18th & 19th Century U.S.-British Relations

Origins of Modern International Arbitration

The diplomatic relations between the United States and Great Britain during the first century of the United States' existence proved to be fertile ground in which to cultivate renewed interest in arbitration as a mechanism to resolve public international disputes. Over that period three significant series of arbitral proceedings took place: proceedings under the Jay Treaty to settle border disputes and restitution claims after the War for Independence; proceedings under the Treaty of Ghent to settle claims stemming from the War of 1812; and, under the Treaty of Washington, the Alabama Claims proceedings to resolve claims from Great Britain's failure to remain neutral during the Civil War. These proceedings showed varying successes of the arbitral mechanism in resolving such disputes. Reaction to the problems and failures of earlier proceedings precipitated procedural changes in subsequent arbitral provisions.

This article documents the important elements of the three series of proceedings and changes that evolved from practical application of the arbitral process. The lessons learned by the American and British politicians and statesmen of the 18th and 19th centuries provide insight to those advocating the use of arbitration to solve public international disputes in the modern world.

Jay Treaty Article 5

On Nov. 19, 1794, Great Britain and the U.S. signed the Jay Treaty. Most commentators agree that this event marked the beginning of the modern era of international dispute settlement by means of arbitral or judicial proceedings. The Treaty set the standards for a regular and systematic approach for resolving international disputes. Designed to settle a lingering border dispute and restitution claims from the American Revolution, the Treaty provided for three separate arbitral boards to decide three separate disputes.

Article 5 of the Treaty dealt with the question of the northeast boundary of the U.S. and the interpretation of the Treaty of Peace between the U.S. and Great Britain. The Treaty of Peace mentioned the river St. Croix as the northernmost border of the U.S., but it was not clear what river was "truly intended under the name St. Croix."
Article 5 of the Jay Treaty provided for a three-person board of arbitration of which the King of England and the President of the U.S. were each to appoint a commissioner and those two commissioners were to mutually agree on the third. If the two commissioners could not agree on the third, then each side would propose an appointee and the final decision would be made by drawing lots. The two commissioners selected by the respective heads-of-state were named in the early part of 1796. They were Thomas Barclay (Gr. Brit.) and David Howell (USA). On Aug. 30, 1796, approximately one week after their first meeting in Halifax (the meeting place designated by article 5 of the Jay Treaty), Barclay and Howell agreed on the third member of the commission: Egbert Benson (USA). Meanwhile the governments of the disputant countries had each appointed an agent to represent their interests in front of the commission. The U.S. appointed James Sullivan and Great Britain appointed Ward Chipman. These men were responsible for collecting and presenting the vast amount of testimony and other evidence that was presented to the commission over the next two years.

Although the Treaty specified that the commission meet at Halifax, Barclay and Howell chose to move the first meeting to Saint Andrews, a settlement on Saint Andrew's Point in the Passamaquoddy Bay and in the area under dispute. The full commission first met at Saint Andrews on Oct. 4, 1796. There they decided how the surveys would be conducted. The commissioners viewed the two rivers which were purported to be the Saint Croix named in the Treaty of Peace, set the surveyors on their mission, and then adjourned until the following August. They next met on Aug. 11, 1797, in Boston, Mass. However, because of poor weather the previous year, the surveyors were unable to complete their task and after several days of meeting, the commission agreed to adjourn until the first Monday in June of 1798 in Providence, Rhode Island. The final decision of the commission came in the form of a published declaration signed by all three commissioners and a map that represented the completed work of the surveyors and clearly indicated the commission's conclusions as to what river was the Saint Croix. The declaration provided a description and the latitude and longitude of its mouth and source as required in the Jay Treaty. Following the terms of the Treaty, the decision was final and was not "called into question, or made the subject of dispute or difference between the parties." The decision was rendered Oct. 25, 1798, and accepted by both parties. It is interesting to note that the commission determined that their role was simply to determine the mouth of the river Saint Croix and not to determine the boundary line from Passamaquoddy Bay to the Bay of Fundy as indicated in the Treaty of Peace. They felt that implementation of the boundary line based on their determination of the river Saint Croix was best left to the respective governments with the aid of the newly drawn map.

In this respect the commission followed a very narrow reading of its instructions in Article 5 of the Jay Treaty- it simply interpreted the language of the treaty. The arbitral proceedings were drawn out and costly for that time and did not resolve the core of the dispute, namely where the border lay between Great Britain and the U.S. In spite of the unanimity of the commission giving the impression of successful resolution of the dispute, the instructions of the commissioners hindered their ability to resolve the dispute with finality. This deficiency was provided for in Article 4 of the Treaty of Ghent, discussed later.

Jay Treaty Article 6

Article 6 of the Jay Treaty provided a means of resolving the claims of British merchants who sought compensation for the breach of lawful contracts with U.S. citizens and merchants caused by the war. This provision was to fulfill the pledge made by the U.S. at the signing of the Treaty of Peace to acknowledge past debts in order to encourage future commerce. The British merchants did not feel that they could receive adequate compensation for the debts by means of judicial proceedings in the U.S. Although the Treaty of Peace sought to resolve the problem of unpaid debts, it was not until the breakdown of diplomatic relations between the U.S. and Great Britain and the implementation of the new U.S. Constitution that an alternative mechanism to resolve the claims was created: Article 6 of the Jay Treaty.

The article provided for the establishment of a five-member board of arbitration consisting of two members appointed by the King of England and two members appointed by the President of the United States, with the advice and consent of the Senate. The final member was to be mutually agreed upon by the four appointed commissioners or, in the event of non-mutual agreement, each side would propose a nominee and the final selection would be made by drawing lots in the presence of the commissioners. The commissioners were sworn to decide "according to justice and equity" the
amount of losses and damages to British creditors. The board was permitted to function with only three members—
as long as one member appointed by each side and the mutually selected member were present. Article 6 specified that
the commissioners were first to meet in Philadelphia, but could then adjourn to other locations as they deemed
necessary.

The British appointments to the commission were Thomas Macdonald and Henry Pye Rich and the American
appointments were Thomas Fitzsimons and James Innes. The four commissioners met at the house of Fitzsimons in
Philadelphia in May 1797 to select the fifth commissioner. Being unable to agree on the fifth member, they put the name
of a recommended representative from each country on a piece of paper and had Innes draw one of the slips from an urn;
the name drawn was John Guillemard, Great Britain's choice for the final member. Over the next 18 months, as
specified in Article 6, the commissioners met with regularity in or near Philadelphia in order to accept claims that they
were to adjudicate. At the end of this period the commissioners recorded claims in excess of $19 million, which eventually
swelled to $25 million.

The commission decided a number of cases before difficulties arose among the commissioners which led the U.S.
members to withdraw and prevented the commission from making any further decisions. The difficulties stemmend in
part from a difference in opinion on whether English creditors ought to have exhausted their remedies before being
allowed to appeal to the commission. The question was decided in favor of the British creditors by an affirmalive vote of
the two British commissioners and the fifth commission member, who was also a British citizen. This created a deadlock
between the commission members, split along nationality line, and the Americans withdrew from the commission. The
lack of further American representation on the commission arguably disallowed any further decisions because of the
requirement in Article 6 that at least one representative from each country must be present to vote on decisions. The
subsequent failure of the commission forced the two nations to settle upon a cash sum to be paid by the U.S. in place of
recovery by individual parties under the commission's auspices.

The arbitral proceedings under Article 6 of the Jay Treaty arguably failed because of personality conflicts among the
members of the commission. In addition, the procedure specified by this provision of the treaty allowed for the minority to
block meaningful resolution of the dispute. Similar failure was foreseen and addressed in the subsequent arbitral
proceedings. The drafters of both the Treaty of Ghent and the Treaty of Washington used differing procedural
mechanisms to limit the damage caused by personality conflicts and dissent by the arbitrators selected by one side.

Jay Treaty Article 7

In 1794, the year the Jay Treaty was signed, Great Britain and France were in a war that had grown out of the French
Revolution. During this war, both countries practiced a policy of controlling the sea trade of the enemy and neutrals
trading with the enemy. Seized merchandise belonging to the enemly was declared booty of war and seized merchandise
belonging to neutral third parties was to be paid for at a fair price. The U.S. was caught in the middle of this practice,
losing ships bound for French ports and providing the means for the French to capture British ships on the high seas and
bring them to ports in the U.S. Both the U.S. and Great Britain claimed that the judicial proceedings available to settle
the claims of such seizures were not sufficient or functional.

Thus, Article 7 of the Jay Treaty was aimed at answering claims by U.S. citizens against Great Britain "by reason of
irregular or illegal capture or condemnations of their vessels and other property, under color of authority or commissions
from His Majesty" and for which "adequate compensation for the losses and damages so sustained cannot now be
actually obtained, had, and received by the ordinary course of judicial proceedings." Likewise, the commission had
authority to hear British subjects' complaints of "loss and damage sustained by reason of capture of their vessels and
merchandise, taken within the limits and jurisdiction of the States and brought into the ports of the same, or taken by
vessels originally armed in ports of the said States." The members of the commission were selected in the same manner as indicated in Article 6. Great Britain's original appointments to the commission were

John Nicholl LL.D. and John Anstey. Maurice Swabey, LL.D., replaced Nicholl when he resigned. The American
members of the commission were "among the ablest men in the country, and their distinction and ability added greatly to
the authority of the board of which they were members." They were Christopher Gore and William Pinkney. After
their first meeting at the home of Dr. Nicholl on Aug. 16, 1796, and several subsequent meetings, the four commissioners
were unable to select a fifth commissioner and the group had to resort to drawing lots. As luck would have it, the draw

Page 45

www.Trans-Lex.org - Please cite as: www.trans-lex.org/133900
resulted in a third American on the commission: Colonel Trumbull.48

The commission successfully adjudicated many claims between 1796 and 1804.49 The decisions of this commission proved to be the most important of the three tribunals formed under the Jay Treaty because of the precedent they provided to future international arbitration. Perhaps the most important question the commission faced was whether it had the power to determine its own jurisdiction.50 In order to answer the question of jurisdiction, the commission sought the advice of Lord Chancellor Loughborough, who stated that "the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd, and that they must necessarily decide upon cases being within, or without their competency."51 The number of claims the commission handled and the amount of money awarded to the claimants was quite extraordinary for the time.52 Moreover, it appears that the governments of both Great Britain and the U.S. paid the amounts to the claimants without delay or complaint.53

Under Article 7 of the Jay Treaty, when faced with a deadlock because of differing opinion on a substantive law issue, the commission circumvented the deadlock by consulting a respected outside expert. This may be considered the beginning of dependence of disputant parties or states on neutral or disinterested third parties in making binding decisions to resolve their disputes. Such influence can be seen in the Treaty of Ghent, wherein non-unanimous arbitral decisions were sent to third parties for final resolution, and the Treaty of Washington, wherein the majority of the commission was composed of "neutral" third party representatives.

The Treaty of Ghent

The next significant use of arbitration to settle disputes between the United States and Great Britain took place after the War of 1812. On Dec. 24, 1814, the Treaty of Ghent was signed by the U.S. and Great Britain to resolve disputes remaining after the end of the war. Each of the disputes provided for the resolution of border disputes to the North and West of the U.S. territory.

The dispute over the islands in Passamaquoddy Bay and Grand Menan in the Bay of Fundy originated from interpretation of the 1783 Treaty of Peace. The Treaty did not identify Passamaquoddy Bay or the islands therein, but merely mentioned the river Saint Croix as forming part of the border.54 The decision of the commission under Article 5 of the Jay Treaty determined which river was the river Saint Croix, but it did not determine, based on its finding, what land belonged to Nova Scotia (Great Britain) and what land belonged to the U.S.55 Prior to the War of 1812, both countries had tried without success to reach agreement on this border dispute through diplomatic negotiations.56 Because the ownership of the islands in Passamaquoddy Bay was never resolved before the War of 1812, the Treaty of Peace concluded at Ghent provided a specific mechanism for resolution of the dispute.

Article 4 of the Treaty provided for the creation of a two-member commission to settle the ownership of the islands in Passamaquoddy Bay and of the Grand Menan in the Bay of Fundy.57 This conscious change in format from the earlier three or five member commissions formed under the Jay Treaty, to a commission of two, was designed to avoid the deadlock that had marred these earlier commissions.58 Article 4 provided that if the two commissioners were unable to agree, they would submit reports to their respective governments which would then mutually choose a neutral third government to settle the dispute based on the reports.59 Although this mechanism was provided to the commission in the event of a disagreement, the commission was able to settle the dispute without resorting to it.60

Following the procedure provided in the Treaty of Ghent, Great Britain appointed Thomas Barclay61 and the U.S. appointed John Holmes.62 The two commissioners met at Portland in September 1816 and chartered a boat to transport...
them to St. Andrews, where Article 4 indicated that their first meeting should take place. There, the agents of the two sides made their respective claims and laid their evidence before the commission. The next meeting of the commission took place in Boston, on June 3, 1817. Both agents made their arguments and then the commission retired until the following September, at which time the agents were to make their replies. After a week of discussion in October, the two commissioners were able to reach an amicable decision based on such diverse evidence as King James' 1621 grant of land to Sir William Alexander and the unratified treaties of 1803 and 1807. The agreement was executed in New York, Nov. 24, 1817. There is some indication that President Monroe, though satisfied with the allocation of islands in the Passamaquoddy Bay, was not pleased Holmes agreed to cede Grand Menan to Great Britain. In spite of this dissatisfaction, the agreement proved a lasting settlement to this long-standing dispute.

In this instance the new method of resolving disputes worked admirably - the commissioners did not have to resort to sending the dispute to a neutral third party to resolve a deadlocked decision. This may be partially attributed to the nature of the dispute or the personality and negotiating style of the commissioners. In spite of the President's apparent disappointment with how the U.S. commissioner guarded American interests, the dispute was resolved with finality. This may not have been the case if it had to be decided by a third party and thus the U.S. commissioner showed wisdom compromising in order to avoid a Jess certain and effective outcome.

Ghent Treaty Article 5

Article 5 of the Treaty of Gent empowered a commission of similar constitution to determine the northeastern boundary of the U.S. from the source of the River St. Croix to the St. Lawrence River. The Treaty of Peace of 1783 had stated that the starting point of the east and west boundary was "the northwest angle of Nova Scotia, viz. that angle which is formed by a line drawn due north from the source of the Saint Croix River to the Highlands" and then following "the said Highlands which divide those rivers that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean." Unfortunately there were no such "Highlands" or mountain ridge in this area and thus the Treaty was impossible to conclusively interpret. The commission constituted in Article 5 was to settle the long-standing dispute on the interpretation of this boundary.

Great Britain once again appointed Thomas Barclay as its representative to the commission, whereas the U.S. appointed C. P. van Ness. The commission met from time to time during the period of 1816 to 1824, reviewing numerous surveys of the area and listening to the arguments of the agents of the two sides. Unfortunately, the two commissioners were unable to agree. As provided in Article 5 of the Treaty of Ghent, the dispute was subsequently referred to a friendly sovereign of state; in this case the King of the Netherlands. The king was unable to agree with either side's arguments as to what constituted the "Highlands" described in the Peace Treaty, and thus recommended a compromise that did not follow the language of the Treaty. The recommended compromise, giving Great Britain 75% of the disputed territory, was accepted by Great Britain, but rejected by a vote in the U.S. Senate. This was followed by 10 years of negotiations and border incidents that did not end until the Webster-Ashburton Treaty was signed and ratified in 1842. The negotiated compromise, like the recommendation of the King of the Netherlands, was not an interpretation of
the Treaty of Peace of 1783, but rather a diplomatic compromise. However, it should be noted that the new agreement gave Great Britain even more territory than the recommendation of the King of the Netherlands that was refused by the Senate 10 years earlier.

Failure of this commission to resolve the dispute centers on the fact that interpretation of the language of the treaty proved impossible. Likewise, resolution of the dispute by an independent third party was not reasonable because he was both unwilling and unable to resolve such a dispute over inaccurate treaty language. The resolution of this dispute called for, diplomatic negotiations and not simply interpretation of international law. Such a barrier could have been avoided by giving the commission a broader scope of authority, i.e., it could have been given the authority to determine the intention of the U.S. and Great Britain in designating this inaccurate geographic characteristic and the dividing line between their territories, and thus settle the dispute by following such intention. The express authority given to the arbitral commission once again prompted failure in resolving the dispute.

Ghent Treaty Articles 6 and 7

Similarly, Article 6 and Article 7 of the Treaty of Ghent referred respectively to a two-member commission the questions of the boundary along the lakes, rivers and water communications that constituted the middle of the Great Lakes and the boundary line that extended to Lake of the Woods. These areas were not prone to the bitterness of the dispute covered by Article 5 because the territory was sparsely if at all populated.

In spite of the fact that the Treaty of Ghent identified these disputes in two separate articles, the same commission served to resolve both disputes. Great Britain appointed J. Ogilvy, who was succeeded by A. Barclay, and the U.S. appointed P. B. Porter. In the case of Article 6, the commission was able to reach an agreement on June 18, 1822, and this agreement was accepted by the U.S. and Great Britain.

However, the commission was not able to agree on a complete resolution of the dispute under Article 7, and discontinued proceedings in 1827. Because both nations were preoccupied with solving the border dispute in Maine (Article 5), neither made any move to refer the unresolved dispute under Article 7 to a friendly sovereign or state as provided in the Treaty. The remaining conflicts over this northwest border were not worked out until 1842 when Webster and Ashburton negotiated the end of this dispute with the signing of the Webster- Ashburton Treaty.

In spite of the success of the commission under Article 6, failure of the commission under Article 7 spurred the end of the two-person system for resolving public international disputes. The mechanism of referring unresolved disputes to an independent sovereign who was not designated beforehand in the Treaty did not assure that such action would take place. Hints of such problems can be seen in the non-resolution of the dispute under Article 5 after a waiting period of 10 years. Such referrals after the complete presentation of the case by the disputant states exposed the procedure to long delays, distractions by other intervening events, and thus the failure of the dispute resolution mechanism.

The Treaty of Washington

The most important arbitration in the 19th century between the U.S. and Great Britain took place after the Civil War and is commonly known as the Alabama Claims Arbitration. This arbitration is considered significant because of the international collegiate nature of the tribunal, the success of this mechanism in averting armed conflict, and the substantial sum of the final award.

After the Civil War, the U.S. charged the English government with breaching its duty to remain neutral during the war, specifically in supporting the efforts of the Confederate government. It was alleged by the U.S. that during the Civil War, the Confederate government had boats constructed, fitted, and armed in Great Britain. These "privateers" inflicted substantial damage on the fleet and the commerce of the Union. The best known of the privateers was the Alabama, which, between 1862 and 1864, inflicted numerous losses on vessels and merchandise of U.S. citizens.

At first, England refused arbitration as a means of settling the dispute because of the nature of the charge: failure of the British Government from fulfilling its enforcement responsibilities. Negotiations between the two countries on how to settle the claims began quietly in 1870, and Great Britain finally agreed to allow the dispute to go to arbitration in 1871.

The Treaty of Washington of May 8, 1871, directed the dispute to a commission of five arbitrators. However, this was not
a binational commission of the traditional type seen in earlier arbitration. In order to address the objections England had voiced on the idea of others passing judgment on the honor of its actions, the tribunal was composed of a majority of neutral foreign members. In addition to one member appointed by each side, one member was selected by the King of Italy, one member by the President of the Swiss Republic, and one member by the Emperor of Brazil. This marked the creation of a collegiate international court that was to set a new trend in international dispute settlement. To further support the neutral and international nature of the commission, the Treaty of Washington specified that the commission was to hold all proceedings in Geneva.

During negotiations for the Treaty of Washington, Great Britain had proposed that the dispute be settled by a neutral head of state. However, the U.S. convinced the British to agree on a commission of jurists. Following the agreed upon means of appointing jurists to the commission, the appointed arbitrators were: Charles Frances Adams for the U.S., Sir Alexander Cockburn for Great Britain, Jacob Staempfli for Switzerland, Baron D'Itajuba for Brazil, and Count de Sclopis for Italy.

In addition to the new type of tribunal, the Alabama Claims Arbitration also advanced a body of substantive international law related to war-time disputes. The decision of the arbitral commission was to be consistent with the law which the contracting parties in the Treaty of Washington explicitly agreed was governing. Rules on the duties of neutrals were annexed to the Treaty of Washington in Article 6 and generally held neutral countries to a higher standard than that which was accepted during the period of the Civil War. Not only did this set a new standard in international law, it also greatly reduced the work of the arbitration tribunal. The tribunal had little more to do than set the amount of damages against Great Britain.

The result of the commission was an award of $15.5 million in favor of the U.S. made on Sept. 14, 1872. The members of the commission found unanimously that Great Britain was responsible for damage inflicted by the Alabama, but were not unanimous in the cases of the other ships also allegedly responsible for damage. Personal conflict within the commission erupted even on the day of signing of the arbitral decision; the British representative refused to sign the decision and instead read a statement of why we would not assent. After Count Sclopis officially closed the proceedings of the commission, Cockburn rushed out of the hall without a word to any of the other arbitrators or the large crowd that had gathered in the hall to hear the decision.

Great Britain paid the full amount without incident the following year. British Secretary of State Fish travelled to Washington, D.C.; on Sept. 9, 1873, and gave the task of delivering the certificate of deposit to Sir Edward Thornton, the Minister of Washington and Edward M. Archibald, the British Consul-General in New York. The same day these three men visited the State Department and then delivered the certificate to the Treasury Department, where it was deposited pending disposition by Congress. The receipt for the $15.5 million was returned to England and still hangs in the Prime Minister’s residence as a reminder of the cost of not enforcing the rules of neutrality.

The success of the commission formed to resolve the Alabama Claims dispute is a testimony to the lessons learned from the earlier arbitrations in the 18th and 19th centuries. In spite of great personal conflict on the arbitral tribunal on the part of the British representative, the commission was nevertheless able to render a binding decision. The British could hardly argue that the decision of the commission was not valid when the majority opinion was composed mostly of commissioners named by third party states. In addition, the substantive law to be applied to the claims having been spelled out in the treaty itself enabled the commission to resolve the dispute effectively without putting into question the ability of the individual commissioners to ascertain and interpret problematic international law.

Conclusion

Modern mechanisms designed to resolve public international disputes continue to employ the lessons learned from the experience of Great Britain and the United States. Arbitration remains a serviceable mechanism for solving the complex factual issues associated with longstanding border disputes. Analogies can be drawn between more recent arbitrations and the resolution of border disputes between the U.S. and Great Britain. For example, an ad hoc arbitral tribunal was convened in 1966 to settle the long-simmering border dispute between India and Pakistan, known as the Rann of Kutch Arbitration. As in the case of the U.S. after the War of Independence, the newly-emerged countries of Pakistan and India were unable to resolve the dispute through diplomatic correspondence, and in 1965, hostilities erupted on the countries’ mutual border. After mediation, both parties agreed to settle the dispute peacefully through arbitration, creating the Indo-Pakistan Western Boundary Case Tribunal in 1966. Similar to the three U.S./Great Britain arbitral
commissions described above, the ad hoc tribunal was by nature international; each party to the dispute appointed one member to the tribunal and the United Nations appointed the third member. In addition, as in the cases of the three important 18th and 19th century United States-Great Britain arbitral commissions, the proceedings of the Indo-Pakistan Tribunal focused on fact finding. The 1968 decision, partitioning the disputed territory between the two parties, was not unanimous. Nevertheless, both parties accepted the decision, and by 1969, the newly agreed upon boundary was demarcated, providing a peaceful solution to this long-standing dispute in little more than four years and a model for future productive arbitrations.

More recently, the arbitral process has been utilized successfully to settle damage claimed under both the Jay Treaty and the Treaty of Washington. The Iran-United States Claims Tribunal in the Hague was created by the Algiers Accords of January 19, 1981 as a means to end the hostage crisis at the U.S. embassy in Tehran and begin the process of "unfreezing" the $11 billion of Iranian assets held in U.S. banking institutions. As had been done in the Jay Treaty and the Treaty of Washington, the scope of the Iran-United States Claims Tribunal's jurisdiction, its competence, its constitution, and the conduct of its proceeding were delineated in a binding international agreement. To date, the collegiate, international tribunal has settled thousands of claims arising out of the conflict between the U.S. and Iran. The tribunal has proven itself sufficiently stable to continue its work of international justice in spite of swirling political controversies that further marred the diplomatic relations of the two countries. Commentators have recognized the success of the adjudicatory character of the tribunal, which is designed to work, to the greatest extent possible, independently of the influences of either the U.S. States or Iran.

The lessons learned through the arbitral processes developed by the U.S. and Great Britain undoubtedly had some role in the creation of the Indo-Pakistan Tribunal and the Iran-United States Claims Tribunal. The experience of the U.S. and Great Britain proved that arbitration could be expressly fashioned to increase fairness by limiting the influence of national bias, expanding the competency of independent adjudicatory bodies to resolve public international disputes, and increasing the certainty of interpretation of international law. The U.S.-Great Britain proceedings did not function without obstacles and, indeed, failures caused by their “humanness” and the influences of history and politics. However, the arbitrations under the Jay Treaty, the Treaty of Ghent, and the Treaty of Washington did set worthy examples of how to attempt peaceful resolution of public international disputes through the evolution of international arbitration. Their examples should be continually examined as new situations arise that may call for similar mechanisms to be created.
\[\text{1}^\text{st} \text{J. H. Ralston, } \textit{International Arbitration from Athens to Locarno} (1929) \text{ p. } 191.\
\[\text{2}^\text{nd} \text{Id.}\
\[\text{3}^\text{rd} \text{T. M. C. Asser Institut, } \textit{Survey of International Arbitrations:} 1794-1989 \text{ (AM. Stuyt, ed. 1990) p. 1.}\
\[\text{4}^\text{th} \text{"Whereas doubts have arisen what river was truly intended under the name of the river St. Croix, mentioned in the said treaty of peace, and forming a part of the boundary therein described; that question shall be referred to the final decision of commissioners to be appointed . . ." Treaty of Amity Commerce and Navigation (Jay Treaty), Feb. 29, 1796, U.S.-Gr.
One commissioner shall be named by His Majesty, and one by the President of the United States, and with the advice and consent of the Senate thereof, and the said two commissioners shall agree on the choice of a third."

If they cannot so agree [on the choice of a third commissioner], they shall each propose one person, and of the two names so proposed, one shall be drawn by lot in the presence of the two original Commissioners." Id.

Great Britain appointed Thomas Barclay, of Annapolis, Nova Scotia, on March 5, 1796. Barclay was born in New York and studied in the law office of John Jay. After the outbreak of the Revolution, his royalist sympathies caused him to enlist as a volunteer in the British army for the duration of the war. At the close of the war, he and many other royalists sought refuge in Nova Scotia, where he continued to practice law. His appointment to the Commission established by article V of the Jay Treaty was the beginning of a long career in diplomatic dealings between the United States and Great Britain. John Bassett Moore, International Adjudications Ancient and Modern: History and Documents; (Modern Series, 1929) pp. 10-11.

On April 1, 1776, the U.S. named General Henry Knox as Commissioner for the United States. However, Knox declined, stating that he had a conflict of interest in the outcome. The U.S. then named David Howell of Providence, Rhode Island. Howell was born in New Jersey and graduated from what was to become Princeton University (College of New Jersey). After graduation Howell pursued an academic and administrative career at Brown University. He also actively practiced law and held a number of public offices including associate justice of the Supreme Court of Rhode Island, attorney general of Rhode Island, and finally federal judge for the district of Rhode Island. His career as a jurist was distinguished by his outstanding public writing and extensive knowledge of many different disciplines. Id. at 12-13.

Egbert Benson was a native of New York and a near relative of Thomas Barclay. He graduated from King's College and already had a distinguished career as a jurist and a public servant before being selected to serve on the arbitral commission. He previously served as a judge of the Supreme Court of New York, as New York's first attorney general, as a commissioner to oversee the withdrawal of British troops from New York at the end of the war, and as a U.S. Circuit Court judge. Benson accepted the commission in September after learning of his nomination. Id. at 22-25.

James Sullivan was a native of Maine and a distinguished attorney from Massachusetts who at the time served as that state's attorney general. He was the historian of the District of Maine and president of the Historical Society of Massachusetts. Id. at 15.

Ward Chipman was, like Barclay, a native of Massachusetts who had served under the royalist forces and then sought refuge in a part of Nova Scotia that was to become part of New Brunswick. At the time of his appointment he was solicitor-general of New Brunswick. He later rose to chief justice and then president of that province. Id. at 19.

The Saint Andrew's Point was on the western side of what was considered to be the river Saint Croix. The settlement on the island was sizable enough to be of interest to both the United States (specifically Massachusetts, which controlled the territory of Maine) and Great Britain. Id.

Id. at 57-59.

See John Bassett Moore, International Adjudications: Saint Croix River Arbitration (Modern Series, 1930) pp. 373-4 and attached map ("[T]he mouth of the said river is in Passamaquoddy Bay, at a point of land called Joe's Point, about one mile northward from the northern part of Saint Andrew's Island ... And the said River is designated on the Map hereto annexed, and hereby referred to as farther descriptive of it, by the letters A B C D E F G H I K and L, the letter A being at its said mouth, and the letter L being at its said source ....").

"The said Commissioners shall, by a declaration, under their hands and seals, decide what river is the river St. Croix, intended by the treaty .... And both parties agree to consider such decision as final and conclusive, so as that the same shall never thereafter be called into question, or made the subject of dispute or difference between them." Jay Treaty, supra, note 1, at 191.

"Whereas it is alleged by divers British merchants and others His Majesty's subjects, that debts to a considerable amount, which were bona fide contracted before the peace, still remain owing to them by citizens or inhabitants of the United States, and that by the operation of various lawful impediments since the peace, not only full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that, by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and
receive full and adequate compensation for such losses and damages which they have thereby sustained." Jay Treaty, supra, note 4, at art. VI.

22 Supra, note 20, at 12-14.

23"For the purpose of ascertaining the amount of any such losses and damages, five Commissioners shall be appointed and authorized to meet and act...." Jay Treaty, supra, note 4, at art. VI.

24"[T]he fifth [Commissioner shall be appointed] by the unanimous voice of the other four; and if they should not agree in such choice, then the Commissioners named by the two parties shall respectively propose one person, and of those two names so proposed, one shall be drawn by lot, in the presence of the four original Commissioners." Id.

25 Id. (The oath of the Commissioners stated that "I will honestly, diligently, impartially and carefully examine, and to the best of my judgment, according to justice and equity, decide all such complaints, as under the said article shall be referred to the said Commissioners ....").

26"Three of the said Commissioners shall constitute a board, and shall have the power to do any act appertaining to the said Commission, provided that one of the Commissioners named on each side, and the fifth Commissioner shall be present." Id. See also supra, note 1, at 192.

27"The said Commissioners shall first meet at Philadelphia, but they shall have the power to adjourn from place to place as they shall see cause." Supra, note 4, at art. VI.

28Both Macdonald and Rich were attorneys from Great Britain. Macdonald gained a reputation during the proceeding of being extremely domineering and this caused Rich to be viewed by his American counterparts as overly submissive to Macdonald's views. Supra, note 20, at 18-19.

29Fitzsimons was from Pennsylvania and Innes was from Virginia. Innes died while serving on the commission in 1798 and was replaced by Samuel Sitgreaves of Pennsylvania. All three men were attorneys active in the political life of their respective states and the new nation. See id. at 19-21.

30Although a British subject, Guillelmar, an attorney, was living in Philadelphia at the time of his selection. The American representative not selected was Fisher Ames, an attorney from Massachusetts. Id. at 22.

31 Id.

32The difficulties apparently did not begin until after the death of Innes in August 1798. Correspondence from Macdonald indicates Innes was well-respected by Macdonald and may have had a soothing effect on Macdonald's abrasive and aggressive personality. After Innes' death, Fitzsimons and the new member, Sitgreaves, were unable to get along with Macdonald. Id. at 21, 24.

33 Supra, note 1, at 192.

34 Id. (This decision contradicted a similar decision Teached by the commission formed under Article 7 of the Jay Treaty.)

35 See supra, note 20, at 165-169.

36 See supra, note 3, at 2. (On January 8, 1802, Article 6 of the Jay Treaty was annulled by a convention signed in London in which the U.S. agreed to pay a sum of $2,664,000. A domestic English commission was set up to hear claims of English creditors and distribute the indemnity accordingly. The English commission eventually settled eight claims.)

37 John Bassett Moore, International Adjudications: Compensation for Losses and Damages Caused by the Violation of Neutral Rights, and by the Failure to Perform Neutral Duties (1931) p. 13.

38 Id.

39 Id. at 23-24.

40["I]t is agreed, that in all such cases, where adequate compensation cannot, for whatever reason, be now actually obtained, had, and received by the said merchants and others, in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the said complainants." Supra, note 4, at art. VII.

41"And whereas certain merchants and others, His Majesty's subjects, complain that, in the course of the war, they have sustained loss and damage by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the States and brought into the ports of the same, or taken by vessel originally armed in ports of the said States: It is agreed that in all such cases .. the complaints of the parties shall be and hereby are referred to the Commissioners to be appointed by virtue of this article." Id.

42Nicholl, an eminent civilian attorney who represented the interests of the U.S. in proceedings prior to the signing of the Jay Treaty, was a noted specialist in admiralty law. He resigned from the Commission hvo years later to accept the post of King's Advocate, in succession to Sir William Scott, who was appointed to the High Court of Admiralty in Great Britain. Supra, note 37, at 63.

43Prior to serving on the commission, Anstey was lmown in the U.S. for being sent there to collect information for the London commission settling loyalist claims against citizens of the U.S. Son of a well-known poet, Anstey made a career as a barrister and commissioner for auditing public accounts, as well as writing his own poetry that spoofed law and politics in England. See id. at 64.

44 Supra, note 1, at 192-93.

45Gore, known as the "legal preceptor of Daniel Webster," already had an outstanding reputation in the Massachusetts bar. He had a lucrative practice in his native Boston and in 1789 was named by Washington as the first district attorney of the U.S. for Massachusetts. After his service on the commission, he subsequently served as governor of Massachusetts,
state legislator in both houses, and finally, U.S. Senator. See supra, note 37, at 64-65.

Pinkney, a native of Maryland, was chosen as a delegate to the convention of Maryland to ratify the Constitution of the U.S. He was soon thereafter elected to both the Maryland and then the U.S. House of Representatives. He was only 32 years old when he was named to the commission created under Article 7 of the Jay Treaty. After finishing his service on the commission, he became state attorney general and then minister of the U.S. in London. During the War of 1812, he was severely wounded while helping to defend Baltimore. In his later years he served as minister to Russia, minister to the court of Naples, and finally, U.S. Senator from Maryland. See id. at 66-67.

In order to increase the fairness of drawing lots, the commissioners agreed to have each side choose one name from among those suggested from the other side and then draw one of the two names from an urn. The U.S. chose Dr. Swabey from among those names proposed by Great Britain, and Great Britain chose Colonel Trumbull from among those names proposed by the U.S. Id. at 72.

Supra, note 1, at 192. Aside from the fact that he happened to be in London at the time, Trumbull had secured his reputation for fairness while serving as secretary to Mr. Jay during the negotiation of the Jay Treaty. He was not trained in law or diplomacy, but rather was a student of art, being best remembered for his historical paintings. His lack of training did not inhibit him from conscientiously and fairly fulfilling his role as the fifth Commissioner. Supra, note 37, at 72.

Supra, note 3, at 3. (The commission recorded 536 awards, of which 478 were decided in favor of the U.S. and 58 were decided in favor of Great Britain.)

Supra, note 1, at 193. The work of the commission was halted soon after it started by questions as to whether the commission had jurisdiction to adjudicate cases that had already been decided by the Lords Commissioners of Appeal in Prize Causes- the court of last resort in England in prize cases. The position of the American commissioners was not that the decisions of that court could be overturned by the commission, but that they could award compensation for damages not covered by the decisions of the English court. In order to prevent a decision on the matter, the English commissioners withdrew, and, according to Article 7 of the Jay Treaty, no decision could be made without at least one commissioner from the other side present. Supra, note 4, at 82-83.

Supra, note 37, at 85.

It appears from records of the proceedings that the U.S. paid a total of approximately $145,000 to British claimants and that Great Britain paid approximately $11,650,000 to American claimants. See id. at 160-61.

Id. at 161.

John Bassett Moore, International Adjudications: Arbitration of the Title to Islands in Passamaquoddy Bay and the Bay of Fundy (1933) p. 7.

Id.

In 1803, Rufus King, the minister of the U.S. in London and Lord Hawkesbury negotiated a convention that decided the border dispute, but the convention was never ratified. A similar attempt took place in 1807. See id. at 8-9.

Supra, note 1, at 194.

H. C. Alien, Great Britain and the United States: A History of Anglo-American Relations (1969) p. 343 ("[Five articles of the Treaty of Ghent] followed that vital and fertile example of international judicial procedure, inaugurated at the suggestion of Jay in the Treaty of 1794, the joint commission. But, at the suggestion of the British, this procedure was improved upon, in an effort to end deadlocks such as had marred the work of some of the previous commissions.").

"It is further agreed that, in the event of the two Commissioners differing upon all or any of the matters, ... they shall make, jointly or separately, a report or reports, as well to the Government of His Britannic Majesty as to that of the United States . . . And His Britannic Majesty and the Government of the United States hereby agree to refer the report or reports of the said Commissioners to some friendly sovereign or State, to be then named for that purpose, and who shall be requested to decide on the differences which may be stated in said report or reports ...." Treaty of Peace and Amity (Treaty of Ghent), Dec. 24, 1814, U.S.-Gr. Brit., art. IV.

Id. See also supra, note 3, at 13. (The two commissioners awarded ownership of the islands in question to Great Britain in their decision of Nov. 17, 1817.)

Barclay served in a similar capacity under Article 5 of the Jay Treaty. See supra, note 7, and accompanying text.

Holmes was a resident of the part of Massachusetts that was to become the State of Maine in 1820. He served as a state legislator and as a U.S. Congressman in Massachusetts, and after Maine gained statehood, he served as U.S. Senator from that state. Supra, note 54, at 10.

Id. at 17; Treaty of Ghent, supra, note 51, at art. IV ("The said Commissioners shall meet at St. Andrews, in the Province of New Brunswick, and shall have the power to adjourn to such other place or places as they shall think fit.").

Supra, note 54, at 30-34 (containing Mr. Barclay's account of how agreement was reached and on what grounds). It should be noted that in correspondence to Secretary of State John Quincy Adams, Mr. Holmes indicated that "[a]lthough the decision was not ... so favorable to the United States as perhaps it should be, yet it was, he trusted, better than to disagree." Id. at 34.

"We, the said Thomas Barclay and John Holmes ... have decided, and do decide, that Moose Island, and Dudley Island, and Frederick Island, in the Bay of Passamaquoddy, which is part of the Bay of Fundy, do, and each of them does, belong to the United States of America and we have also decided, and do decide, that all the other islands, and each and
every of them, in the said Bay of Passamaquoddy, which is part of the Bay of Fundy, and the Island of Grand Menan, in the said Bay of Fundy, do belong to his said Britannic Majesty in conformity "With the true intent of the said second article of said treaty of one thousand seven hundred and eighty-three [the Treaty of Peace]." Supra, note 54, at 36.

See id. at 37 (noting that the President, in addressing Congress, specifically mentioned his satisfaction of the division of islands in the Bay of Passamaquoddy, but failed to mention the more important decision concerning the island of Grand Menan).

Supra, note 1, at 194.


Id.

Id.

Supra, note 3, at 14.

The disagreement was recorded in separate reports on October 4, 1821. See supra, note 3, at 14.

Supra, note 68, at 10. (The King of the Netherlands was chosen to referee the dispute in 1828, and he consented to do so.) See also supra, note 1, at 194. (The award of the King of the Netherlands, given 10 years later, on January 10, 1831, proved to be more of a recommendation than a decision, and thus was rejected by the U.S. and Great Britain for its failure to follow the terms of submission.)

Supra, note 68, at 10.

Id. at 11. Daniel Webster, who became Secretary of State in 1841, was determined to settle what was close to becoming a war and suggested that both sides empower representatives to conduct direct negotiations. Webster represented the U.S. and Lord Ashburton represented Great Britain.

Supra, note 3, at 15. (The dispute also included ownership of the islands contained in these waterways.)

See id. at 16.

Supra, note 68, at 12.

Supra, note 3, at 15-16.

See supra, note 1, at 194. See also supra, note 3, at 15.

Supra, note 1, at 194. See also supra, note 3, at 16. (Although the commission made several reports in 1826-27, it adjourned sine die on December 24, 1827 without having come to a settlement of the question.)

Supra, note 68, at 13.

Supra, note 1, at 194. See also supra, note 68, at 13.

Supra, note 1, at 197. See also C. G. Roelofsen, "The Jay Treaty and All That: Some Remarks on the Role of Arbitration in European Modern History and Its 'Revival' in 1794," in International Arbitration: Past and Prospects (A.H.A. Soons, ed., 1990) pp. 201, 210. ("If we wish to point to a conspicuous revaluation [of arbitration] it is probably to the Peace of Paris (1856) and above all to the Alabama arbitration that we will have to turn.")


The Alabama was sunk in the English Channel on June 19, 1864 during an engagement with the frigate USS Kearsage. Supra, note 86, at 13.

Supra, note 58, at 508 ("[The British Secretary of State for Foreign Affairs had] brusquely refused in 1865 to consider claims arising from actions of the Alabama, since they were incompatible with the dignity of the British Crown, because 'England would be disgraced for ever if a foreign government were left to arbitrate whether an English secretary of state had been diligent or negligent in his duties.' ")


Supra, note 86, at 27.

Supra, note 1, at 197-98.

Treaty of Washington, May 8, 1871, U.S.-Gr. Brit., art. I. [T]he high contracting parties agree that all the said claims, growing out of acts committed by the aforesaid vessels, and generally known as the 'Alabama Claims,' shall be referred to a tribunal of arbitration to be composed of five Arbitrators, to be appointed in the following manner, that is to say: One shall be named by the President of the United States; one shall be named by Her Britannic Majesty; His Majesty the King of Italy shall be requested to name one; the President of the Swiss Confederation shall be requested to name one; and His Majesty the Emperor of Brazil shall be requested to name one."

Supra, note 85, at 27.

See supra, note 89, at 187.

Id. at 185.

Id. at 207.

"A neutral government is bound ... to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a
Power with which it is at peace . . . and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above .... Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules."

*Supra*, note 92, at art. VI.

98 *Supra*, note 85, at 27; *supra*, note 86, at 7.

99 *Supra*, note 1, at 199.

100 *Supra*, note 3, at 96 (noting that the award was not signed by the British arbitrator).

101 The Tribunal found four to one on the *Florida* and three to two on the *Shenandoah*. *Supra*, note 85, at 170.

102 Cockburn's reasons for not assenting were soon thereafter published in both Great Britain and the U.S. *Id.* at 170.

103 *Supra*, note 3, at 96.

104 *Supra*, note 85, at 170.

105 *Id.* at 170-1


107 *Id.*

108 *Id.* at 947. The Indo-Pakistan Tribunal was an independent institution, financed by the parties. It held its meetings in the same city as the *Alabama* Claims tribunal: Geneva.

109 *Id.*

110 *Id.* at 349. (Important factual issues investigated by the Indo-Pakistan Tribunal included whether either party could prove that the boundary was historically well-established, the true meaning of "the Rann," and the past treatment of the territory by other sovereign states.)

111 The decision was by majority. The majority was formed by the Pakistan member concurring with the UN appointed chairperson: the Indian member of the tribunal dissented. The decision allocated 90% of the territory to India, and the balance was allocated to Pakistan. *Id.* at 348.

112 *Id.* at 357 ("[T]he Rann of Kutch arbitration demonstrates that even today a peaceful settlement can be reached in a dispute affecting large nations, which, though superficially insignificant, has been the cause of war. It is therefore to be hoped that it will serve as a precedent for the settlement of other disputes of like character.").


114 The Algiers Accord, in addition to several supplemental documents, formed the legal foundation of the Iran-United States Claims Tribunal. *Id.* at 7.

115 Since 1981, the tribunal has settled or facilitated the settlement of the majority of the nearly 4000 claims originally filed. All of the settled claims have been paid, causing the transfer of over $2 billion. Charles N. Brower, "Lessons to be Drawn from the Iran-U.S. Claims Tribunal," *9 J. Int'l Arbitration* 51 (1992). The tribunal is composed of three members appointed by Iran, three members appointed by the U.S., and three members either mutually agreed upon or selected by the chief justice of the Netherlands Supreme Court. *Id.* at 53.

116 *Id.* at 51 ("The Tribunal has continued notwithstanding such events as the sinking of the Iranian vessel, *Iran Ajar*, in 1987 by U.S. military forces; notwithstanding the infamous Iran/Contra affair; ... notwithstanding the shooting-down of an Iranian Airbus in 1988 with the loss of all lives on board by U.S. naval forces; and notwithstanding the alleged Iranian complicity in the taking and holding of American hostages in Lebanon.").

117 *Id.* at 58 ("[T]he Iran-U.S. Claims Tribunal was not, and is not, a political institution in the classic sense. It is an adjudicative body and to a remarkable extent, once established and manned it has acted independently of the States Parties and has carried out its writ to the best of its ability to make independent judgments and to carry forward on an independent basis.").