory provisions were sometimes inserted into peace treaties.⁶⁵

At the downfall of the Empire, the Ottoman chancellery was fully aware of the capitulations’ evolution and the qualitative change that occurred in the mid-18th century: In the legal analysis prepared before the unilateral abrogation of the capitulations in 1914, the Ministry of Justice observed that ‘(...) certain concessions had been granted to foreign subjects resident in Ottoman territories, as a special donation. (...) These grants later evolved into acquired rights, based partially upon treaties and custom (...)’.⁶⁶ By a curious historical repetition, the Ottoman capitulation had followed the evolution of those granted by Muslim princes to the Italian maritime cities by the late Middle Ages:⁶⁷ from unilateral concessions, they had evolved into treaties.

D. Privileges granted under capitulations and criticism of the capitulatory regime

Privileges accorded by capitulations to European powers, especially judicial privileges, were incompatible with the modern legal principles of independence and territorial sovereignty. Although foreigners residing in the Ottoman Empire should be directly subject to its jurisdiction from a legal perspective, these foreigners addressed their respective ambassadors and consuls for any sort of official transaction. All measures and actions that the Ottoman Government were to take *vis-à-vis* those individuals needed to be

⁵⁸Gatteschi (n 3) XXIV; Abi-Chahla (n 37) 97; Abelous (n 24) 52–53; Sousa, (n 13) 164–165; Franco Cardini, *Europa e Islam, Storia Di Un Malinteso* (Laterza 2003) 268; Niyazi Berkes, *Türkiye’de Çağdaşlaşma* (Yapı Kredi Yayınları 2003) 80.

⁵⁹See 1699 Carlowitz Peace Treaty art 14, Noradounghian (n 22) 189, 196; 1718 Passarowitz Peace Treaty art 13, Noradounghian (n 22) 212, 219; 1718 Passarowitz Treaty of Commerce and Navigation, art 4; Noradounghian (n 22) 223.

⁶⁰*Traité de Commerce et de Navigation avec la Suède*, 10 January 1737, Noradounghian (n 22) 239.

⁶¹The French text of the 1740 treaty is peppered with references to the Ottoman Caliphate, which are absent from the Ottoman text, which may be interpreted as the beginning of an instrumentalization of the Ottoman Caliphate by France, a traditional ally of Turkey. It is curious to note that in mainstream historiography, the Treaty of Küçük Kaynarca of 1774 is considered the first international instrument to recognise the Ottoman Caliphate, whereas the capitulations of 1740 precede it by a quarter of a century, and other references to the Caliphate can be found in earlier treaties. See Emre Öktem, ‘Küçük Kaynarca: Miti e (talvolta mitopoietiche) demistificazioni’ (2025) *Nuova rivista storica*, 43.

⁶²Noradounghian (n 22) 255; Duparc (n 7) XVIII (see article 55 of the Treaty); Eldem (n 11) 319.

⁶³Kandelafte (n 24) 43–44.

⁶⁴Ali İhsan Bağış, *Osmanlı Ticaretinde Gayri Müslimler* (2nd edn, Turhan Kitabevi 1998) 12; Abelous (n 24) 56.

⁶⁵See, for instance, Jules de Clerq (ed), ‘Traité de Paix de 1802’, *Recueil des Traités de France*, Vol I (Amyot 1864) 588.

⁶⁶Draft note n 245 of 23 August 1330 on the necessity of the abrogation of the capitulations, sent by the Ministry of Justice to the Office of the Grand Vizier; cited by Tahir Taner, ‘Kapitülasyonlar Nasıl İlga Edildi?’, Muammer Reşit Seviğ’e Armağan (İÜHF Yayınları 1956) 32.

⁶⁷Giuseppe Cavarretta, *La Clausola Della Nazione Più Favorita* (Alberto Reber 1906) 20.



implemented through their consulates and embassies as if these governments had sovereign jurisdiction over persons residing in the Ottoman territory.⁶⁸

This feature undermined one of the most important pillars of the state and limited the legislative function of the Ottoman Government: Ottoman legislation did not apply to foreigners.⁶⁹ Mustafa Kemal (Atatürk)'s Nutuk (Speech) explained that the Ottoman Government could not exercise its adjudicatory function with respect to foreigners dwelling in the Ottoman Empire and it was forbidden to impose taxes on foreigners.⁷⁰ The nightmare of judicial privileges had been so traumatic that after the abolition of the capitulations in Lausanne at the cost of painful negotiations, it continued to haunt the subconscious of the Republic, which jealously stuck to its judicial monopoly and was reluctant to consent to arbitration mechanisms—like many other developing states, but perhaps more so than other states.⁷¹ Significantly, in 1999, during parliamentary debates on legislative reforms expanding the scope of arbitration and allowing, in particular, disputes arising from public service concession contracts to be referred to international arbitration, opposition MPs compared such mechanisms to Ottoman capitulations and declared them incompatible with the principle of national sovereignty.⁷²

Capitulations were criticised even by foreign authors as they created a “legal monstrosity” which stripped sovereignty of its essential attributes.⁷³ Indeed, all foreigners living in the Ottoman territory were subject to their national laws, and the Ottoman Government could not impose its police powers on them. In other words, the Ottoman Government could not subject foreigners to its domestic legislation.⁷⁴ This made the authors question whether the Ottoman Empire was a genuine state.⁷⁵ Considering the limits to its jurisdiction, one could consider the Empire to be under the tutelage and protection of the European powers.⁷⁶

In the 17th century, French diplomats already observed that the Turks started to feel that the privileges granted to the French by treaties without reciprocity were more onerous than useful for their country.⁷⁷ Some Turkish authors argued, ‘if Soliman the Magnificent imagined the evil consequences of the concessions he had granted, [...] he would have never responded favourably to the supplications of the Europeans’.⁷⁸ Another Turkish author observed that the judicial privileges enjoyed by foreigners in the Ottoman territory would be permissible nowhere in Europe.⁷⁹ Hasan Fehmi distinguished between civil and criminal cases and described the submission of criminal cases to consular courts as the most harmful privilege granted to foreign powers, which undermined public peace and order. For him, the existence of mixed tribunals where foreign judges would sit was an unreasonable privilege and incompatible with the sovereignty concept.⁸⁰

⁶⁸ Ali Şahbaz, *Mufasssal Hukuk-i Düvel*, Cilt II (Bağdadlıyan 1325) 227.

⁶⁹ Taner (n 66) 32–33.

⁷⁰ Kemal Atatürk, *A Speech Delivered by Mustafa Kemal Atatürk, 1927* (Ministry of Education Printing 1963) 585–586.

⁷¹ See Saim Üstündağ, ‘Tahkim ve Özellikle Uluslararası Tahkim’, *Yargı Reformu Sempozyumu* (İzmir Barosu 2000) 295.

⁷² TBMM Tutanak Dergisi, Dönem 21, Yasama Yılı I, Cilt 9, Birleşim 46, (Collection of minutes of the Turkish Grand National Assembly) 40–113.

⁷³ Abelous (n 24) 28.

⁷⁴ Kandelafté (n 24) 20.

⁷⁵ See Kandelafté (n 24) 19–20.

⁷⁶ Atatürk (n 70) 585–586.

⁷⁷ Mahmoud Essad (n 38) 50.

⁷⁸ Ali Şahbaz (n 68) 227. Relying mainly on European sources, the author does not question the authenticity of the 1536 Capitulations allegedly granted by Suleiman the Magnificent.

⁷⁹ Hasan Fehmi, *Telhis-i Hukuk-u Düvel* (Matbaa-i Osmaniye 1300) 172 para 233.

⁸⁰ Ibid 205, 210 paras 244, 246.



E. Renouncement of capitulations

The Ottoman Government attempted to renounce the capitulatory system starting in the mid-19th century. The first attempt to obtain the European powers' consent to abolish the capitulations was made by the Ottoman Grand Vizier Aali Pacha at the 1856 Paris Congress.⁸¹ This attempt was not successful. Terminating the capitulations had since become a salient agenda of the Ottoman foreign affairs.

The capitulations were abolished in 1914 by a unilateral declaration of the Ottoman Empire, which gave rise to harsh reactions by both the Empire's allies and enemies during the Great War.⁸² The capitulations were forcibly put back into force by the occupying powers after the defeat of the Empire in 1918.⁸³

The capitulations were finally terminated in 1923 by article 28 of the Treaty of Lausanne of 24 July 1923.⁸⁴ The capitulations were unanimously considered to be the thorniest issue⁸⁵ of the Lausanne Conference, and the Turkish delegation was given strict instructions to cease the negotiations in case the counterparties had not accepted the termination of the capitulations.⁸⁶ In the telegraph dated December 12, 1922, Mustafa Kemal instructed İsmet Pasha that as long as the capitulation issue was not absolutely clarified, he should not address the other issues with circumspection.⁸⁷ The Turkish Government repeatedly warned the Turkish delegation in Lausanne that it was not authorised to make any kind of concession in the capitulations issue.⁸⁸ The acceptance of such a financial burden that would "crush the people under its weight" was even deemed above the National Parliament's competence.⁸⁹ In turn, the Turkish delegation reassured the government that it would not make any concessions on this question during the negotiations.⁹⁰

The negotiations between Turkey and the Western states were interrupted on February 4, 1923.⁹¹ One of the main reasons was the disagreement on the capitulation issue. The negotiations resumed on 23 April 1923. The Lausanne Conference ended with the Western Powers accepting the abolishment of the capitulations. Article 28 of the Treaty of Lausanne provides the complete abolition of the capitulations in Turkey in every respect.

III. Special Mechanisms within and Reforms of the Ottoman Judicial System as a Requirement to Attract Foreign Investment and Trade

As explained above, the Ottoman capitulations were, in their origin, one of the numerous instances of extraterritorial jurisdiction mechanisms commonly adopted by many states. Despite the gradual abandonment of the extraterritorial jurisdiction principle and mechanisms by other states, this principle survived in

⁸¹'Le Traité de Paris du 30 Mars 1856 et les Conférences de Londres de 1871', *Archives diplomatiques* 1873, tome III (Amyot 1873) 42–43.

⁸²'L'abolition Des Capitulations et Ses Conséquences' (1914) 21 *Revue générale de droit international public* 487, 488–489; Thayer (n 24) 224; Mahmoud Essad (n 38) 120; The correspondence between the Grand Vizier and the Minister of Netherlands includes an interesting debate about the legal nature of the capitulations, see Sinan Kunalalp (ed), 'Letters of 26 September and 5 December 1914', *Recueil des traités, Conventions, Protocoles, Arrangements et Déclarations signés entre l'Empire Ottoman et les Puissances Etrangères, 1903–1922, Volume I, 1903–1916* (Isis 2000) 305.

⁸³Thayer (n 24) 229.

⁸⁴Treaty of Lausanne (signed 24 July 1923, entered into force 6 August 1924) 28 LNTS 11.

⁸⁵M Cemil Bilsel, *Lozan*, Cilt II (Ahmet İhsan Matbaası 1933) 25.

⁸⁶Baskın Oran, 'Lausanne Barış Antlaşması' in Baskın Oran (ed), *Türk Dış Politikası, Kurtuluş Savaşı'ndan Bugüne Olgular, Belgeler, Yorumlar* (İletişim 2002) 218.

⁸⁷N Bilal Şimşir, *Lozan Telgrafları: Türk Diplomatik Belgelerinde Lozan Barış Konferansı*, Cilt I (Türk Tarih Kurumu Basımevi 1990) 203.

⁸⁸Ibid 336–337. See also 295, 322.

⁸⁹Ibid 259–260.

⁹⁰See ibid 287, 341, 348, 350, 397, 484.

⁹¹Ömer Kürkçüoğlu and Çağrı Erhan, 'Lozan Gelişmeleri' in Çağrı Erhan (ed), *Yaşayan Lozan* (Kültür ve Turizm Bakanlığı 2003) 78; Şimşir (n 87) 203.



the Ottoman capitulations. Not only did the Ottoman Government conclude capitulations with new states, but the capitulations also progressively included more advantageous and generous stipulations in favour of the European states.

The Ottoman Empire did not benefit from the major economic developments that characterised modernity, such as the discovery of new continents and commercial routes, the emergence of a trade bourgeoisie and the industrial revolution. For this reason, it was badly in need of foreign capital.⁹² To attract foreign investors, it offered economic privileges, such as tax and custom duty immunities, through capitulations. The economic privileges had to be supported by judicial privileges that would allow circumventing the domestic judiciary, which suffered egregious and endemic problems that could otherwise harm foreign trade.

A. Special Mechanisms in the Ottoman Empire: Capitulatory Tribunals, Arbitration and Mixed Commissions

Capitulations provided some privileges to the European powers. Judicial privileges were among those privileges. Accordingly, more than 15 states had their own tribunals within the Ottoman territory. These tribunals had jurisdiction to adjudicate on matters involving their subjects residing in the Ottoman territory. In practice, these tribunals also played an active role in the lives of the subjects of the Ottoman Empire. This is because of the extension of their jurisdiction through excessive interpretations.⁹³

The capitular tribunals extended their jurisdiction beyond the original jurisdiction defined by the treaties. According to the capitulatory regime, the imperial council (*Divan*) was exclusively competent in proceedings between foreigners and Ottoman subjects for any dispute exceeding 4,000 aspres. By an accumulation of derogatory practices, combined with the Empire's tolerance and passive attitude towards these practices, these proceedings were gradually subjected to the jurisdiction of relevant consuls. Several categories of disputes, including those between foreign subjects and Ottoman subjects, which should normally fall within the jurisdiction of Ottoman courts according to the Capitulations, were thus submitted to the consular courts. Thus, foreign consuls acquired jurisdiction over disputes involving Ottoman subjects.⁹⁴

The consul of the foreign state was in most cases the consular tribunal's judge. This should suggest that, contrary to his colleagues in mission in other countries, the "Western" consul in the Ottoman Empire was not only a representative of his government but he accumulated the offices of judge, clerk of court, bailiff, registrar, public notary, and police officer and was able to negotiate with local authorities with a panoply of immunities and prerogatives.⁹⁵

The role played by foreign consuls in the Ottoman territory was one of the main reasons why the Ottoman Empire ultimately attempted to terminate the capitulations in the mid-19th century. The Ottoman Grand Vizier Aali Pacha explained at the 1856 Paris Congress that the consular jurisdiction granted by the capitulations gave rise to a multiplicity of competing judicial authorities within the Ottoman judiciary (*multiplicité de gouvernements dans le Gouvernement*).⁹⁶ Instead of this regime, the Grand Vizier proposed to include a new clause in the 1856 Paris Treaty by which European powers would declare that the Sublime Porte was admitted

⁹²Roderic Davison, 'The Turks in History', *Essays in Ottoman and Turkish History, 1774-1923, The Impact of the West*, Roderic Davison (Saqi Books 1990) 16; Salgur Kançal, 'La Conquête Du Marché Ottoman Par Le Capitalisme Industriel Concurrentiel (1838-1881)', *Colloques internationaux du CNRS, No. 601- Economie et Sociétés dans l'Empire Ottoman (fin du XVIIIe—début du XXe siècle)* (Centre national de recherche scientifique 1983) 355-362.

⁹³Kandelafté (n 24) 102-103.

⁹⁴Georges Mikonios, *Les Consuls En Orient et Les Tribunaux Mixtes* (Braun 1881) 46.

⁹⁵Kandelafté (n 24) 101-102.

⁹⁶'Le Traité de Paris du 30 Mars 1856 et Les Conférences de Londres de 1871' (n 81) 42-43.



“to participate in the advantages of the public law and system of Europe,” meaning that the Ottoman Empire would be accepted by the then “international legal community.”

The proposition of the abolition of capitulations was artfully repelled by the European powers’ representatives. What the Grand Vizier suggested reminds us of how public international law functioned before the establishment of any general or specific dispute settlement mechanism: the sovereign would conclude treaties with other sovereigns whereby the former would undertake to provide protections to the subjects of the latter in addition to the international minimum standard accorded to foreigners under customary international law. Any dispute would be then resolved by diplomacy or gunboat diplomacy. By the same token, subsequent to the abolition of the privileges in 1914, Sultan Mehmed V declared at the opening of the Parliament that international law would apply to foreigners in the Ottoman territory, as was the case in other countries.⁹⁷

The system designed and imposed by the capitulations relating to the judicial organisation was essentially justified by problems concerning the rule of law, access to justice and fair trial in the Ottoman Empire. Corruption within the judiciary had become proverbial: ‘No Backsheesh, no judge’, as was reported by a 19th century doctoral dissertation.⁹⁸ Corruption was an incurable problem that had been desperately combatted by high-ranking officials, by religious authorities, and even by the sultans, and ultimately it played an important role in the Empire’s collapse.⁹⁹

The corruption problem was even referred to in the literature outside the legal context. Fuzuli, a Golden-Age Ottoman poet, wrote in his satire on Ottoman bureaucrats spurning his application for pension, “I gave them my greetings, they did not accept it because it was not a bribe.” Four and a half centuries later, in Bram Stoker’s *Dracula*, the log of the ship that transports the vampire’s coffin specifies: ‘(...) entered Bosphorus. Boarded by Turkish Customs Officers. Backsheesh’.¹⁰⁰

In fact, some political abuses, covering various actions and demands, from harassment to bribes, were considered to be of a “structural” nature. Most individuals in power expected gifts and donations. A wide spectrum of Ottoman authorities, from the government to local authorities and even paramilitaries, exerted political pressures on trading communities.¹⁰¹

Although the capitulatory system was meant to bypass the legal and administrative apparatus, it was not always immune from the intrusion of corruption. As early as 1665, the French King’s instructions to his ambassador to the Sultan required the diplomat to ask reparation for the torts committed by public officials in violation of the capitulations and warned the ambassador that the petty officials of the Great Turk made immense benefits by such means.¹⁰² Notwithstanding this, capitulations still offered a rather stable mechanism, which allowed subjects of the European powers to avoid the turbulences of the Ottoman legal and administrative system to a large extent. The foreign merchants and subjects were thus supposed to be more immune from the corruption that permeated domestic mechanisms. The disputes involving the merchants and subjects of foreign powers were submitted to mechanisms other than the Ottoman courts.

⁹⁷İkdam Newspaper, Kanun-ı Evvel 1330 (December 1914), cited by Muhammet Emin Külünk, *Kapitülasyonların Kaldırılması* (Yeditepe Yayınevi 2011) 43.

⁹⁸Mikonios (n 94) 34.

⁹⁹Ahmet Mumcu, *Osmanlı Devletinde Rüşvet (Özellikle Adli Rüşvet)* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1969) 257, 272, 308.

¹⁰⁰Bram Stoker, *Dracula & Dracula’s Guest* (Wordsworth Editions 2009) 93.

¹⁰¹Eldem (n 11) 309–310.

¹⁰²Mémoire Du Roy Pour Servir d’instruction Au Sieur de La Haye Vantelay s’en Allant à Constantinople En Qualité d’ambassadeur de Sa Majesté Vers Le Grand Seigneur, Duparc (n 7) 30–31.



Beside the capitulatory tribunals, since the early times of the Ottoman Empire, there have been mixed tribunals or councils of arbiters composed of Muslim and non-Muslim Ottoman subjects and Europeans. The history of international arbitration in Anatolia is astonishingly old: In the 14th century, arbitration was organised by the Genoese courts of the Chios Island in commercial disputes involving Genoese citizens and merchants from “Turchia” (this term has the connotation of the land under Turkish control in sources written in Latin language). Cases between the Turks and other Italian states’ subjects could be taken before the Italian and Turkish authorities acting together, which then produced a joint judgement.¹⁰³ A clause of the 1348 Treaty¹⁰⁴ concluded between, on the one hand, the *Sancta Unio*, the coalition of Italian powers including Cyprus, the Venetians, the Knight Hospitallers and the Pope, and on the other, the Turkish Principality of Aydin, provided that if any Turk had a case against any of the Italian subjects of the *Sancta Unio* members, both the relevant Italian consul and the Turkish judge were to sit in session together and deliver a judgement.¹⁰⁵

There was also an arbitration practice in the Ottoman Empire. The foreign consul, who assumed judicial functions under the capitulatory regime, played a pivotal role in these arbitrations. The foreign consuls could ‘organise (...) a council of arbitrators to be established, the members of which were appointed by both parties. The consuls often chose this final method, after which they merely ordered the implementation of the arrangements proposed by the arbitration committee.’¹⁰⁶ In two different contributions, van den Boogert provides detailed explanations concerning the features of these arbitrations:

The procedure entailed the establishment of a council of experts that would function as a jury in the conflict. The selection of the council’s members was an important aspect of the process because its aim was to secure maximum acceptability of the jurors for all the parties. Each party commonly appointed an equal number of members of the council, but sometimes the consul or consuls selected the arbiters. Merchants of all nations could participate in arbitration procedures. (...) Once an arbitration committee had reached a conclusion, the consul merely confirmed it, whereupon it became his official verdict. This procedure effectively incorporated the arbitration procedures within the consular jurisdiction, making it possible for the parties involved to appeal against the outcome to the ambassador in Istanbul.¹⁰⁷

The domestic authorities generally complied with the decisions of these tribunals by converting their recommendations into a judgement and thus guaranteed the implementation of the decision of the arbiters. Since the power of ambassadors and consuls was limited, this procedure was more effective when it had the support of Ottoman authorities enforcing the decision of the arbiters. Vanneste reports on an arbitration practice in Izmir in 1771 among the Dutch and under the auspices of the Dutch consul. The arbitrators, two Englishmen and a Dutchman, experienced in trade and the commercial practices of Izmir, were chosen by the litigants. Both parties agreed not to appeal the decision before another court, on a penalty of 3,000 lion dollars should they come back on that agreement. The difference in the nationalities of the arbitrators was irrelevant: In any case, consular adjudication/arbitration was done according to the rules that were customary amongst merchants, summarised in the concept of the “merchant’s style”. Differences in nation-

¹⁰³Fleet (n 16) 609, 611.

¹⁰⁴The peace treaty of 1348 is considered to be the oldest commercial concession to a Latin state made by a Turcoman prince of Anatolia. See İnalçık (n 8) 1183.

¹⁰⁵Fleet (n 16) 611.

¹⁰⁶Van den Boogert (n 37) 621–622.

¹⁰⁷ibid 622–623.

alities or religion played little to no role in the process.¹⁰⁸ This form of resolution was based on consensus building.¹⁰⁹

This early example of arbitration included some preliminary features of the current arbitration practice. Each party appointed an equal number of arbitrators. The outcome of the proceeding was effectively binding and final: an appeal was possible but it was allowed on limited grounds. Domestic authorities recognised the award and enforced it. More importantly, it presented an effective dispute settlement mechanism that is more accustomed to the needs of foreign merchants involved in international commerce.

In the 16th and 17th centuries, each foreign state had its own tribunal in the Ottoman Empire. There were also some mixed tribunals, which comprised 14 persons, among which there were foreign and Ottoman notables, and they were presided over by the chief custom officer. However, this mechanism was abandoned as the procedure was slow, difficult and proved to be uncertain.¹¹⁰

In the 19th century, some bilateral treaties stipulated for consular arbitration, such as the 1896 Consular Convention with Serbia, which reciprocally authorised the consuls of both states to proceed to arbitration for disputes between their own subjects, provided that subjects of the territorial power or other foreigners were not involved in the case and that their national legislation allowed arbitral settlement.¹¹¹

In 1820, the legations of Austria, Great Britain, France and Russia concluded a verbal agreement (*accord verbal*), to which the other legations joined, in order to set up mixed judicial commissions. These commissions heard disputes between foreigners of different nationalities (not between a Muslim and a Christian party but between two Christian parties). These commissions were composed of three members, one of them chosen by the plaintiff's legation, and the other two designated by that of the defendant. The award was made by most votes. The defendant or the plaintiff could appeal against the award before the appellant's consular judges. It was the defendant's court that supervised the execution of the award. These mixed commissions had been established by virtue of a verbal agreement and not by a binding treaty. Therefore, the competence of the judges could be easily challenged and judges hearing the appeals were reluctant to recognise their jurisdiction.¹¹² In 1864, the Court of Aix, which was the competent court of appeals for French capitulatory courts, ruled that the mixed commissions' procedure was not mandatory because it was not based on written law.¹¹³

Around 1839, some *mixed tribunals* were established to hear commercial disputes between a Muslim party and a Christian party in the principal commercial cities: Constantinople (Istanbul), Smyrna (Izmir), Beirut and Alexandria. These tribunals comprised a Muslim president and five assessors, including two Muslims and three Christians. These tribunals were sometimes allowed to hear civil cases as well, although the jurisdiction to hear civil cases had been—in principle—reserved to the Ottoman courts. There was also a mixed maritime tribunal in Constantinople, which heard disputes arising in matters of maritime trade between natives and foreigners.¹¹⁴

These mixed courts, similar to the mixed commissions, were criticised for not being based on any treaty obligation. Another criticism concerned the legal proficiency of their members who were designated by their respective embassies and consulates. The judgments rendered by these members were often influenced

¹⁰⁸Vanneste (n 15) 142, 326, 327.

¹⁰⁹Maurits H van den Boogert, *The Capitulations and the Ottoman Legal System, Qadis, Consuls and Beratlis in the 18th Century* (Brill 2005) 305.

¹¹⁰Kandelafte (n 24) 170.

¹¹¹Gabriel Effendi Noradounghian (ed), *Recueil d'actes Internationaux de l'Empire Ottoman*, Vol IV (Pichon 1903) 523 and ff.

¹¹²Mikonios (n 94) 49.

¹¹³Kandelafte (n 24) 171.

¹¹⁴Mikonios (n 94) 47.



by the instructions of their hierarchical superiors.¹¹⁵ That is to say, although Ottoman courts had been criticised for several reasons, alternative judicial mechanisms constituted under the privileges accorded by capitulations were not perfect either. In most cases, especially in minor consulates, the capitulatory judge was the consul himself, who had a diplomatic background but no legal experience. In such cases, arbitration could have been a better mechanism than the capitulatory court or mixed courts or commissions.

One may otherwise compare the mixed court or commission system to bilateral arbitration treaties (but not to bilateral investment treaties). Under this system, a dispute between the subjects of different powers, e.g., a dispute between a Muslim and a Christian or a dispute between two Christians from different countries, could be submitted to a specialised dispute settlement mechanism—rather than to the courts of the state of the *for*.

B. Judicial and Legal Reforms

Falling behind other civilisations because of the industrial revolution in Europe, the Ottoman Empire was, by the early 19th century, more than ever in need of favouring foreign trade. However, foreign merchants were rightly requiring legal security standards in order to venture their businesses into the Ottoman territories. The regime introduced by and attached to the trade agreements signed with Britain on 17 August 1838¹¹⁶ and with France on 26 November 1838¹¹⁷ is an example demonstrating the correlation between the rule of law, legal stability and security on the one hand and attracting foreign investment into the host state on the other.

These treaties renewed the privileges granted by previous capitulations, provided other advantages, included an MFN clause, and thus established an absolute liberalism of trade. However, these substantive engagements had to be secured by political liberalism and some institutional changes.

The latter condition required the Ottoman Empire to adopt a set of legal reforms. The “*Tanzimat*” Imperial Edict (Imperial Edict of Reorganisation) of 1839 was issued for this purpose. The edict recognised, *inter alia*, the security of life, honour and property, fair and public trial and equality of persons of all religions in the application of law.¹¹⁸ These guarantees were *sine qua non-conditions* of the implementation of the 1838 treaties. Indeed, although to a lesser extent than earlier epoques, legal and physical insecurity, arbitrariness, political pressures on the market, harassment, bribery, ransoming, expulsion, excessive taxation, forced and unpaid loans, and unjustified fines still constituted a part of the overall conditions of trade in the Ottoman territories by the time the edict was issued.¹¹⁹ By the same token, politically motivated summary executions had been regrettably common in the Ottoman legal/political practice, and these executions were, in most cases, followed by the confiscation of the executed person’s entire property.¹²⁰ Any modern trade treaty would be meaningless in such a climate of legal, political and commercial insecurity.

Promising legal security was a significant incentive to attract foreign capital. To be more specific, the 1839 *Tanzimat* Edict was followed by an over-enthusiastic rush for capitulations. After the issuance of this Edict, the Ottoman Empire became an attraction centre for foreign investment and trade. The Ottoman Empire concluded capitulations with Sardinia in 1839 and in 1854,¹²¹ with Sweden and Norway in 1840,¹²² with Spain

¹¹⁵Ali Şahbaz (n 68) 235.

¹¹⁶See Gabriel Effendi Noradounghian (ed), *Recueil d’actes Internationaux de l’Empire Ottoman*, Vol II (Pichon 1900) 249–253.

¹¹⁷Ibid 256–260. See also the Treaty of Commerce and Friendship with Belgium, signed on 3 August 1838, ibid 276–282.

¹¹⁸Bernard Lewis, *The Emergence of Modern Turkey* (2nd edn, Oxford University Press 1968) 107.

¹¹⁹Eldem (n 11) 310–311.

¹²⁰Ahmet Mumcu, *Osmanlı Devletinde Siyasetin Katl* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1963) 147 ff.

¹²¹Noradounghian (n 116) 283–287, 425–431.



in 1840,¹²³ with Holland in 1840,¹²⁴ with Belgium in 1840,¹²⁵ with Prussia and the Zollverein (German custom union) States in 1840,¹²⁶ with Denmark in 1840 and 1841,¹²⁷ with Tuscany in 1841,¹²⁸ with the Hanseatic League in 1841,¹²⁹ with Portugal in 1843,¹³⁰ and later with Russia in 1846,¹³¹ with the Kingdom of Two Sicilies in 1851,¹³² and with Greece in 1855.¹³³

In about two decades, another structural edict was issued by the Ottoman Sultan. The “*Islahat*” Edict (Imperial Edict of Reform) of 1856 reinforced and developed the legal reforms initiated by the *Tanzimat* Edict, reinforcing the rights of non-Muslim Ottoman subjects who had a privileged role in foreign trade. Surprisingly, this edict, which was devoted to the civil rights of—primarily non-Muslim—Ottoman subjects, included a provision on the contribution of the state to the creation and development of banks (article xxxvii).¹³⁴ Unsurprisingly, similar to the developments in the aftermath of the issuance of the *Tanzimat* Edict, the post-*Islahat* period was marked by a profusion of commercial treaties that the Ottoman Empire concluded with Brazil in 1858,¹³⁵ with France in 1861,¹³⁶ with Britain in 1861,¹³⁷ with Italy in 1861,¹³⁸ with Belgium in 1861,¹³⁹ with Russia in 1862,¹⁴⁰ with the USA in 1862,¹⁴¹ with Holland in 1862,¹⁴² with Sweden-Norway in 1862,¹⁴³ with Denmark in 1862,¹⁴⁴ with Spain in 1862,¹⁴⁵ with Prussia and the Zollverein States in 1862,¹⁴⁶ with Austria in 1862,¹⁴⁷ with Hanseatic Cities in 1862,¹⁴⁸ with Mexico in 1866,¹⁴⁹ and with Portugal in 1868.¹⁵⁰

¹²²ibid 298.

¹²³ibid

¹²⁴ibid

¹²⁵ibid 302–303.

¹²⁶ibid 314–319.

¹²⁷ibid 301, 330.

¹²⁸ibid 338.

¹²⁹ibid 345.

¹³⁰ibid 354–360.

¹³¹ibid 371–379.

¹³²ibid 394–407.

¹³³ibid 437–444.

¹³⁴Aristarchi Bey (Grégoire), *Législation Ottomane, Ou Recueil Des Lois, Règlements, Ordonnances, Traités, Capitulations et Autres Documents de l'Empire Ottoman, Deuxième Partie, Droit Public Intérieur* (Démétrius Nikolaidès ed, Bureau du Journal Thraky 1874) 22.

¹³⁵Gabriel Effendi Noradounghian (ed), *Recueil d'actes Internationaux de l'Empire Ottoman*, Vol III (Pichon 1902) 104–108.

¹³⁶ibid 130–135. This treaty was extended to Switzerland. See ibid 150.

¹³⁷ibid 136–144.

¹³⁸ibid 151–159.

¹³⁹ibid 160–168.

¹⁴⁰ibid 171–178.

¹⁴¹ibid 179–180.

¹⁴²ibid 180–181.

¹⁴³ibid 182.

¹⁴⁴ibid 183.

¹⁴⁵ibid 184–185.

¹⁴⁶ibid 185–192. The Grand Duchies of Mecklenburg-Schwerin and Mecklenburg-Strelitz and the Duchy of Lauenburg adhered to this treaty in 1868. See ibid 285.

¹⁴⁷ibid 193–202.

¹⁴⁸ibid 206–207.

¹⁴⁹ibid 247–253.

¹⁵⁰ibid 263–270.



Simultaneously, the Ottoman Empire adopted, progressively, a series of codes inspired by European legislations:¹⁵¹ the Commercial Code (1850),¹⁵² the Criminal Code (1858),¹⁵³ the Land Code (1858),¹⁵⁴ the Maritime Code (1863),¹⁵⁵ and the Code of Criminal Procedure (1879).¹⁵⁶ The first Ottoman Constitution entered into force in 1876¹⁵⁷ but was later suspended in 1878 under the pretext of the Russo-Turkish War. The Constitution was re-enacted in 1908 and was substantially amended in 1909. This Constitution remained in force until the Turkish Republic adopted a new constitution in 1924.

The Ottoman Empire was introduced to the international free market network through the 1838 trade agreements concluded with Britain and France. As explained above, it had to adopt new reforms, which it did by issuing the *Tanzimat* Edict. The issuance of the *Islahat* Edict of 18 February 1856, in turn, was followed by the conclusion of the Treaty of Paris of 30 March 1856. By concluding this treaty, the Ottoman Empire became part of the so-called European public law, which corresponds to the international law community of the 19th century.¹⁵⁸ This suggests that the Ottoman Empire joined the globalisation movement led by the European states on the condition that it adopted the reforms imposed by them.¹⁵⁹

In the endless debate on the final abrogation of capitulations, which started at the Paris Congress, European states still made this abrogation dependent on the adoption of radical legal reforms in the Ottoman judiciary and administration.¹⁶⁰ The European powers made a declaration in the protocol of March 25, 1856, whereby they proposed to start negotiations with the Ottoman Empire to reach an agreement regarding the necessary consular reforms. The outcome of whether or not the regime of capitulations would be replaced by these reforms would depend on the guarantees that the Ottoman government would be able to implement.¹⁶¹

These legislative reforms and political guarantees are not very different from what a European Union candidate state should follow to integrate into the Common Market. Under Article 49 of the Treaty on the European Union (TEU), an EU candidate state shall respect and commit to the values set out in Article 2 of the TEU. These values are ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’. Article 2 of the TEU emphasises that ‘[t]hese values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. The EU eligibility criteria are commonly referred to as the “Copenhagen criteria.” Respect for the values indicated in article 2 aside, these criteria also require a candidate state to have a functioning market economy.¹⁶²

¹⁵¹Kançal (n 92) 362–364.

¹⁵²*Düstur*, I. Tertip, C. I (Matbaa-i Amire 1289) 375 ff.

¹⁵³*ibid* 557.

¹⁵⁴*ibid* 178 and ff. The 1858 Land Code allowed private land property (previously, the entire empire was theoretically considered to be the property of the Sultan) and a legislation in 1867 granted the foreigners the right to acquire land in the Ottoman territory. See Baskıcı (n 17) 273–274.

¹⁵⁵*Düstur*, I. Tertip, C. I (n 152) 466–536.

¹⁵⁶*Düstur*, I. Tertip, C. IV (Matbaa-i Amire 1296) 131–224.

¹⁵⁷*ibid* 1–40.

¹⁵⁸See Emre Öktem, ‘Le Traité de Paris de 1856 Revisité à Son 150^e Anniversaire: Quelques Aspects Juridiques Internationaux’ in Gilbert Ameil, Isabelle Nathan and Georges Soutou (dirs), *Le congrès de Paris (1856) un événement fondateur* (Direction des archives, ministère français de l’Europe et des Affaires étrangères 2009) 151–170.

¹⁵⁹Gülten Kazgan, *Tanzimattan 21. Yüzyıla Türkiye Ekonomisi, Birinci Küreselleşmeden İkinci Küreselleşmeye* (2nd edn, İstanbul Bilgi Üniversitesi Yayınları 2006) 21.

¹⁶⁰Kandelafte, (n 24) 66–67; Taner (n 66) 4.

¹⁶¹Mikonios (n 94) 80.

¹⁶²See <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14536>> accessed 28 September 2020.



Criticism of the Ottoman legal system by the European powers played a decisive role in the reforms of the Ottoman Empire, which sought to abolish the capitulation in order to become a true part of Europe. In a remarkably similar way, the hope of joining the European Union was a powerful stimulus for Turkey, which carried out colossal constitutional and legislative reforms to this end.¹⁶³

Similarly to the contemporary criticism against reforms imposed in the context of Turkey's EU candidacy,¹⁶⁴ the adoption of the 1839 *Tanzimat* Edict, which could be compared to a human rights charter, was criticised at that time by having allowed European powers to interfere with the internal affairs of the Ottoman Empire.¹⁶⁵

The measures, institutions and principles adopted by the Ottoman Empire in 1839 and onwards certainly reformed domestic law. At the same time, however, these reforms functioned as political and economic guarantees to attract foreign capital and investment in the Ottoman Empire.¹⁶⁶ This may suggest that the concern to attract foreign investment acted as a catalyst in Ottoman legal/political history, although it would not be plausible to argue that these reforms were made for purely economic reasons. Notwithstanding that, the trade agreements concluded before the *Tanzimat* Edict could not probably have been properly implemented without the implementation of these reforms.

The actual implementation of these monumental reforms was highly problematic, and the functioning of the judicial system was far from perfect. The principle of the separation of powers was practically unknown in the Ottoman Empire. Basic criminal law principles were not either applicable or at least well-settled: the right of defence was not respected, and the accused was considered guilty and risked ill-treatment.¹⁶⁷ The organisation of the police was far from satisfactory.¹⁶⁸

Observing that the organisation of the Ottoman judiciary was based on the French system as established by the law of August 24, 1790 and that the two systems were theoretically identical, the Russian legal scholar Mandelstam addressed the question of why the Ottoman judicial system functioned well in some cases and not that well in others. It seems that the main difference lies in the qualifications of the judicial personnel. In France, the personnel involved within the judicial system had the capacity, dignity, and zeal of this profession. Although the same procedural rules were applied in the Ottoman Empire, the absence of a budget, lack of good law schools, the sad situation of the bar association, and the arbitrary regime imposed by the monarch did not allow independent, educated judges of integrity to occupy judicial posts.¹⁶⁹ Similarly, Sir Pears, the President of the European Bar who spent about forty years in Constantinople, wrote, 'Turkish courts and judges, (...) speaking generally, are corrupt. I have known not merely able, but honest Turkish judges, but their popular reputation is deservedly bad. (...) There is certainly no presumption in the public mind that a judgement, even if just, has been honestly obtained'.¹⁷⁰ He also observed that magistrates were ordinary servants of the state, were not equipped to perform their office duties in dignity, and were

¹⁶³Ergun Özbudun and Ömer Faruk Gençkaya, *Türkiye'de Demokratikleşme ve Anayasa Yapımı Politikası* (Doğan Kitap 2010) 112.

¹⁶⁴For striking similarities with reactions against Turkey's EU candidacy and the reforms required by Turkey's accession, see Bahadır Kaleağası, *Dünya Nasıl Değişiyor? Türkiye Nereye Gidiyor?* (Doğan Kitap 2011) 280–283.

¹⁶⁵According to Said Halim Pasha, (1861–1921) foreign minister and grand Vizier (1913–1915) of the Ottoman Empire, who leaned towards a pan-Islamist tendency, the "*Tanzimat*" was a "misfortune for Turkey," which he drew in "a Western, or rather Christian, conspiracy." See Said Halim Pasha, 'La Turquie et Le Califat' in Said Halim Pasha (ed), *L'Empire ottoman et la Guerre mondiale* (Isis 2000) 100, 108.

¹⁶⁶Kazgan (n 159) 23, 26.

¹⁶⁷Kandelafte, (n 24) 189–190.

¹⁶⁸Gatteschi (n 3) XL.

¹⁶⁹André Mandelstam, 'Préface' in Léon Ostroróg, *Pour la Réforme de la Justice Ottomane* (Pédone 1912) XI–XIII.

¹⁷⁰Edwin Pears, *Turkey and Its People* (Methuen & Co 1911) 341.



ill-paid.¹⁷¹ Other authors who actually lived in the Ottoman Empire agreed with Pears and stated, ‘the Ottoman tribunals had never reached that point of development where a Christian was assured of a fair trial. Discriminatory rules of evidence, and a judiciary largely composed of freely removable judges who never studied law, made this an impossibility’.¹⁷² The author observed that there still were inequalities between Muslims and Christians before the Ottoman courts despite the (attempted) reforms and that corruption had become proverbial and something of scandalous frequency.¹⁷³ In his book on the destiny of the Ottoman Empire, Mandelstam concludes, ‘[a]s long as the morality of the judges will not reach the level of their European colleagues and as long as they will remain devoted slaves of the baksheesh of the plaintiffs or accused, and vile executors of the wishes of the current ruler, be it Abdülhamid [(the Sultan of that time)] or Talaat [(the Grand Vizier (Prime Minister) of that time)], the civilised world cannot renounce its control over the Ottoman justice’.¹⁷⁴

Although undoubtedly containing some truth, the criticisms levelled at the Ottoman judicial system were somewhat exaggerated: the shortcomings of the system were greatly amplified to legitimise the maintenance of the capitulations. Modern research suggests that despite European assertions of corruption and unpredictability, ‘we can identify a legal system with relatively concrete boundaries, pre-established procedure of litigation, and well-known evidentiary standards’.¹⁷⁵

In fact, the principles laid down in the capitulation had become a sort of natural law for the Europeans. Even shortly before the negotiations at the Lausanne Peace Conference began, the French Chamber of Commerce of Istanbul issued a report addressed to the French Ministry of Commerce stating that Europeans could not honourably live in Turkey in the absence of guarantees provided by the capitulations. The report advocated that consular courts should be maintained because Turkish legislation and magistrates were deficient and judges had neither legal knowledge nor experience and were scandalously corrupt. It even claimed that if the capitulations were abolished, French, English and Italian post offices would disappear, and all foreign correspondence would be deprived of confidentiality.¹⁷⁶

During the Lausanne Conference, Lord Curzon, head of the British delegation, noted similar issues, such as lack of the highest standard legal education, political pressure upon judges, underpaid judges and delays in the procedure. He underscored that arbitrary arrests and domiciliary visits by the police were taking place without any warrant and that people were often detained in prison for a long time before any trial started.¹⁷⁷ He concluded:

Unless you have a judicial system that makes life possible for the European traders, skilled advisers whom you require and for commercial travellers to go about your country, Turkey will gradually be reduced to the condition, not of a great and prosperous nation, but of a little country lost in the wastes of Asia. It is therefore just as much in the interests of Turkey as of

¹⁷¹ibid 342–343.

¹⁷²Thayer (n 24) 231.

¹⁷³ibid 232.

¹⁷⁴André Mandelstam, *Le Sort de l'Empire Ottoman* (Payot et Cie 1917) 401.

¹⁷⁵Boğaç A Ergene, *Local court, provincial society and justice in the Ottoman Empire: Legal practice and dispute resolutions in Çankırı and Kastamonu (1652–1744)* (Leiden and Boston, 2003) 115 (cited by Vanneste (n 15) 317).

¹⁷⁶Rapport de la Chambre de Commerce française de Constantinople adressé au ministère de commerce 22/10/1922’ cited by Abelous (n 24) 152–154.

¹⁷⁷‘Records of Proceedings and Draft Terms of Peace’, *Lausanne Conference on Near Eastern Affairs 1922–1923* (His Majesty’s Stationery Office 1923) 497.



any foreigner to agree to such protection for foreigners as will be provided by the revision of the Turkish judicial system.¹⁷⁸

One may find these criticisms rather biased, one-sided, and even hypocritical, which were made to support the antiabolitionist discourse regarding the existing capitulations. A study on the capitulations suggests, 'there is no evidence that the Western powers were ever sincerely desirous of cooperating in the introduction of any measures to better the situation. But, on the contrary, most of the powers used the advantage of this anomalous condition to increase their privileges and to satisfy their political and economic interests'.¹⁷⁹ By the same token, Ismet Pacha, who would later become the second President of the Republic of Turkey, stated that '(...) many of the acts perpetrated by the Allied authorities during the last few years in the occupied parts of Turkey are far more serious in their effect and much more difficult to justify'.¹⁸⁰ He also noted that similar problems to the ones alluded by Lord Curzon (erroneous judgments, delays, lengthy detentions in prison) existed in other countries as well. Moreover, referring to the Calvo doctrine, in his opinion, there was no reason for foreign residents in a country to demand more guarantees and privileges than the people of the country.¹⁸¹

Certain criticisms of the Turkish judicial system were probably due to the ignorance of the Turkish language and the inability to understand the legal rules. For instance, the 1877 Codification of Civil Law (*Mecelle*), which was despised as a "defective compilation of the religious law,"¹⁸² was in fact the first codification of Islamic law put into European code-form, prepared by a large team of qualified scholars. It was later adopted by several Arab countries succeeding the Ottoman Empire, such as Syria, Jordan, Iraq, and Lebanon,¹⁸³ remained in force in Israel until 1984,¹⁸⁴ and still constitutes the basis of civil law in Jordan and Kuwait.

Hasan Fehmi, an Ottoman legal scholar, reminded us that the Ottoman Empire was admitted into the community of European states by the 1856 Paris Treaty, and since then, the Empire has strived to reform and organise its administrative and judicial affairs. Based on that, he argued that Europeans who believe in equity should have unanimously believed in the necessity to abolish the privileges that had lost their *raison d'être* and were completely incompatible with the basic principles of international law.¹⁸⁵

Although one should be sceptical in relation to criticisms brought by supporters of anti-abolitionist discourse, which do not provide a completely accurate account of the Ottoman judicial system, there is little doubt that the judicial system in the Ottoman Empire remained primitive, was not liberated from religious influences, and thus did not offer sufficient qualities as to its ability, independence and morality that would likely gain the trust of the European states. Indeed, the mere existence of a criminal code and a code of criminal procedure were not sufficient to establish a sound guarantee that would comply with the modern standards of civilised nations.¹⁸⁶ Based on that, European powers continued to advocate the survival of the

¹⁷⁸ibid 498.

¹⁷⁹Sousa (n 13) 112.

¹⁸⁰'Records of Proceedings and Draft Terms of Peace' (n 177) 511.

¹⁸¹Ibid 520.

¹⁸²Abelous (n 24) 109.

¹⁸³Abdulazim İbrahim, 'Mecelle'nin Orta Doğu Devletlerine Tesiri' (2017) 1 Türkiye İlahiyat Araştırmaları Dergisi 8, 88 ff.

¹⁸⁴Shlomo Guberman, 'The Development of the Law in Israel: The First 50 Years' (2000) <[https://mfa.gov.il/mfa/aboutisrael/israelat50/pages/development of the law in israel- the first 50 yea.aspx](https://mfa.gov.il/mfa/aboutisrael/israelat50/pages/development%20of%20the%20law%20in%20israel-%20the%20first%2050%20years.aspx)> accessed 1 July 2020.

¹⁸⁵Hasan Fehmi (n 79) 220 para 251.

¹⁸⁶Kandelafte (n 24) 191.



capitulatory regime despite the political, legal and judicial reforms made by the Ottoman Empire.¹⁸⁷

C. Conclusion

Biased, it may be, the criticism of the Ottoman judicial system demonstrates the strong correlation between the idea of justice in a given country, as well as access to justice and the rule of law, and the respective country's attractability of foreign capital, investment and trade. Without procedural and substantive law guarantees, a country with great potential could turn into a "little country lost in the wastes of [uncivilised territories]" as stated by Lord Curzon.

Such legal guarantees require the adoption of legal reforms and strict adherence to the general principles of law as accepted by civilised nations and compliance with the rules of international law. They also require putting in place an efficient and fair judicial system.

If the country fails to adopt such substantive rules and provide an efficient and fair judicial system by its own dynamics, capital exporting nations impose on this country the need to adopt legal reforms and accept the jurisdiction of neutral dispute settlement mechanisms. Fulfilment of these requirements is a prerequisite for entering into international trade, commerce and investment agreements. Ottoman capitulations are one of the early examples of this practice. In the aftermath of the Second World War, international investment agreements found a rather good balance between state sovereignty and legal guarantees that a state should undertake towards foreign investors to attract foreign capital.

IV. Most Favoured Nation Clauses in Ottoman Capitulations: An Early Example of a Multilateral Trade System

The Sublime Porte adopted the practice of including the most favoured nation (MFN) clause in the treaties it concluded¹⁸⁸. This meant that the more favourable privileges given to one foreign nation applied to all others at the same time as the states with which the Ottomans concluded a treaty were entitled to such more favourable privilege through the MFN clauses inserted in their own treaty. This implies that the Ottomans did not distinguish any of the Western powers when they concluded capitulations or other trade-related treaties. Accordingly, the capitulatory system functioned on the same bases for all the beneficiary states.¹⁸⁹

An early Ottoman MFN clause may be found in the Genoese Treaty of 1387, which was concluded by Sultan Murad I. In Article 5 of the Treaty, the Ottoman Sultan promised that all Genoese ships (and all those being handled for and considered as Genoese) would be entitled to export grains for an export tax for which Arabs, Greeks, Venetians and others pay at a lesser rate.¹⁹⁰ This specific MFN clause guaranteed to Genoese ships to load grains at a lesser price and thus granted a treatment no less favourable than the treatment accorded to other nations on a specific subject. By the same token, the Treaty of 1454 with Venice granted Venetian merchants all the privileges similar to those previously given to the Genoese.¹⁹¹

The Ottoman Empire was absolutely not the first state to include MFN clauses in its treaties. The genealogy of this technique can be traced back to imperial grants of customs privileges to cities within the Holy Roman Empire on the basis of favours obtained "by whatsoever other town" and to treaties concluded

¹⁸⁷Gatteschi (n 3) XXXVII–XXXVIII; Mandelstam (n 169) XXVII.

¹⁸⁸For a comprehensive study on the MFN clause in Ottoman Capitulations, see Emre Öktem, 'La clausola della nazione più favorita nelle capitolazioni ottomane: Genesi, tipologia, patologia' (2022) 105 *Rivista di diritto internazionale* 483.

¹⁸⁹Van den Boogert (n 37) 614.

¹⁹⁰Fleet (n 12) 15 (Latin text), 17 (English translation).

¹⁹¹Cavarretta (n 67) 26.

during the 12th century between England and the Continental powers and cities.¹⁹² A very embryonic example can be found in the Treaty of November 8, 1226, in which Emperor Frederick II granted to the city of Marseilles the privileges previously conceded to the citizens of Pisa and those of Genoa.¹⁹³

MFN clauses were commonly included in commercial treaties concluded between Italian “maritime” republics and “Mediterranean” Muslim states in the late Middle Ages. Following this earlier form of MFN clauses, ‘the reference treatment [was] that of the other Christian states in general, and not precisely that of the most favoured third nation’.¹⁹⁴ The International Law Commission, referring to McNair,¹⁹⁵ recognises that ‘[w]hether a given treaty provision falls within the purview of a most-favoured-nation clause is a matter of interpretation. Most-favoured-nation clauses can be drafted in the most diverse ways’.¹⁹⁶ The Commission finds, in particular, that ‘[i]n earlier history there was a practice whereby the States parties to the clause explicitly named the third State enjoying the treatment that might be claimed by the beneficiary State’.¹⁹⁷

The types, formulation and scope of the MFN standard have varied in the eight centuries of its history.¹⁹⁸ After the first period based on *tertium comparationis*, for which the early Ottoman capitulations are cited as relevant examples,¹⁹⁹ the clause enters, by mid-17th century, a period of transformation in which the privileged state is no longer specified, but it is agreed that the other contracting state will enjoy all the favourable treatment already accorded to any other nation whatsoever.²⁰⁰

The formulas used in various Ottoman capitulations were not uniform. Article 16 of the first “genuine” French Capitulations of 1569 includes an MFN clause whereby the reference treatment was not the treatment accorded to any third nation but that accorded by the Ottoman Empire to a specific nation, namely the Venetians. The clause reads, ‘*Voulons aussi que toutes les choses contenues et écrites en la notre très haute capitulations accordées et remise aux Vénitiens, qu’elles soient et demeurent encore certifiées en faveur des Français*’.²⁰¹ The comprehensive Venetian Capitulations were referred to and thus incorporated in the French Treaty to guarantee treatment to the French nation no less good than the treatment to the Venetians. Article 19 of the 1581 English Capitulations contains a broader MFN clause. The clause reads, ‘the articles written and registered in our imperial treaty-letters which have been granted to the Venetians and France and other kings who were in terms of friendship with us be confirmed on behalf of the English also (...)’.²⁰² The 1680 Dutch Capitulations, in their turn, simply referred to the treatment accorded to the French and English nations.²⁰³

¹⁹²Georg Schwarzenberger, ‘The Most-Favoured-Nation Standard in British State Practice’ (1945) 22 British Year Book of International Law 96, 97.

¹⁹³Cavarretta (n 67) 58–59.

¹⁹⁴Tullio Scovazzi, ‘Alcuni Antichi Trattati Tra Cristiani e Mussulmani per La Tutela Del Commercio Marittimo Nel Mediterraneo’ in Guido Camarda, Salvatore Corrieri and Tullio Scovazzi (eds), *La Formazione del diritto marittimo nella prospettiva storica* (Giuffrè Editore 2010) 103.

¹⁹⁵Arnold Duncan McNair, *The Law of Treaties* (Clarendon Press 1962) 273, which reads, ‘[a]lthough it is customary to speak of the most-favoured-nation clause, there are many forms of the clause, so that any attempt to generalise upon the meaning and effect of such clauses must be made, and accepted, with caution’.

¹⁹⁶Draft Articles on Most-Favoured-Nation Clauses with Commentaries (n 24) 20 para 13.

¹⁹⁷Ibid 23 para 7. The Commission refers to the Treaty of 1417 concluded between Henry V of England and the Duke of Burgundy and Count of Flanders, which specified that the masters of the ships of the contracting parties should enjoy in their respective ports the same favours as the “Francois, Hollandois, Zellandois et Eschohis,” a language reminiscent of the early Ottoman MFN clauses.

¹⁹⁸Schwarzenberger (n 192) 98.

¹⁹⁹LE Visser, ‘Clause de La Nation La plus Favorisée Dans Les Traités de Commerce’ (1902) 4 *Revue de Droit International et de Legislation Comparée* 66, 70.

²⁰⁰Cavarretta (n 67) 30–31.

²⁰¹Noradounghian (n 22) 92.

²⁰²SA Skilliter, *William Harborne and the Trade with Turkey, 1578-1582* (Oxford University Press 1977) 85–89.

²⁰³(...) y traffiquer sur le même pied amical sur lequel étaient avec la Sublime Porte, la France et l’Angleterre (...) Noradounghian (n 22) 171; *Muahadat Mecmuası*, Vol II (Hakikat Matbaası 1294/1307) 97.

Unable to escape the spirit of the times, the MFN clauses in the Ottoman Capitulations had also become generalised, and no longer referred exclusively to specified states. Article 14 of the Carlowitz Treaty of 1699 with Austria provides that ‘*Les nations dépendant de l’empereur jouiront en Turquie des mêmes favours dont jouissent les autres nations amies*’.²⁰⁴ By the same token, Article 4 of the 1718 Passarowitz Commercial Treaty placed Austrian merchants on equal footing with the subjects of other powers and granted them the same favour in case a specific nation was allowed to export some prohibited articles.²⁰⁵

The importance and frequency of the MFN clauses had generally increased in the 18th century in the international community. The MFN clauses became so common in commercial treaties during the 19th century that they were almost considered a matter of course; MFN clauses were characterised as the ‘corner-stone of all modern commercial treaties’.²⁰⁶ However, the Ottoman MFN clause practice is radically different from the network of commercial treaties concluded by the Western Powers, as the trade relations were not governed on an equal footing and the MFN treatment was not granted on a reciprocal basis. The Ottoman Empire, with its failing economy, inevitably found itself in a disadvantageous position in relation to other contracting states. In addition, whereas the MFN clauses were generally applicable only to commercial relations,²⁰⁷ the MFN clauses in the Ottoman treaties provided favourable treatment for practically all legal rights, including religious rights and the judicial privileges establishing an overall extraterritorial regime.

All Ottoman commercial treaties concluded in the 19th century included MFN clauses. The exact wording of the MFN clauses inserted in each treaty could differ. However, the legal effect of the MFN clauses in these treaties was the same. Since each treaty included an MFN clause, any favourable treatment accorded to the nationals of one state had to be accorded to the nationals of all other states that had a treaty with the Ottoman Empire. As a result, the rights of all European consuls and nationals became identical by the operation of this network of MFN clauses.²⁰⁸ Sir Pears explains, ‘the whole body of Capitulations thus form[ed] a [single] code for the ‘ex-territorial colony of foreigners in Turkey’.²⁰⁹ That is also to say that all foreigners in the Ottoman Empire were entitled to the same rights regardless of their nationalities, as if they all belonged to the same nation.²¹⁰ In other words, there was no preferential treatment to any particular nation;²¹¹ the practice under all Capitulations was uniform.

The voluminous 1740 French Treaty triggered a chain reaction due to the MFN clauses in other treaties. Through these MFN clauses in other treaties, other nations simultaneously obtained the same privileges from the Ottoman Empire as the French. Foreigners other than the French also relied on the extensive jurisdictional immunity in the 1740 French Capitulations.²¹² The 1740 French Capitulations thus created a common status for all foreign residents and deprived the Ottoman Empire of its judicial jurisdiction over foreigners residing in its territory.²¹³

²⁰⁴Noradounghian (n 22) 195. (See *ibid* 189 for the Latin text: ‘(...) ita etiam subditi cujuscunque nationis Caesareae Majestatis, securitate et utilitate commerciorum in regnis excelsi imperii idoneis modis et usitatatis privilegiis gaudebunt et perfruentur’); Muahadat Mecmuası, Vol III (Ceride-i Askeriye Matbaası 1297) 99.

²⁰⁵Noradounghian (n 22) 223; Muahadat Mecmuası, Vol III (n 204) 115.

²⁰⁶Stanley K Hornbeck, ‘The Most-Favoured-Nation Clause’ (1909) 3 *American Journal of International Law* 395, 395, 400, 401; see also Visser (n 199) 66, 71–73; Lassa Oppenheim, *International Law, A Treatise*, Vol 1: *Peace* (2nd edn, Longmans, Green and Co 1912) 580.

²⁰⁷Visser (n 199) 77.

²⁰⁸Nys (n 11) 409; Mikonios (n 94) 40.

²⁰⁹Pears (n 25) 416.

²¹⁰Pierre Arminjon, *Étrangers et Protégés Dans l’Empire Ottoman*, Vol I (A Chevalier-Maresq 1903) 250.

²¹¹Gatteschi (n 3) XX.

²¹²Brown (n 6) 38, 40–41.

²¹³Abelous (n 24) 56–58; Van den Boogert (n 37) 9.



Since the “treatment” referred to in the MFN clause did not necessarily refer to treaty treatment but could also include de facto treatment, the legal advisers of the Ministry of Foreign Affairs were careful to warn the Ministry against the slightest danger that particular, fortuitous or even friendly treatment may be abusively taken as a pretext by all States to claim the same treatment under the MFN clause.²¹⁴

The network established by the MFN clauses generated extraordinarily complex issues in unexpected times and circumstances. In 1901, France dispatched a war flotilla to Mytilene/Lesbos and seized the Ottoman customs treasury to collect the debt owed to the descendants of Lorenzo and Tubini, naturalised French who enjoyed the status of “*protégés*”. The Sublime Porte bowed to the gunboat diplomacy.

France also took the opportunity to have the legal status of French scientific, religious and charitable institutions recognised. Availing themselves of the MFN clause in their respective treaties with Turkey, Russia, Germany and England sought and obtained legal recognition of their similar institutions.²¹⁵

In 1919, in Western Anatolia under the Greek military occupation, a Dutch national was accused of grand larceny against an Ottoman national. The first issue was to decide on the applicable law. This question was resolved in favour of Ottoman law, as the Empire was still nominally sovereign over the occupied territories. Article 65 of the 1740 French Capitulation conferred jurisdiction to the Ottoman courts. However, through the MFN clause in the Dutch Capitulations, Dutch nationals could benefit from the US-Ottoman Empire Treaty of May 7, 1830 and the Belgium-Ottoman Empire Treaty of August 3, 1839, which exempted their respective nationals from the jurisdiction of Ottoman courts. The Allied Powers claimed that they were entitled to punish their respective nationals condemned by the Ottoman courts, as provided by article 5 of the 1718 Austrian Treaty. Although Austria had renounced this privilege in 1877, the Powers argued that they acquired this privilege at the time they were granted the MFN treatment as a direct capitulatory privilege that they could independently claim regardless of whether the initial treaty was terminated at the time the said provision was called for.²¹⁶

MFN clauses continued to appear in the treaties concluded by the Ottoman Empire in the early 20th century. The counterparty of these treaties includes states that had recently become independent from the Ottoman Empire, such as Bulgaria,²¹⁷ and some states that had no geographic proximity, such as Argentina and Chile.²¹⁸ The Ottoman Empire even concluded a one-article protocol featuring only an MFN clause with Norway in 1907.²¹⁹ Ironically, even the treaties concluded with France and the United Kingdom in 1914, just before the Ottoman Empire declared war against these two states, included MFN clauses.²²⁰ Another irony might be found in the insertion of MFN clauses in the treaties concluded with four states, including Armenia, in June 1918,²²¹ just before the Ottoman defeat. Shortly after, the Moscow Treaty of 16 March 1921 concluded between the Union of Soviet Socialist Republics and the Ankara government (at that time coexisting with the Ottoman government in Istanbul until the abolition of the monarchy in 1922) considered ‘null and void any exercise in Turkey of any function and any right having any relation with the regime of capitulations’ (article

²¹⁴For the reports nos. 789 of 31 December 1884, 2806 (1436) of August 1888, 2888 of 3 September 1888, 3023 and 2951 of 31 October 1888; and 3718, 3726, 3786 of 30 December 1889, see Sinan Kunalalp and Emre Öktem, *Chambre Des Conseillers Légistes de La Sublime Porte: Rapports, Avis et Consultations Sur La Condition Juridique Des Ressortissants Étrangers, Le Statut Des Communautés Non Musulmanes et Les Relations Internationales de l'Empire Ottoman (1864-1912)* (Les éditions Isis 2012) 182, 241, 247, 270, 407.

²¹⁵Said Pasha, *Said Paşa'nın Hatıratı*, Vol II (Sabah Matbaası 1328) 185, 329-330.

²¹⁶G. Ténékidès, ‘L'occupation Hellénique En Asie-Mineure et La Justice Répressive Ottomane Dans Leurs Rapports Avec Les Capitulations’ (1921) 48 *Journal du droit international* 103, 105-106, 108.

²¹⁷For the 1911 Treaty see Kunalalp (n 82) 161-162

²¹⁸ibid 129, 186.

²¹⁹For the *Protocole avec le Norvège assurant la jouissance réciproque du traitement de la nation la plus favorisée*, see Kunalalp (n 82) 115.

²²⁰See ibid 271, 287.

²²¹See Kunalalp (n 82) 460, 472, 480, 489 ff.



7). Notwithstanding, this treaty established an MFN regime for the nationals of both countries residing in the territory of the other (article 11).²²²

The overwhelming problem created by the MFN clauses in the Ottoman capitulations was that the Ottoman Empire could not modify its obligations towards the European states by negotiating only with one or a few of those states the terms of the relevant treaties. Due to the regime established by the MFN clauses, privileges would have an effect on all foreigners, even if that privilege was never recognised in the treaty concluded with a specific state or had been removed from the content of the treaties concluded with that state.²²³ Because of its weak bargaining power in the 19th century and strong desire to attract foreign trade, capital and investment, the Ottoman Empire could not renounce all these treaties or terminate the MFN clauses therein.

An interesting example concerning an entangled circumstance involving the renunciation of the capitulations and their survival by the MFN clauses could be found in the secret treaties concluded with Germany, the then ally of the Ottoman Empire, in January 1917²²⁴ and November 1917.²²⁵ These treaties were concluded after the Ottoman Empire's unilateral abolition of the capitulations in 1914. Germany agreed to the abolition of the capitulations by the Ottoman Empire.²²⁶ Article 1 of the January Treaty involved the commitment, for both states, not to sign a peace treaty that would reestablish the capitulatory regime, which was reaffirmed by article 3 of the November 1917 Treaty. Yet, Germany insisted on including MFN clauses in these Treaties. Article 2 of the January 1917 Treaty provided the MFN clause for consular privileges and immunities, exclusively for Germany and without reciprocity for the Ottoman Empire.²²⁷ It seems that Germany was cautious enough to consider that the Ottoman Empire might conclude other capitulations in the future and was willing to benefit from potentially more favourable terms in those future Capitulations with third states. Concerns were expressed at the Ottoman Parliament that if, at the end of the war, Britain, France and the United States would conclude treaties, which, instead of abolishing the capitulations, would add further privileges, Germany would benefit from such privileges by virtue of the MFN clause, which would amount to nullifying the whole purpose of the 1917 Treaties concluded with Germany.²²⁸

The negotiations between the Ottoman Empire and Japan evidenced one of the rare circumstances where a treaty could not be concluded because the Ottoman Empire requested a reciprocal treatment based on general international law, excluding the application of the capitulatory régime. In 1881, negotiations between the Japanese and the Ottoman ambassadors conducted in Saint-Petersburg for concluding a Turco-Japanese commercial treaty ended up failing because the draft involved several reciprocal MFN clauses: 'Since foreigners are under the rule of local laws and courts in Japan whereas they are under the jurisdiction

²²²'Traité Entre La Turquie et La Russie' <http://www.mfa.gov.tr/data/Kutuphane/Kurucu_Anlasmalar/1921-moskova-anlasmasi-fransizca.pdf> accessed 11 November 2020.

²²³Kandelafte (n 24) 21.

²²⁴'Traité Secret Avec l'Empire Allemand Relatif à l'abolition Des Capitulations, Berlin, 11 Janvier 1917', *Akten des Auswärtigen Amts*, IA 127, n. 5 secr.; cited by Kunalalp (n 82) 333.

²²⁵'Traité Additionnel Secret Entre l'Empire Allemand et l'Empire Ottoman, Concernant Le Complément et La Modification Des Traités Secrets Allemands-Ottomans du 28 Septembre 1916 Relatifs Aux Conditions de Paix Future, et du 11 Janvier 1917 Relatif à l'abolition des Capitulations (Constantinople, 27 novembre 1917)', *Akten des Auswärtigen Amts*, Bonn. IA 127 n 5 secr.; cited by Kunalalp (n 82) 405.

²²⁶Two identical treaties were signed with the Austro-Hungarian Empire. See 'Convention Consulaire Signée Avec l'Autriche-Hongrie (Vienne, 12 Mars 1918); Convention Relative à La Protection Judiciaire et Au Concours Réciproque Entre Les Autorités Judiciaires En Matière Civile Signée Avec l'Autriche-Hongrie, (Vienne, 12 Mars 1918)', *ibid* 427.

²²⁷Article 2 – 'L'Empire ottoman prend l'engagement de ne pas se prévaloir de la condition de réciprocité prévue aux articles 12 et 26 de la Convention consulaire conclue en date de ce jour, en tant qu'il s'agirait de faire bénéficier les consuls de l'Empire Allemand en Turquie de privilèges, immunités et attributions qui dépassent les limites du droit international européen général et que le Gouvernement Impérial Ottoman se trouverait éventuellement obligé par les événements de tolérer provisoirement en faveur des consuls d'une tierce puissance'.

²²⁸Ottoman Senate, '50th Session of 27 March 1333 (1917)', *Proceedings from Year 3*, Vol II 382–383.



of consular courts in the Ottoman Empire', wrote the then Grand-Vizier Said Pasha, 'the MFN treatment offers no interest to Ottoman subjects in Japan, and obvious interests to Japanese subjects here'.²²⁹

The MFN clauses naturally applied to custom tariffs. They consequently deprived the Ottoman Government of applying different tariffs to different European powers. Having lost its sovereign rights on the customs, the Sublime Porte could no longer adopt a protectionist policy; custom duties were uniformed by the operation of the MFN clauses. The capitulatory treaties thus provided the legal framework that opened Ottoman markets and raw materials to European industrial and commercial capital, giving rise to an accumulation of capital to the detriment of Ottoman subjects and in favour of foreigners.²³⁰

One could note that the practice based on capitulations was even more uniform than the protection afforded under the contemporary investment treaties concluded by any given state. There had been a single regime applicable to all Christian foreigners residing or travelling in the Ottoman Empire, which remained practically unaltered during four centuries until the early 20th century.²³¹ This may be compared to multilateral systems, such as the one existing under the WTO: the right of any European state towards the Ottoman Empire also became the right of another state.

The difference is that under the Ottoman capitulations, the regime was unilateral (an exceptional type limited to relations with the countries in the "border-zones of Western civilisation")²³² rather than reciprocal (the rightholder was always the European powers and the burden was always on the Ottoman Empire). Even bilateral treaties between the Ottoman Empire and European states included MFN clauses where the European state was the only beneficiary (the application of the MFN clause was unilateral).²³³ Even if some treaties concluded in the late 18th century and onwards envisaged reciprocal MFN clauses,²³⁴ the application of the MFN clause practically remained unilateral considering that Turkish / Muslim Ottoman investors did not venture in Occidental states (Christian Ottoman subjects who invested abroad usually had dual nationalities).

The fact that these treaties were practically one-sided is comparable to the north/south and west/east BITs (BITs concluded between a developed country and a developing or less developed country): although the treaty grants rights to the investors of both parties on paper, in reality the investment would flow unilaterally and hence the protection is practically only for the investors of one of the parties to the relevant BIT.

This tradition of using MFN clauses in trade agreements and capitulations by the Ottoman Empire may explain why the Republic of Turkey has an MFN clause almost in all of its BITs, including the BITs concluded with states that Turkey has a volatile history of diplomatic relations (such as the Turkey-Greece BIT of January

²²⁹Said Pasha, *Said Paşa'nın Hatıratı*, Vol I (Sabah Matbaası 1328) 37. For the Draft Commercial Treaty, see *ibid* 39–41.

²³⁰Baskıcı (n 17) 270, 322.

²³¹Pélissié du Rausas (n 14) 105.

²³²Schwarzenberger (n 192) 100.

²³³The International Law Commission observed that 'Unilateral most-favoured-nation clauses were found in capitulatory regimes and have largely disappeared with them'. See 'Draft Articles on Most-Favoured-Nation Clauses with Commentaries' (n 24) 18 para. 6.

²³⁴See, for instance, Gabriel Effendi Noradounghian (ed), 'The 1746 Commercial Capitulations with Denmark', *Recueil d'actes internationaux de l'Empire ottoman*, Vol I (Pichon 1897) 314 art 17; Gabriel Effendi Noradounghian (ed), 'The 1761 Capitulations or Treaty of Friendship and Commerce with Prussia', *Recueil d'actes internationaux de l'Empire ottoman*, Vol I (Pichon 1897) 315, 317 arts 1, 7; Gabriel Effendi Noradounghian (ed), 'The 1783 Convention of Commerce and Navigation with Russia', *Recueil d'actes internationaux de l'Empire ottoman*, Vol I (Pichon 1897) 358 art 17; Gabriel Effendi Noradounghian (ed), 'The 1784 Exchange of Letters with Austria', *Recueil d'actes internationaux de l'Empire ottoman*, Vol I (Pichon 1897) 381, 383; Gabriel Effendi Noradounghian (ed), 'The 1830 Commerce and Navigation Treaty Between the United States of America and the Ottoman Empire', *Recueil d'actes internationaux de l'Empire ottoman*, Vol II (Pichon 1900) 192 art 1. It is noteworthy to observe that most of the treaties concluded in the second half of the 18th century involved reciprocal/bilateral MFN clauses. In the 19th century, the MFN clause became essentially unilateral. The early 20th century witnessed the return of the bilateral MFN clause between the Ottoman Empire and the Western Powers.

20, 2000). Interestingly enough, an MFN clause features even in BITs that have a rather limited scope of application or that expect less protection (such as the Turkey-Turkmenistan BIT of May 2, 1992).

V. Nationality Shopping under the Capitulations

It is common ground under contemporary international economic and investment law to use special purpose vehicles (SPV) in structuring one's investment in a way that maximises the substantial and procedural protection granted by international investment treaties to foreign investors.²³⁵ Accordingly, investors structure or restructure their investment through companies incorporated in countries having the most beneficial investment treaties with the host state (the state in which the investor is intending to invest) in terms of substantive protection granted to investors and procedural protection envisaged in the dispute settlement provisions. Such corporate structures enable investors to bring investment arbitration claims and be compensated for the wrongful conduct committed by the host state. This practice is also called nationality or treaty shopping.²³⁶

Two particular practices under the capitulatory regime are curiously reminiscent of the contemporary nationality / treaty shopping: the acquisition of protection given to subjects of states benefitting from capitulations by subjects of the states non-parties to capitulatory treaties, especially by means of flying the flag of these other states, and the arbitrary grant of foreign nationality to Ottoman subjects by way of the so-called "protégé" system.

A. Shipping under Foreign Flags

The 1387 Genoa Treaty already seems to allow third states' subjects the right to enjoy the protection granted by the Treaty, since it grants freedom to trade and tax privileges not only to "all Genoese ships" but also "all those being handled for and considered as Genoese."²³⁷ The 1479 Treaty of Peace that Sultan Mehmed II the Conqueror concluded with the Republic of Venice granted protection to all foreigners coming into Ottoman lands under the flag of *San Marco*.²³⁸ This privilege became a significant stake in subsequent capitulations to Venice and other western capitulatory powers. By the same token, the 1535 Draft French Treaty authorised other nations to place themselves under the protection of the French flag. Similarly, in the Preamble of the 1569 French Capitulation, Sultan Selim II proclaims that '*les grands galions et autres vaisseaux dudit empereur de France qui devaient venir trafiquer en nos ports et hâvres ont été différés et entre tenus, comme si ont été les marchands français et ainsi ceux des étrangers qui, en faveur dudit empereur de France, ont coutume de venir par deçà sous son ombre et bannière, comme Génevois, Siciliens, Ancônetois et autres*'.²³⁹ The ability to extend the protection of a banner to other nations had existed *de facto* since medieval times, but with the capitulation of 1569, it became a conventional rule.²⁴⁰

Extension of the capitulatory protection to foreign subjects having the French flag became a source of benefits for France and contributed to its commercial supremacy. This privilege could easily turn out to be abusive. Initially, hostile and competing states were banned from the benefits of the protection.²⁴¹ French

²³⁵See Ed Poulton and others, 'Corporate Restructuring and Investment Treaty Protections' (BIICL Report on Empirical Study, 2020) <https://www.biicl.org/documents/89_isds-corporate-restructuring.pdf> accessed 29 September 2020.

²³⁶Baumgartner, (n 1).

²³⁷The original text reads, "*quod omnia et singula navigia Januensium et qui pro Januensibus tractantur et reputantur*". See Fleet (n 12) 15, 17.

²³⁸de Groot (N 13) 588.

²³⁹Noradounghian (n 22) 89.

²⁴⁰Işıkşel (n 18) 147.

²⁴¹Pélissié du Rausas (n 14) 31–35.



diplomacy enjoyed, until 1580, the monopoly²⁴² to grant the prerogative flag and other Christian nations needed, therefore, to sail under the French flag in order to enjoy these privileges and become subjected to the jurisdiction of the French consuls in case a dispute arises in the Ottoman Empire (otherwise, they would be subject to domestic courts).²⁴³

The 1597 French Capitulations kept France's right to grant its protection to nations navigating under its flag, except for the English and Venetians who could sail under their own flag.²⁴⁴ England obtained in 1601 new capitulations²⁴⁵ that extended the right of protection under the English flag to the Dutch.²⁴⁶ The 1604 French capitulations (article 6) resumed the 1597 formula: it confirmed the French monopoly for the flag protection except for the English and Venetian ships.²⁴⁷

In 1670, the French ambassador Nointel was mandated to submit to the Sublime Porte a memorandum that requested, *inter alia*, that all nations not having any ambassador or consul before the Porte sail under the French flag and to recognise the jurisdiction of French ambassadors and consuls and pay their fees (Article 16).²⁴⁸ The Ambassador met the Grand Vizier, who sharply requested reciprocity between France and the Ottoman Empire.

More importantly for the purposes of this article, the Grand Vizier warned the Ambassador that it would no longer be allowed that the Sultan's subjects operated foreign vessels shipping under the French flag.²⁴⁹ This warning mentioned a new kind of abuse of the capitulatory regime. This abuse is comparable to the situation of a local investor structuring its investment through a foreign SPV to gain access to investment treaty protection and recourse to investment arbitration in case a dispute arises between the investor and his own national state. It seems that there was a comparable practice in the 17th century: ships owned by Ottoman subjects had foreign flags to benefit from the privileges given to foreigners.

It seems that this practice had become quite extensive. In 1716, a regulation issued in France prohibited '*aux sujets du roy de prêter leur noms aux étrangers pour leur faciliter les moyens de faire leur commerce à la faveur du pavillon de France et au préjudice de celui des François*' and severely criminalised these acts.²⁵⁰ To prevent expanding abuses of the French flag, a royal decree of 1727 ruled that only subjects born in the Kingdom of France would enjoy the flag protection.²⁵¹

Some capitulations included special provisions to prevent flag/nationality shopping. Article 5 of the 1830 US Trade Treaty included such a preventive clause that 'American merchant vessels that trade to the dominions of the Sublime Porte [...] shall not take the flag of any other Power, nor shall they grant their flag to the vessels of other Nations and Powers, nor to the vessels of rayahs [Non-Muslim Ottoman Subjects]'.²⁵²

²⁴²'Mémoire du Roy pour servir d'instruction au Sieur Marquis de Villeneuve, conseiller en son conseil d'Estat, son ambassadeur à la Porte ottomane, 11 Aoust 1728', Duparc (n 7) 304.

²⁴³'Mémoire du Roy pour servir d'instruction au Sieur de la Haye Vantelay s'en allant à Constantinople en qualité d'ambassadeur de Sa Majesté vers le Grand Seigneur', Duparc (n 7) 304.

²⁴⁴Abelous (n 24) 37; Eldem (n 11) 292.

²⁴⁵İnalçık (n 8) 1184.

²⁴⁶de Groot (n 13) 600.

²⁴⁷Noradounghian (n 22) 95.

²⁴⁸Pélissié du Rausas (n 14) 63.

²⁴⁹*ibid* 67.

²⁵⁰'Mémoire pour servir d'instruction au Sieur Marquis de Bonnac, ambassadeur extraordinaire de Sa Majesté à la Porte Ottomane, sur les affaires concernant la navigation et le commerce', Duparc (n 7) 252.

²⁵¹'Mémoire du Roy pour servir d'instruction au Sieur Marquis de Villeneuve', Duparc, (n 7) 307–398; 'Mémoire pour servir d'instruction au Sieur Comte des Alleurs allant à Constantinople en qualité d'ambassadeur du Roy', Duparc (n 7) 380.

²⁵²'Treaty Between the United States of America and the Ottoman Empire. Commerce and Navigation' (1830) <https://archive.org/stream/ldpd_11015515_000/ldpd_11015515_000_djvu.txt> accessed 4 February 2021.

By the same token, Article 11 of the 1833 Treaty for Peace, Friendship and Commerce with Tuscany stipulated that Tuscan vessels would not fly foreign flags, and prohibited Tuscany from granting the Tuscan flag to foreign vessels or to vessels belonging to the Sublime Porte's rayahs, or to grant Ottoman subjects any kind of protection, "openly or clandestinely."²⁵³

Flag-borrowing practices continued throughout the 19th century despite the extension of the capitulatory system to almost all Western states. The 19th century witnessed another curious practice of nationality-borrowing: Italian catholic missionaries were assimilated to become French in order to enjoy the religious privileges granted under French capitulations.²⁵⁴

B. "Protégé" System

The second practice, similar to nationality shopping under the Ottoman capitulatory regime, was the "protégé" system. The "protégé" system was basically the mechanism by which Ottoman subjects acquired foreign nationality, immunity or protection without being required to reside in the country granting the protection and thus were entitled to the capitulatory privileges enjoyed by the nationals of that country.²⁵⁵ This practice culminated in the 19th century.

The protection of a state's nationals by another state within a third state is certainly a practice recognised by international law. However, the question was whether this foreign protection in the Ottoman case could extend to millions of native subjects.²⁵⁶

The origins of the Ottoman protégé system date back to the Byzantine period, when certain natives such as Syrians, Jews or Armenians could enjoy protection granted by the Italian republics, in particular by Venice. Ottoman rulers confirmed this practice and allowed foreign ambassadors to employ Ottoman Christians as interpreters (dragomans). These interpreters received "*berats*" (a certain type of patent or licence) through which they were treated as European subjects.²⁵⁷

This privilege evolved into a system by which embassies and consulates improperly gave *berats* in a way that their diplomatic immunity was extended to non-Muslim Ottomans without legitimate and plausible grounds.²⁵⁸ The early capitulations prohibited European consuls from granting their protection to Ottoman subjects. At the peak of the Ottoman power, this provision was strictly observed. When the Sublime Porte started to lose its power and influence, European consuls started to protect the natives and abused their diplomatic privileges.²⁵⁹

In the 18th century, foreign protection progressively became a commodity for non-Muslim Ottoman subjects that could be purchased for large sums of money from European embassies or consulates. The trade of *berats* became a welcome addition to the income of most ambassadors, who personally received almost the entire value of *berats* as profit.²⁶⁰ A French ambassador was reported to have received a sum exceeding 400,000 francs from this source and a British ambassador 2000 to 3000 pounds from the same

²⁵³Noradounghian (n 116) 225.

²⁵⁴Pélissié du Rausas (n 14) 46.

²⁵⁵Sousa (n 13) 93.

²⁵⁶ibid 98.

²⁵⁷Nys (n 11) 412–413.

²⁵⁸Van den Boogert (n 37) 8.

²⁵⁹Gatteschi (n 3) XL.

²⁶⁰Van den Boogert (n 37) 76, 79, 82.



source.²⁶¹ In this way, a British ambassador almost tripled his annual salary by selling *berats*.²⁶² The system of *berats* expanded, even leading to ‘dragoman dynasties’, where the post became hereditary.²⁶³

Some authors express the opinion that *berats* became a political instrument in the hands of some of the foreign powers and were even issued for the benefit of the Muslim Ottomans.²⁶⁴ Although recognising that Western ambassadors and consuls took full advantage of the protection system, van den Boogert suggests that the extent to which they abused the privilege of protection was more limited than is commonly thought.²⁶⁵ The author expresses views on the idea that issuing *berats* was an aspect of the French claim to be the champion of Catholicism in the Levant (Ottoman Empire) and that France systematically used the protection system as an instrument of proselytisation. The author does not undermine the fact that the French ambassadors were also motivated by financial considerations.²⁶⁶

The “protégés” enjoyed immunity from Ottoman jurisdiction and the inviolability of domicile. They were exempted from all personal taxes. They were practically independent from local authorities,²⁶⁷ immune to the Ottoman criminal legislation, paid lower custom duties and enjoyed further commercial privileges, as well as protection by the consulates of the European states. They could sell their goods for a more advantageous price than their (unprotected) Ottoman competitors. Apart from the economic and legal advantages, the holders of *berats* were also exempted from civil duties such as the military service.²⁶⁸ *Berats* also granted protégés access to trade networks and markets that would otherwise be unavailable.²⁶⁹ *Berats* placed their holders out of the reach of local courts and gave them access to consular jurisdiction for dispute resolution and arbitration services. A *berat* holder was practically an Ottoman subject armed with extraterritorial rights normally granted to Europeans. *Berats* also conferred on their holders more secure property rights. *Berat* essentially shielded a deceased *beratlı*’s (berat-holder’s) estate from local magistrates’ arbitrary confiscations.²⁷⁰

The scope of the protection of these *berats* was not limited to the holder of *berat* but extended to the family and heirs of the holder as well. This protection became progressively attractive for the Ottoman subjects. As van den Boogert explains, ‘*Beratlıs* had a dual status, enjoying the privileges accorded by the capitulations and their individual patents on the one hand, while remaining subjects of the Ottoman sultan on the other’.²⁷¹ This practice definitely constituted a form of “forum shopping.”²⁷² These Ottoman subjects could resort to the more favourable judge and request the application of the more favourable law depending on the circumstances in a given situation.

Beratlıs were abusing this opportunity to resort to different mechanisms. Artunç provides the following example: ‘a *beratlı* who would like to obviate his contractual obligation could defect to other jurisdictions

²⁶¹Sousa (n 13) 96–97; de Testa I, *Recueil Des Traités de La Porte Ottomane Avec Les Puissances Étrangères Depuis Le Premier Traité Conclu En 1536, Entre Suléyman I et François I, Jusqu’à Nos Jours*, Vol I (Amyot 1864) 226.

²⁶²Cihan Artunç, ‘The Protégé System and Beratlı Merchants in the Ottoman Empire: The Price of Legal Institutions’ (2013) 9 <<http://www.levantin.eheritage.com/pdf/The-Protege-System-Cihan-Artunc.pdf>>.

²⁶³Vanneste (n 15) 62.

²⁶⁴Sousa (n 13) 101.

²⁶⁵Van den Boogert (n 37) 92.

²⁶⁶*ibid* 101.

²⁶⁷G. Ténékidès, ‘La Floraison Des Protégés Étrangers Dans La Région de Smyrne Depuis l’Armistice’ (1922) 49 *Journal du droit international* 326, 327.

²⁶⁸Baskıcı (n 17) 324–325.

²⁶⁹Artunç (n 262) 15.

²⁷⁰*ibid* 8, 22.

²⁷¹Van den Boogert (n 37) 632–633.

²⁷²Vanneste (n 15) 14.

either to get a favourable verdict or delay judgement. (...) This hypothesis states that there is an option value of having access to multiple legal systems and courts, independent of their efficiency.²⁷³ A *beratlı* might thus choose before which court to litigate depending on the procedure to be followed, the delays in that jurisdiction, as well as the applicable law and rules to the merits of a case.

There was also the practice of forum shopping the other way around: a *beratlı* choosing to be treated as an Ottoman. A Dutch *beratlı* who was doing extensive trade with the Netherlands declared himself an Ottoman subject during his bankruptcy in order to delay the litigation that had already started before the Dutch consular court.²⁷⁴

Beratlıs exploited their legal options extensively. There was anecdotal evidence and cases demonstrating that *beratlıs* were switching courts during disputes very often. Altunç gives the examples of *beratlıs* switching from a British court to an Austrian tribunal or to a Turkish court.²⁷⁵ Indeed, *beratlıs* could take separate *berats* from different European powers.

Due to the naturalisation of non-Muslim Ottoman subjects through the protégé system, some Ottoman dominions became territories without Ottoman subjects.²⁷⁶ At the end of the 18th century, Austria had more than 200,000 subjects under her protection in Moldavia alone. In Wallachia, Emperor Joseph II distributed 60,000 patents of protection. When Russian influence superseded in the region, however, Austrian patents were transformed into Russian patents.²⁷⁷

In 1760, the Dutch Consul at Izmir warned the “States General” that “those people of the land [Ottoman Empire] serve themselves effectively from the *berats* and protections of the Europeans, for as long as it coincides with their interest, and as soon as they observe, particularly in bankruptcies, that those *berats* do not coincide with their own particular” interests, they abandon *berats* and protections, and return to Turkish protection.”²⁷⁸

In 1793, the Governor of Aleppo warned the Sublime Porte that there were around 1500 consulate dragomans in this city, all of whom were tradesmen who were exempt from paying any tax. The Porte (the Ottoman Empire) assigned a special inquiry commission that repealed all *berats* whether authentic or forged. All those who proposed bribes to the commissioners were sent to Istanbul for punishment.²⁷⁹

In 1848, the British Consul to Trabzon (a north-eastern Anatolian city on the coast of the Black Sea) warned the British Ambassador to Constantinople that many Greeks had changed their residence to Georgia in order to obtain the Russian nationality after having resided for a while. Obtaining the Russian nationality would facilitate their commercial activity and enable them to pay less tax. Some Christians obtained Romanian passports, which they later exchanged with Russian passports. According to the British consul, unless drastic measures were immediately taken, all non-Muslims of Trabzon would become Russian within a few years.²⁸⁰

Enjoying extensive legal privileges and opportunities, non-Muslim Ottoman subjects became a powerful commercial oligarchy. They also became Europeanised and thus alienated from the society. Since they were exempt from paying taxes, they preferred importing foreign products instead of using local industrial

²⁷³Artunç (n 262) 24.

²⁷⁴ibid 25.

²⁷⁵ibid 28.

²⁷⁶Gatteschi (n 3) XL.

²⁷⁷Sousa (n 13) 98.

²⁷⁸Cited by Vanneste (n 15) 308.

²⁷⁹Kamil El-Gazzi, *Nahr El-Dahab Fi Ta'rih Halab*, Vol III (1926) 311, cited by Salahi Sonyel, 'Osmanlı İmparatorluğu'nda Koruma (Protégé) Sistemi ve Kötüye Kullanılışı' (1991) LV Belleten 359, 361.

²⁸⁰PRO and FO, 'From Stevens to Canning', 195/294 (1848), cited by Sonyel (n 279) 364.

products, which would have contributed to domestic employment. Despite being rich, they hardly made any contribution to the domestic economy, which in turn relied only on taxes received from agriculture.²⁸¹

Public authorities in the Ottoman Empire took some measures from time to time against the abuse of the power of naturalisation or protection of Ottoman subjects by foreign states.²⁸² As early as 1677, the Grand Vizier Merzifonlu Kara Mustafa Pasha issued a *ferman* against the excessive sale of dragomanships by European ambassadors and consuls. In 1758, a survey of the numbers of protégés espoused by all foreign embassies and consulates led to a decree dated 10 October 1758. The decree ordered the officers of the Ottoman chancery to examine the registers each time an application was submitted by a foreign embassy for the issuance of a dragoman's *berat*. Patents that became available (or vacant) following the death or retirement of their holders should not be reissued until the total number of protégés was reduced to an acceptable level. On May 12, 1786, the Sublime Porte sent a memorandum to all foreign diplomatic representatives about the abuses of granting *berats*. Despite the measures taken by the Ottoman Empire to control the *berats* and the protégé system, the Sublime Porte could only cancel less than a dozen *berats* between 1758 and 1806.²⁸³ Sometimes, the government specifically targeted a particularly problematic city: a *hatt-ı şerif* (sultanic writ) was issued in 1766 warning consuls in Izmir to no longer accept Ottomans under their protection.²⁸⁴

The most effective measure restraining the excessive increase in the number of protégés was taken at the beginning of the 19th century. In 1806, the Sultan issued a *hatt-ı şerif* (imperial rescript). The rescript ordered all *berat*-holders and foreign servants, who did not reside in the same place as the consulates they were serving, to return to their stations. In the case of noncompliance, they would lose their privilege and become ordinary Ottoman subjects. The Sublime Porte requested the European ambassadors to comply with this order. This decree was announced publicly in Istanbul, Edirne and Thessaloniki.²⁸⁵ In his letter of 5 May 1806, the British Ambassador advised the Foreign Minister that the Sublime Porte's order was just and proper, and the *berat*-holders should either waive their *berats* or reside at the places specified by their respective *berats*. Napoleon also agreed to terminate the practice of issuing *berats*.²⁸⁶ The Porte's measure mainly targeted Russia, which liberally granted nationality to Turkish subjects. The Sultan was ready to undertake the risk of a war against several states to prevent these foreign interferences.²⁸⁷ Despite these measures, half a century later, the American minister plenipotentiary to Constantinople estimated in 1860 that around 50,000 Ottoman subjects residing in the capital enjoyed foreign protection.²⁸⁸

From the beginning of the 19th century onwards, the Sublime Porte attempted to resolve the problems arising from the protégé system in a series of actions in addition to the ones cited above. First, the Ottoman Empire concluded treaties prohibiting European or American diplomats and consuls from issuing *berats* to Ottoman subjects and from granting other types of protection to them either overtly or secretly.²⁸⁹ The only exception was provided for persons actually engaged in the service of the ambassador or the consuls.²⁹⁰ In

²⁸¹Kazgan (n 159) 15, 30–31.

²⁸²Ténékidès (n 267) 327.

²⁸³Van den Boogert (n 37) 105–108.

²⁸⁴Vanneste (n 15) 63.

²⁸⁵ibid 109–110.

²⁸⁶Sousa (n 13) 101.

²⁸⁷PRO and FO, 'Letter from Charles Arbuthnot to Charles James Fox' (1806), cited by Sonyel (n 279) 362.

²⁸⁸'From Williams to Cass (17.9.1860)'; *The United States Archives, Legations, Dispatches, Turkey*, Vol 16; cited by Sonyel (n 279) 367.

²⁸⁹Nys (n 11) 414.

²⁹⁰Sousa (n 13) 102 on 30.

1852, the Ottoman Government declared that it would no longer recognise the foreign protection of Ottoman subjects other than those in the service of foreign legations or consulates. On September 14, 1860, The Grand Vizier Aali Pasha sent a memorandum to foreign legations, notifying them of the measures that the Sublime Porte had decided to adopt with regard to these native protégés. Accordingly, the protégés were to be subjected to Ottoman jurisdiction and no inheritance of rights of protection would be allowed. In the case of a change of nationality, the protégés were to leave the Ottoman territory within three months. This memorandum established a mixed commission to revise the titles of protection. On August 9, 1863, another regulation determined the number of persons who could be employed by the embassies, consulates, ecclesiastical missions and foreign monasteries. The same decree ordered that no Ottoman subjects should be employed as consuls or vice-consuls without special arrangements with the Porte and consular protections should not be extended to the family and descents of the consular employees.²⁹¹ In addition to these measures, the dragomans' names should be notified to the Sublime Porte for approval.²⁹² This regulation was not retroactive; *berats* issued before August 9, 1863 thus remained unaffected.

The 1863 Regulation established a new class of protégés entitled to temporary protection. In the aftermath of the 1863 Decree, there were four kinds of protégés who were treated as subjects of European powers to which capitulations were granted: (i) Protégés recognised prior to this date with their vested rights (*berat*-holders under the traditional regime); (ii) Ottoman subjects practising consular functions in cases strictly limited by the 1863 Decree; (iii) Subjects of states not parties to any capitulation, such as Switzerland or South American states, but who were protected by a state benefiting from capitulations; (iv) Subjects of a state in war or whose diplomatic relations were severed with the Ottoman Empire, who were protected by a state not in war with the Ottoman Empire.²⁹³

It seems, however, that these measures did not completely prevent Ottoman subjects from gaining foreign citizenship. In its notes in 1866²⁹⁴ and 1869,²⁹⁵ the Ottoman Government declared that the number of Ottoman subjects naturalised by foreign powers had increased since 1863. In a memorandum communicated to the diplomatic missions on July 1869, the Sublime Porte warned that the imperial authorities had been ordered to strictly and loyally observe all capitulatory provisions and repel any transgression of capitulatory privileges that would undermine the sovereign rights of His Imperial Majesty the Sultan.²⁹⁶

The protégé system is a classic example of nationality shopping. Similar techniques are still used in contemporary international economic law. Local subjects or nationals of the host state have been attempting to benefit from the better and larger protection granted to foreigners under the network created by bilateral and multilateral investment treaties. In the contemporary era, the mechanism of benefitting from the protection afforded to foreign investors is to structure the investment through SPVs incorporated in foreign jurisdictions. In the Ottoman era, foreigners who were not entitled to any protection or Ottoman subjects referred to two mechanisms. The first mechanism, similar to establishing an SPV, was to fly a foreign flag while navigating. The second mechanism, similar to the adoption of foreign nationality, was receiving *berat* and becoming a protégé (and thus receiving the protection of a capitulation beneficiary state).

²⁹¹ *ibid* 101–103.

²⁹² Kandelafte (n 24) 114.

²⁹³ Ténékidès (n 267) 327–328.

²⁹⁴ Sousa (n 13) 103–104.

²⁹⁵ Ignace de Testa (ed), 'Mémoire Du Gouvernement Ottoman, En Date d'avril 1869 (Mouharrem 1286)', *Recueil des traités de la Porte ottomane avec les puissances étrangères depuis le premier traité conclu en 1536, entre Suléyman I et François I, jusqu'à nos jours*, Vol VII (Amyot 1892) 542.

²⁹⁶ George Young, 'Privilèges Judiciaires Des Étrangers. Mémoire Communiqué Aux Missions et Publié Dans La Turquie Du 7 Juillet 1869', *Corps de Droit ottoman: Recueil des Codes, Règlements, Ordonnances et Actes les plus importants du Droit Intérieur, et d'Études sur le Droit Coutumier de l'Empire Ottoman*, Vol I (Clarendon Press 1905) 268.



The nationality and treaty shopping mechanisms used in the Ottoman era might have risked failing to provide any protection under modern international law for several reasons. First, the protégés who happen to be an Ottoman subject would be considered as a national of the host state and would not be protected under most bilateral investment treaties, the ICSID Convention, and customary international law applicable to diplomatic protection. Second, an abusive grant of nationality to a person not having any connection with the state whose nationality is sought might not be recognised in international law. Third, an acquisition of foreign nationality could be considered an abuse of law, especially if it is done after a certain dispute has already arisen between the individual and the host state.

This explanation should not, however, suggest that nationality or treaty shopping is not permitted under modern international law at all. In today's world, investors change their nationalities or residence to pay less tax and to benefit from the substantive and procedural protection of relevant international investment agreements. More importantly, investors do establish SPVs in convenient jurisdictions. Investors also benefit from trustees to hide the real stakeholder of the business. Choosing the most convenient corporate structuring and restructuring constitutes an important strategy before (or even sometimes after) engaging in a business or investment.

Establishing SPVs has become something very regular, which does not take even more than a few minutes. However, the naturalisation of physical persons does take much more effort. Therefore, different from the 19th century and the examples given above, "nationality shopping" through naturalisation is not extensive in today's world. More importantly, it is not generally allowed to bring claims in investment arbitration against one's national state or at least against the state of one's effective nationality. Indeed, pursuant to Article 7 of the International Law Commission's Articles on Diplomatic Protection, in the case of multiple nationalities, the nationality of a foreign state could not be claimed against the other state of nationality unless the nationality of the former state is predominant. By the same token, article 25(2)(a) of the ICSID Convention²⁹⁷ requires that the claimant have the nationality of another contracting state and should not have the nationality of the contracting state party to the dispute. This prohibition can be compared to some measures adopted by the Ottoman Empire. The main idea was that Ottoman subjects (nationals of the host state) should not be allowed to benefit from the international protection and privileges asserted against the Ottoman Empire.

However, nationality shopping through SPVs does not involve similar problems. Obviously, states try to preclude SPVs not having any genuine economic activity from benefiting from all protections granted under international investment agreements. For this, some BITs require the claimant to have a genuine economic activity in the state of its incorporation. This is not, however, very difficult to attain. Therefore, it is possible to structure one's investment through SPVs located in convenient jurisdictions that offer favourable investment law protection.

VI. Conclusion

*'Nihil novum sub sole'*²⁹⁸

The research on Ottoman capitulations and the comparison with international investment law and international trade law reveal many common features between the capitulations and modern international economic law.

²⁹⁷Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) (concluded on 18 March 1965, entered into force on 14 October 1966), 575 UNTS 159.

²⁹⁸There is nothing new under the sun (Ecclesiastes 1:10).



The very first common feature is the underlying reason why capital-exporting countries consider the grant of capitulations as a *conditio sine qua non-requirement* of international trade. Trade, investment, or other economic activity needs judicial security. Judicial security could only be established by independent, impartial, well-educated judges who may serve justice in a country that respects the law. Failure to abide by the principles of the rule of law or provide an effective and independent judicial system discourages such economic activities. The only solution to attract investment or trade in such conditions is to undertake substantive international law guarantees on the one hand and to provide access to a dispute resolution system independent of the courts of the host state. The idea that led to the flourishing of the capitulations and international investment treaties is thus similar.

Another common feature between the capitulatory regime and international economic law is that both systems make foreign nationality a commodity. It is indeed through foreign nationality that one accesses substantive privileges and procedural rights granted under capitulations and contemporary investment treaties. This mechanism leads to nationality and treaty shopping: unprotected third state nationals or host state nationals either attempt to obtain convenient nationalities or restructure their investment through SPVs to be able to assert rights under international treaties.

To conclude, the development of international investment law is not the first time the international community has attempted to respond to the need for judicial security for investors; the international community had already provided several instruments throughout history. Similar problems led to similar mechanisms, which in turn led to similar consequences.



Peer Review	Externally peer-reviewed.
Conflict of Interest	The author has no conflict of interest to declare.
Grant Support	The author declared that this study has received no financial support.
Acknowledgement	The authors thank Bruno Ciani, Edhem Eldem, Güray Erdönmez, Bahadır Kaleağası, Fatma Gül Karagöz, Sinan Kunalalp, Pelin Manti, Ebru Şensöz Malkoç, Özlem Öktem, Tullio Scovazzi and Mehmet Tınç for their time to discuss the subject, for providing materials and for their thoughtful suggestions. We would like to extend our special thanks to Mr. Tayanç Molla and Ms. Emine Bıçakçı for the invaluable research and editorial assistance.

Author Details

Akif Emre Öktem (Prof. Dr.)

¹ Galatasaray University, Faculty of Law, Istanbul, Türkiye

 0000-0002-9966-6501  akifemreoktem@yahoo.com

Berk Demirkol (Assoc. Prof. Dr.)

² Potestas Partners, Dubai, UAE

 0000-0001-9758-8450  bd@potestas.co.uk

Bibliography

Abelous F, *L'évolution de La Turquie Dans Ses Rapports Avec Les Étrangers* (Pédone 1928).

Abi-Chahla H, *L'extinction Des Capitulations En Turquie et Dans Les Régions Arabes* (Picart 1924).

Ahmed Réchid, 'La Condition Des Étrangers Dans La République de Turquie' (1933) 46 *Recueil des Cours de l'Académie de Droit International de La Haye*, 165-227.

Ali Şahbaz, *Mufasssal Hukuk-i Düvel*, Cilt II (Bağdadlıyan 1325).



- Aristarchi Bey (Grégoire), *Législation Ottomane, Ou Recueil Des Lois, Règlements, Ordonnances, Traités, Capitulations et Autres Documents de l'Empire Ottoman, Deuxième Partie, Droit Public Intérieur* (Démétrius Nikolaidès ed, Bureau du Journal Thraky 1874).
- Arminjon P, *Étrangers et Protégés Dans l'Empire Ottoman*, Vol I (A Chevalier-Maresq 1903).
- Artunç C, 'The Protégé System and Beratlı Merchants in the Ottoman Empire: The Price of Legal Institutions' (2013) <<http://www.levantineheritage.com/pdf/The-Protege-System-Cihan-Artunc.pdf>>.
- Atatürk K, *A Speech Delivered by Mustafa Kemal Atatürk, 1927* (Ministry of Education Printing Plant 1963).
- Bağış Aİ, *Osmanlı Ticaretinde Gayri Müslimler* (2nd edn, Turhan Kitabevi 1998).
- Baskıcı MM, 'Lozan Barış Andlaşmasının Ekonomik ve Mali Hükümleri' in Çağrı Erhan (ed), *Yaşayan Lozan* (Kültür Bakanlığı Yayınları 2003). 263-391.
- Baumgartner J, *Treaty Shopping in International Investment Law* (Oxford University Press 2016).
- Belin FA, *Des Capitulations et Des Traités de La France En Orient* (Challamel Ainé 1870).
- Berkes N, *Türkiye'de Çağdaşlaşma* (Yapı Kredi Yayınları 2003).
- Bilsel MC, *Lozan*, Cilt II (Ahmet İhsan Matbaası 1933).
- Bonfils H, *Manuel de Droit International Public* (1912).
- Brown PM, *Foreigners in Turkey: Their Juridical Status* (Princeton University Press 1914).
- Cardini F, *Europa e Islam, Storia Di Un Malinteso* (Laterza 2003).
- Cavarretta G, *La Clausola Della Nazione Più Favorita* (Alberto Reber 1906).
- Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) (concluded on 18 March 1965, entered into force on 14 October 1966), 575 UNTS 159.
- Cole T, 'The Boundaries of Most Favoured Nation Treatment in International Investment Law' (2012) 33 Michigan Journal of International Law. 537-586.
- Dainese v Hale 91 US Reports 13 (1875).
- Dainese v United States 15 Court of Claims Report 64 (1879).
- Davison R, 'The Turks in History' *Essays in Ottoman and Turkish History, 1774-1923, The Impact of the West*, Roderic Davison (Saqi Books 1990).
- de Clerq J (ed), 'Traité de Paix de 1802', *Recueil des Traités de France*, vol I (Amyot 1864).
- de Groot AH, 'The Historical Development of the Capitulatory Regime in the Ottoman Middle East from the Fifteenth to the Nineteenth Centuries' (2003) 83 Oriente Moderno 575-604.
- de Testa I, *Recueil Des Traités de La Porte Ottomane Avec Les Puissances Étrangères Depuis Le Premier Traité Conclu En 1536, Entre Suléyman I et François I, Jusqu'à Nos Jours*, Vol I (Amyot 1864).
- (ed), 'Mémoire Du Gouvernement Ottoman, En Date d'avril 1869 (Mouharrem 1286),' *Recueil des traités de la Porte ottomane avec les puissances étrangères depuis le premier traité conclu en 1536, entre Suléyman I et François I, jusqu'à nos jours*, Vol VII (Amyot 1892).
- 'Draft Articles on Most-Favoured-Nation Clauses with Commentaries (1978) II Yearbook of the International Law Commission 16.
- Duparc P (ed), 'Mémoire Du Roy Pour Servir d'instruction Au Sieur de La Haye Vantelay s'en Allant à Constantinople En Qualité d'ambassadeur de Sa Majesté Vers Le Grand Seigneur (1665)', *Recueil des instructions données aux ambassadeurs et ministres de France*, XXIX, Turquie (Centre national de recherche scientifique 1969).
- Düstur, I. Tertip, C. I (Matbaa-i Amire 1289).
- Düstur, I. Tertip, C. IV (Matbaa-i Amire 1296).
- Düstur, III. Tertip, C. V (Necmi İstiklal Matbaası 1931).
- El-Gazzi K, *Nahr El-Dahab Fi Ta'rih Halab*, Vol III (1926).
- Eldem E, 'Capitulations and Western Trade' in Suraiya N Faroqi (ed), *The Cambridge History of Turkey*, Vol 3: *The Later Ottoman Empire - 1603-1839* (Cambridge University Press 2006) 283-335.
- Féraud-Giraud L-J-D, *La Juridiction Française Dans Les Échelles Du Levant et de Barbarie...* (A Durand 1859).
- Fleet K, 'The Treaty of 1387 between Murād I and the Genoese' (1993) 56 Bulletin of the School of Oriental and African Studies 13-33.
- , 'Turkish-Latin Diplomatic Relations in the Fourteenth Century: The Case of the Consul' (2003) 83 Oriente Moderno 605-611.
- Frazee CA, *Catholics and Sultans, The Church and the Ottoman Empire, 1453-1923* (Cambridge University Press 1983).
- 'From Williams to Cass (17.9.1860)', *The United States Archives, Legations, Dispatches, Turkey*, Vol 16.
- Gatteschi D, *Manuale Di Diritto Pubblico e Privato Ottomano* (Posta Europea di V Minasi e c 1865).

- Guberman S, 'The Development of the Law in Israel: The First 50 Years' (2000) <<https://mfa.gov.il/mfa/aboutisrael/israelat50/pages/development-of-the-law-in-israel-the-first-50-yea.aspx>> accessed 1 July 2020.
- Guéna P, 'Qui a lu les capitulations? Note à partir d'un copie crétienne de 1454' (2022) 53 *Turcica* 115-135.
- Hasan Fehmi, *Telhis-i Hukuk-u Düvel* (Matbaa-i Osmaniye 1300).
- Hathaway IF, 'Layers of protection: Safe conduct practices and diplomacy in the sixteenth-century mediterranean' (2022) 53 *Turcica* 175-203.
- Hrand Asadur, Halil Cemaleddin, *Ecanibin Memalik-i Osmaniye'de Haiz Oldukları İmtiyazat-ı Adliye* (Hukuk Matbaası 1330-1332).
- Herodotus, *The History of Herodotus, Book II* (GC Macaulay ed, 2008) <<http://www.gutenberg.org/files/2707/2707-h/2707-h.htm#linknote-331>>
- Hornbeck SK, 'The Most-Favoured-Nation Clause' (1909) 3 *American Journal of International Law* 395 <https://www.cambridge.org/core/product/identifier/S0002930000250756/type/journal_article>
- İbrahim A, 'Mecelle'nin Orta Doğu Devletlerine Tesiri' (2017) 1 *Türkiye İlahiyat Araştırmaları Dergisi* 8-18.
- İnalcık H, 'İmtiyazat', *Encyclopaedia of Islam*, Vol III (2nd edn, Brill 1986). 1178-1189.
- , *Ottoman Empire, the Classical Age, 1300-1600* (Phoenix 1998).
- İsmet Pasha, 'December 2', 1922 *Records of Proceedings and Draft Terms of Peace. Presented to Parliament by the Command of His Majesty* (His Majesty's Stationery Office 1923).
- Kaleağası B, *Dünya Nasıl Değişiyor? Türkiye Nereye Gidiyor?* (Doğan Kitap 2011).
- Kançal S, 'La Conquête Du Marché Ottoman Par Le Capitalisme Industriel Concurrentiel (1838-1881)' *Colloques internationaux du CNRS, No. 601- Economie et Sociétés dans l'Empire Ottoman (fin du XVIIIe—début du XXe siècle)* (Centre national de recherche scientifique 1983). 355-409.
- Kandelaft JS, *L'avenir Réserve Au Régime Des Capitulations En Turquie* (1911).
- Kazgan G, *Tanzimattan 21. Yüzyıla Türkiye Ekonomisi, Birinci Küreselleşmeden İkinci Küreselleşmeye* (2nd edn, İstanbul Bilgi Üniversitesi Yayınları 2006).
- Külünk ME, *Kapitülasyonların Kaldırılması* (Yeditepe Yayınevi 2011).
- Kuneralp S (ed), 'Convention Consulaire Signée Avec l'Autriche-Hongrie (Vienne, 12 Mars 1918); Convention Relative à La Protection Judiciaire et Au Concours Réciproque Entre Les Autorités Judiciaires En Matière Civile Signée Avec l'Autriche-Hongrie, (Vienne, 12 Mars 1918)', *Recueil des traités, Conventions, Protocoles, Arrangements et Déclarations signés entre l'Empire Ottoman et les Puissances Etrangères, 1903-1922, Volume II, 1917-1922* (Isis 2000).
- (ed), 'Letters of 26 September and 5 December 1914', *Recueil des traités, Conventions, Protocoles, Arrangements et Déclarations signés entre l'Empire Ottoman et les Puissances Etrangères, 1903-1922, Volume I, 1903-1916* (Isis 2000).
- (ed), *Recueil Des Traités, Conventions, Protocoles, Arrangements et Déclarations Signés Entre l'Empire Ottoman et Les Puissances Etrangères, 1903-1922, Volume I, 1903-1916* (Isis 2000).
- , *Recueil Des Traités, Conventions, Protocoles, Arrangements et Déclarations Signés Entre l'Empire Ottoman et Les Puissances Etrangères, 1903-1922, Volume II, 1917-1922* (Isis 2000).
- Kumrular Ö, *Avrupa'da Türk Düşmanlığının Kökeni-Türk Korkusu* (Doğan Kitap 2008).
- Kuneralp S and Öktem E, *Chambre Des Conseillers Légistes de La Sublime Porte: Rapports, Avis et Consultations Sur La Condition Juridique Des Ressortissants Étrangers, Le Statut Des Communautés Non Musulmanes et Les Relations Internationales de l'Empire Ottoman (1864-1912)* (Les éditions Isis 2012).
- Kürkçüoğlu Ö and Erhan Ç, 'Lozan Gelişmeleri' in Çağrı Erhan (ed), *Yaşayan Lozan* (Kültür ve Turizm Bakanlığı 2003) 17-98.
- 'L'abolition Des Capitulations et Ses Conséquences (1914) 21 *Revue générale de droit international public* 487.
- 'Le Traité de Paris du 30 Mars 1856 et Les Conférences de Londres de 1871', *Archives diplomatiques 1873*, tome III (Amyot 1873).
- Lewis B, *The Emergence of Modern Turkey* (2nd edn, Oxford University Press 1968).
- Mahmoud Essad, *Du Régime Des Capitulations Ottomanes: Leur Caractère Juridique d'après l'histoire et Les Textes* (Fratelli Haim 1928).
- Mandelstam A, 'Preface' in Léon Ostoróg (ed), *Pour la Réforme de la Justice Ottomane* (Pédone 1912).
- , *Le Sort de l'Empire Ottoman* (Payot et Cie 1917).
- Matuz J, 'À Propos de La Validité Des Capitulations de 1536 Entre l'Empire Ottoman et La France' (1992) 24 *Turcica* 183-191.
- McNair AD, *The Law of Treaties* (Clarendon Press 1962).
- Mikonios G, *Les Consuls En Orient et Les Tribunaux Mixtes* (Braun 1881).
- Muahedat Mecmuası*, Vol II (Hakikat Matbaası 1294).
- Muahedat Mecmuası*, Vol III (Ceride-i Askeriye Matbaası 1297).



- Mumcu A, *Osmanlı Devletinde Siyasetin Katli* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1963).
- , *Osmanlı Devletinde Rüşvet (Özellikle Adli Rüşvet)* (Ankara Üniversitesi Hukuk Fakültesi Yayınları 1969).
- 'Treaty on European Union- Joining the EU' <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:l14536>> accessed 28 September 2020.
- Noradounghian GE (ed), *Recueil d'actes Internationaux de l'Empire Ottoman*, Vol I (Pichon 1897).
- (ed), 'The 1746 Commercial Capitulations with Denmark', *Recueil d'actes internationaux de l'Empire ottoman*, Vol I (Pichon 1897).
- (ed), 'The 1761 Capitulations or Treaty of Friendship and Commerce with Prussia', *Recueil d'actes internationaux de l'Empire ottoman*, Vol I (Pichon 1897).
- (ed), 'The 1783 Convention of Commerce and Navigation with Russia', *Recueil d'actes internationaux de l'Empire ottoman*, Vol I (Pichon 1897).
- (ed), 'The 1784 Exchange of Letters with Austria', *Recueil d'actes internationaux de l'Empire ottoman*, Vol I (Pichon 1897).
- (ed), *Recueil d'actes Internationaux de l'Empire Ottoman*, Vol II (Pichon 1900).
- (ed), 'The 1830 Commerce and Navigation Treaty Between the United States of America and the Ottoman Empire', *Recueil d'actes internationaux de l'Empire ottoman*, Vol II (Pichon 1900).
- (ed), *Recueil d'actes Internationaux de l'Empire Ottoman*, Vol III (Pichon 1902).
- (ed), *Recueil d'actes Internationaux de l'Empire Ottoman*, Vol IV (Pichon 1903).
- Nys E, *Le Droit International, Les Principes, Les Théories, Les Faits*, Vol II (Alfred Castaigne, Albert Fontemoing 1905).
- Oppenheim L, *International Law, A Treatise*, Vol 1: *Peace* (2nd edn, Longmans, Green and Co 1912).
- Orakhelashvili A, 'International Law and Geopolitics: One Object, Conflicting Legitimacies?' (2008) 39 *Netherlands Yearbook of International Law*, 155-204.
- Oran B, 'Lausanne Barış Antlaşması' in Baskın Oran (ed), *Türk Dış Politikası, Kurtuluş Savaşı'ndan Bugüne Olgular, Belgeler, Yorumlar* (İletişim 2002).
- Ottoman Senate, '50th Session of 27 March 1333 (1917)', *Proceedings from Year 3*, Vol II.
- Öktem E, 'Le Traité de Paris de 1856 Revisité à Son 150e Anniversaire: Quelques Aspects Juridiques Internationaux' in Gilbert Ameil, Isabelle Nathan and Georges Soutou (eds), *Le congrès de Paris (1856) un événement fondateur* (Direction des archives, ministère français de l'Europe et des Affaires étrangères 2009).
- , 'La clausola della nazione più favorita nelle capitolazioni ottomane: Genesi, tipologia, patologia' (2022) 105 *Rivista di diritto internazionale*, 483.
- , 'Küçük Kaynarca: Miti e (talvolta mitopoietiche) demistificazioni' (2025) *Nuova rivista storica*, 25-52.
- Panaite V, *The Ottoman Law of War and Peace: The Ottoman Empire and Tribute Payers* (East European Monographs 2000).
- Pears E, 'Turkish Capitulations and the Status of British and Other Foreign Subjects Residing in Turkey' (1905) 21 *Law Quarterly Review* 408-425.
- , *Turkey and Its People* (Methuen & Co 1911).
- Pedani Fabris MP, *La dimora della pace: Considerazioni sulle capitolazioni tra i paesi islamici e l'Europa, Quaderni di Studi Arabi* (Studi e testi, 2, Università Ca' Foscari di Venezia, Dipartimento di Scienze Storico-Archeologiche e Orientalistiche, 1996).
- Pélissier du Rausas G, *Le Régime Des Capitulations Dans l'Empire Ottoman* (Arthur Rousseau ed, 1902).
- Picard MM, 'Vers La Fin Des Capitulations' (1923) 50 *Journal du droit international* 55-63.
- Poulton E and others, 'Corporate Restructuring and Investment Treaty Protections' (*BIICL Report on Empirical Study*, 2020) <https://www.biicl.org/documents/89_isds-corporate-restructuring.pdf> accessed 29 September 2020.
- PRO and FO, 'Letter from Charles Arbuthnot to Charles James Fox' (1806).
- , 'From Stevens to Canning', 195/294 (1848).
- 'Records of Proceedings and Draft Terms of Peace,' *Lausanne Conference on Near Eastern Affairs 1922-1923* (His Majesty's Stationery Office 1923).
- Renton AW, 'The Revolt against the Capitulatory System' (1933) 15 *Journal of Comparative Legislation and International Law* 212 <<http://www.jstor.org/stable/753659>>
- Said Halim Pacha, *Said Paşa'nın Hatıratı*, Vol I (Sabah Matbaası 1328).
- , 'La Turquie et Le Califat' in Said Halim Pacha (ed), *L'Empire ottoman et la Guerre mondiale* (Isis 2000) 97-110.
- Salmon J (ed), *Dictionnaire de Droit International Public* (Bruylant 2001).
- Schwarzenberger G, 'The Most-Favoured-Nation Standard in British State Practice' (1945) 22 *British Year Book of International Law* 96.



- Scovazzi T, 'Alcuni Antichi Trattati Tra Cristiani e Mussulmani per La Tutela Del Commercio Marittimo Nel Mediterraneo' in Guido Camarda, Salvatore Corrieri and Tullio Scovazzi (eds), *La Formazione del diritto marittimo nella prospettiva storica* (Giuffrè Editore 2010) 85-109.
- , *Corso Di Diritto Internazionale*, Vol I (Giuffrè Editore 2018).
- Şimşir NB, *Lozan Telgrafları: Türk Diplomatik Belgelerinde Lozan Barış Konferansı*, Cilt I (Türk Tarih Kurumu Basımevi 1990).
- Skilliter SA, *William Harborne and the Trade with Turkey, 1578-1582* (Oxford University Press 1977).
- Sonyel S, 'Osmanlı İmparatorluğu'nda Koruma (Protégé) Sistemi ve Kötüye Kullanışı' (1991) LV Belleten 359.
- Sousa N, *The Capitulatory Régime of Turkey. Its History, Origin and Nature* (The Johns Hopkins Press, 1933).
- Stefini T, 'Ottoman Capitulations in Comparative Perspective, Sixteenth and Seventeenth Centuries' (2022) 53 *Turcica* 205-231.
- Stoker B, *Dracula & Dracula's Guest* (Wordsworth Editions 2009).
- Taner T, 'Kapitülasyonlar Nasıl İlga Edildi?', *Muammer Reşit Seviğ'e Armağan* (İÜHF Yayınları 1956).
- TBMM Tutanak Dergisi, Dönem 21, Yasama Yılı I, Cilt 9, Birleşim 46.
- Ténékidès G, 'L'occupation Hellénique En Asie-Mineure et La Justice Répressive Ottomane Dans Leurs Rapports Avec Les Capitulations' (1921) 48 *Journal du droit international* 103.
- , 'La Floraison Des Protégés Étrangers Dans La Région de Smyrne Depuis l'armistice' (1922) 49 *Journal du droit international* 326.
- Thayer LE, 'The Capitulations of the Ottoman Empire and the Question of Their Abrogation as It Affects the United States' (1923) 17 *American Journal of International Law* 207.
- 'The Attempt of Turkey to Abrogate the Capitulations' (1914) 8 *American Journal of International Law* 873 <https://www.cambridge.org/core/product/identifier/S0002930000098262/type/journal_article>
- 'Traité Additionnel Secret Entre l'Empire Allemand et l'Empire Ottoman, Concernant Le Complément et La Modification Des Traités Secrets Allemands-Ottomans Du 28 Septembre 1916 Relatifs Aux Conditions de Paix Future, et Du 11 Janvier 1917 Relatif à l'abolition', *Akten des Auswärtigen Amts, Bonn. IA 127 n. 5 secr.*
- 'Traité Entre La Turquie et La Russie' <http://www.mfa.gov.tr/data/Kutuphane/Kurucu_Anasmalar/1921-moskova-anlasmasi-fransizca.pdf> accessed 11 November 2020
- 'Traité Secret Avec l'Empire Allemand Relatif à l'abolition Des Capitulations, Berlin, 11 Janvier 1917', *Akten des Auswärtigen Amts, IA 127, n. 5 secr*
- 'Treaty Between the United States of America and the Ottoman Empire. Commerce and Navigation' (1830) <https://archive.org/stream/ldpd_11015515_000/ldpd_11015515_000_djvu.txt> accessed 4 February 2021.
- Treaty of Lausanne (signed 24 July 1923, entered into force 6 August 1924) 28 LNTS 11.
- Twiss T, *The Law of Nations Considered As Independent Political Communities: On the Rights and Duties of Nations In Time of Peace* (2nd edn, Clarendon Press 1884).
- Üstündağ S, 'Tahkim ve Özellikle Uluslararası Tahkim', *Yargı Reformu Sempozyumu* (İzmir Barosu 2000) 294-300.
- Van den Boogert MH, 'Consular Jurisdiction in the Ottoman Legal System in the Eighteenth Century' (2003) 83 *Oriente Moderno* 613.
- , *The Capitulations and the Ottoman Legal System, Qadis, Consuls and Beratlis in the 18th Century* (Brill 2005).
- Vanneste T, *Intra-European Litigation in Eighteenth- Century Izmir: The Role of the Merchants' Style* (Brill 2022).
- Visser L-E, 'Clause de La Nation La plus Favorisée Dans Les Traités de Commerce' (1902) 4 *Revue de Droit International et de Legislation Comparée* 66.
- Young G, 'Privilèges Judiciaires Des Étrangers: Mémoire Communiqué Aux Missions et Publié Dans La Turquie Du 7 Juillet 1869', *Corps de Droit ottoman: Recueil des Codes, Règlements, Ordonnances et Actes les plus importants du Droit Intérieur, et d'Études sur le Droit Coutumier de l'Empire Ottoman*, Vol I (Clarendon Press 1905).
- Zeller G, 'Une Légende Qui a La Vie Dure: Les Capitulations de 1535' (1955) 2 *Revue d'histoire moderne et contemporaine* 127.

